



# Reflections on Some Constitutional Issues In Relation To '*Work Choices*'

# *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)*

- **Over 600 pages long ...**
- **Amends *Workplace Relations Act 1996* (Cth)**
  - new national minimum employment standard
  - streamlined system of collective and individual agreement making

# *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)*

- new rules governing
  - > industrial action
  - > termination of employment
- **Inconsistent State and Territory laws potentially inoperative**
  - section 109
  - *R v Kearney; Ex parte Japanangka* (1984)  
158 CLR 395

# Is the Act constitutionally valid?

- **Are the provisions of the Act supported by any head(s) of Commonwealth legislative power?**
- **Do the provisions of the Act nevertheless contravene any express or implied limitations on the legislative power of the Commonwealth?**

# Is the Act supported by any head(s) of Commonwealth legislative power?

- **Unlike State Parliaments, the Commonwealth Parliament is a legislature of limited enumerated powers**
- **It is therefore necessary to find in the *Australian Constitution* express or implied powers to legislate for the provisions in the Act**

# Is the Act supported by any head(s) of Commonwealth legislative power?

- **No real legal issue regarding power to pass the Act in relation to**
  - the ACT and NT
    - > section 122
  - Victoria
    - > section 51(37)
    - > *Commonwealth Powers (Industrial Relations) Act 1996 (Vic)*

# Potential heads of power

- **The provisions of the Act may also be supported by the powers that are given to the Commonwealth Parliament under s 51 of the *Australian Constitution* to make laws with respect to**
  - international and interstate trade and commerce
  - external affairs
  - corporations

# Corporations power

- **Section 51(20) gives the Commonwealth Parliament the power to make laws with respect to:**
  - foreign corporations; and
  - trading or financial corporations formed within the limits of the Commonwealth

# Engaging the corporations power

- **Employer means ‘a constitutional corporation, so far as it employs, or usually employs, an individual’**
  - *Workplace Relations Act 1996 (Cth) s 6(1)(a)*

# Is the Act supported by the corporations power?

- **‘[A] betting person would keep their money on the Commonwealth’**
  - Louise Clegg, ‘Can There Be a New Era of Uniform Industrial Relations? A Historical and Constitutional Analysis of the Move Towards a National Industrial Relations Regime’ (2006) 17(2) *Public Law Review* 97, 109

# Is the Act supported by the corporations power?

- **In relation to trading corporations, current jurisprudence permits the enactment of laws with respect to**
  - trading activities
  - non-trading activities undertaken for the purpose of trade
- **See, eg, *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169**

# Trading activity

- **Employment relationship could be characterised as one that involves the supply and acquisition of labour**
  - George Williams, ‘The Constitution and a National Industrial Relations Regime’ (2005) 10(2) *Deakin Law Review* 498, 502

# Non-trading activity

- **A corporation can only conduct its activities through its people**
  - See, eg, *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, 170–1 (Lord Reid)
- **Regulation of employment relationship would therefore also be supported by the implied power to make laws with respect to matters that are incidental to the exercise of the corporations power**

# Implied incidental power

- **‘[E]very legislative power carries with it authority to legislate in relation to ... matters ... the control of which is ... necessary to effectuate its main purpose, and thus carries with it power to make laws ... affecting many matters ... incidental ... to the subject matter’**
  - *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77

# An overly restrictive approach?

- **The words of s 51(20) are construed literally**
  - *New South Wales v Commonwealth* (1990) 169 CLR 482 (*'Incorporations Case'*)
- **The power to make laws 'with respect to' a specific subject is as wide a legislative power as can be created, and no form of words has been suggested which would give a wider power**

# An overly restrictive approach?

– see, eg,

- > *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 186 (Latham CJ) ('*Bank Nationalisation Case*')
- > *R v Public Vehicles Licensing Appeals Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ)

# An overly restrictive approach?

- **No ‘textual, historical or sound policy reason for considering that s 51(xx) is limited to law-making about trading activities’**
  - Keven Booker, Arthur Glass and Robert Watt, *Federal Constitutional Law* (2<sup>nd</sup> ed, 1998) 79

# An overly restrictive approach?

- **By parity of reasoning, the current approach would mean that the power to legislate with respect to foreign corporations is restricted to the making of laws governing the foreign activities of such corporations**
  - *Commonwealth v Tasmania* (1983) 158 CLR 1, 269 (Deane J) (*Tasmanian Dam Case*)

# An overly restrictive approach?

- **Current High Court composed entirely of judges who were not members of the Court when the last major case on the corporations power (*Victoria v Commonwealth* (1996) 187 CLR 416 ('*Industrial Relations Act Case*')) was decided**

*Re Dingjan; Ex parte Wagner* (1995) 183  
CLR 323, 369–70 (McHugh J)

- **‘If a law regulates the activities, functions, relationships or business of a s 51(xx) corporation, no more is needed to bring the law within s 51(xx).**

*Re Dingjan; Ex parte Wagner* (1995) 183  
CLR 323, 369–70 (McHugh J)

**‘Further, if ... a law regulates the conduct of those who control, work for, or hold shares or office in those corporations, it is unlikely that any further fact will be needed to bring the law within the reach of s 51(xx).**

...

*Re Dingjan; Ex parte Wagner* (1995) 183  
CLR 323, 369–70 (McHugh J)

**‘So, where a law seeks to regulate the conduct of persons other than s 51(xx) corporations or the employees, officers or shareholders of those corporations, the law will generally not be authorised by s 51(xx) unless it does more than operate by reference to the activities, functions, relationships or business of such corporations.**

*Re Dingjan; Ex parte Wagner* (1995) 183  
CLR 323, 369–70 (McHugh J)

**‘A law operating on the conduct of outsiders will not be within the power conferred by s 51(xx) unless that conduct has significance for [the corporation]. In most cases, that will mean that the conduct must have some beneficial or detrimental effect on [the corporation] or [on its] officers, employees or shareholders.’**

# Constitutional limitations?

- **‘Originalist’ argument, or doctrine of ‘reserved powers’**
- **Intergovernmental immunity**

# 'Originalist' argument or 'reserved powers' doctrine

- **Architects of the *Australian Constitution* assumed that the States would be responsible for the regulation of industrial relations generally**
- **Commonwealth should only be permitted to make laws under s 51(35) with respect to conciliation and arbitration for the prevention and settlement of industrial disputes that extend beyond one State**

# Problems

- **Effectively a form of legal ‘ancestor worship’**
  - Justice Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24(1) *Melbourne University Law Review* 1
- **Rejected in *Sue v Hill* (1999) 199 CLR 462**

# Problems

- **Doctrine of ‘reserved powers’**
  - discredited in general since *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (‘*Engineers’ Case*’)
  - specifically rejected in *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 (‘*Concrete Pipes Case*’) in relation to the exercise of the corporations power

# Problems

- **The power that is conferred by s 51(35) does not limit the other legislative powers that are contained in s 51**
  - *Pidoto v Victoria* (1943) 68 CLR 87 (defence power)
  - *Re Pacific Coal Pty Ltd; Ex Parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 360 (Gleeson CJ) (corporations power)

# Intergovernmental immunity

- **Commonwealth Parliament may not pass legislation which operates to:**
  - destroy the continued existence of the States; or
  - curtail the capacity of the States to function as governments
- ***Melbourne Corporation v Commonwealth* (1947) 74 CLR 31**

# Intergovernmental immunity

- **Are the States' functions or capacities as governments curtailed if their laws on employment and industrial relations which are inconsistent with the Act are rendered inoperative?**

# Intergovernmental immunity

- **State governments only immune from Commonwealth industrial relations laws in relation to certain matters to which the Act is not directed**
  - *Industrial Relations Act Case (1996) 187 CLR 416*

# Intergovernmental immunity

- **It has been almost a decade since Victoria referred its industrial relations powers to the Commonwealth**
  - *Commonwealth Powers (Industrial Relations) Act 1996 (Vic)*
- **Since that time, it appears to have been business as usual in Victoria**