The Constitution and *Workplace Relations Act 1996*

John M. Williams*

Abstract

The Howard Government's industrial relations reforms represent a significant step towards a uniform system of workplace regulations. To achieve this, the Commonwealth Parliament has expressly attempted to place much of the new regime within the scope of the Commonwealth's corporations power. This article will trace the High Court's development of the jurisprudence related to that power and argue that the central tenets of the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) accords with the contemporary direction of the power.

Introduction

On 22 October 1986 the then Leader of the Opposition, Mr John Howard, expressed his condolences to the family of the late Justice Lionel Murphy. After noting Murphy's achievements Howard stated that 'I will not offend the sensitivity of this Parliament by pretending for a moment that I shared many of the views held by Lionel Murphy – it would be an hypocrisy of mammoth proportions for me to do so' (Howard 1986: 2490). Nearly twenty years on the Prime Minister would be gratified at least by *one* view that Justice Murphy firmly held. In *Actors and Announcers Equity Association v. Fontana Films Pty. Ltd.* (1982) 150 CLR 169, when discussing the outer limits of the corporations power (section 51 (xx)) of the *Australian Constitution* he stated that:

> the [Corporations] power is not confined to laws dealing with the trading

* Professor, School of Law, University of Adelaide. I would like to thank Rachael Gray, Clement Macintyre and Wendy Riemens for their comments, suggestions and support. I would also like to thank Braham Dabscheck for his interest in the progress of one of his former students.

https://doi.org/10.1177/103530460601600204 Published online by Cambridge University Press

> or financial operations of trading or financial corporations (nor to foreign operations of foreign corporations). It extends to laws dealing with industrial relations so that in relation to such corporations Parliament, uninhibited by limitations expressed in s. 51 (xxxv), may legislate directly about the wages and conditions of employees and other industrial matters (at 212).

Such an interpretation of the Corporations power holds the key to unlocking the Howard government's aspirations of 'establishing and maintaining a simplified national system of workplace relations' (section 3 (b) *Workplace Relations Act* 1996 As the *Work Choices* booklet indicated 'Work Choices will be largely based on the corporations power in the Constitution. In addition it will rely on other heads of power – the territories power (for the ACT and the NT), the referral power (for Victoria) and the external affairs power to support existing arrangements (e.g. the unlawful terminations provisions)'(Australian Government 2005: 11).

This article will address some of the constitutional issues that the amendments to the *Workplace Relations Act 1996* raises. Principally it will concentrate upon the express foundations of the Act, the corporations power. The article is divided into two sections. The first will highlight the centrality of the corporations power to the proposed reform. The second section will outline the development of the current case law and argue that the Commonwealth government is well placed to rely upon the power in its policy of a national scheme.

I The *Workplace Relations Amendment (Work Choices) Act* 2005

The *Australian Constitution* grants to the Commonwealth Parliament legislative power with respect to forty competencies in section 51. Included in section 51 is the power to make laws with respect to '(xx) foreign corporations, and trading and financial corporations formed with the limits of the Commonwealth'.

While the Act operates on employees of the Commonwealth (section 4 (1)(b)), those employers and employees who are in the State of Victoria (Part 21 of the Act which operation pursuant to the referral of the power, *Commonwealth Powers (Industrial Relations) Act 1996* (Vic)), employers and employees in the Territories (section 4) and employees involved in interstate trade and commerce (section 4) it is the corporations power

https://doi.org/10.1177/103530460601600204 Published online by Cambridge University Press

which is the most conspicuous feature of the new arrangements. For example the definition section (section 4) indicates that an employer and employee are determined by their relationship to a constitutional corporation.

5 Employee

Basic definition

(1)In this Act, unless the contrary intention appears:

employee means an individual so far as he or she is employed, or usually employed, as described in the definition of ***employer*** in subsection 6(1), by an employer, except on a vocational placement.

An 'employer' is in turn defined by the constitutional heads of power that provides the footing for the operative sections of the Act.

6 Employer

Basic definition

(1)In this Act, unless the contrary intention appears:

employer means:

(a)a constitutional corporation, so far as it employs, or usually employs, an individual; or

(b)the Commonwealth, so far as it employs, or usually employs, an individual; or

(c)a Commonwealth authority, so far as it employs, or usually employs, an individual; or

(d)a person or entity (which may be an unincorporated club) so far as the person or entity, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:

(i) a flight crew officer; or
(ii) a maritime employee; or
(iii) a waterside worker; or

(e)a body corporate incorporated in a Territory, so far as the body

https://doi.org/10.1177/103530460601600204 Published online by Cambridge University Press

employs, or usually employs, an individual; or

(f)a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs, or usually employs, an individual in connection with the activity carried on in the Territory.

The Commonwealth wishes to make its industrial arrangements the predominant scheme throughout Australia. In section 16 (in combination with section 4 of the Act) the Commonwealth outlines its intention to 'exclude' such things as State or Territory industrial laws (section 16). To remove doubt the Commonwealth lists the relevant State laws; for example the NSW *Industrial Relations Act 1996*, and the *Queensland Industrial Relations Act 1999*. Beyond this the Commonwealth leaves open the option of prescribing by regulation any other offending State or Territory law (section 4). The Commonwealth can, with the use of section 109 of the Constitution, invalidate inconsistent laws for the States. Likewise with the support of Section 122 the Commonwealth can override territory laws.

Central to the Commonwealth's more direct approach to industrial relations, and the use of the corporations power, is the creation of minimum standards of pay and conditions. The so-called 'Australian Fair Pay and Conditions Standard' in Part 7 of the Act outlines the five 'key minimum entitlements'. These include section 171(2)

(a) basic rates of pay and casual loadings (see Division 2);
(b) maximum ordinary hours of work (see Division 3);
(c) annual leave (see Division 4);
(d) personal leave (see Division 5);
(e) parental leave and related entitlements (see Division 6).

Under the Act, for instance, a basic wage, called the 'standard Federal Minimum Wage', is set at $12.75 per hour (section 195) and can be varied by the Australian Fair Pay Commission in accordance with 'wagesetting parameters' established by the Act (section 23). The Australian Fair Pay Commission may also determine a 'special' Federal Minimum Wage for 'junior' employees, employees with a disability or employees to whom training arrangements apply (section 197).

Without needing to go into the particulars of the mode of determinations of pay and conditions for employees what is clear is that to be valid the Commonwealth will need to argue that these prescriptive standards (such

as the minimum wage and conditions) must be laws 'with respect to' the powers listed in section 51 of the Constitution.

II The Corporation Power and Industrial Relations

The use of the corporations power as a more direct method of regulating industrial relations is by no means a novel idea. As Andrew Stewart has noted academic writing on the issue can be traced from the 1970s and coincided with the High Court's revival of the power (Stewart 2001: 7). With the introduction of a greater decentralised system of industrial relations since the late 1980s there has been a wealth of material produced on the use of alternative powers to section 51 (xxxv) of the Constitution (for example Ford 1994: 106; McCallum and Pittard 1995: 475-81; Williams 1998: 104-125; Creighton and Stewart 2005: 105-8).

With the latest tranche of industrial relations reforms from the Howard Government 'the corporations power' as Ron McCallum noted, 'is on everyone's lips' (McCallum 2005: 465). There have been numerous articles written in recent time exploring this particular issue and the likely limitations on the power (Gray 2005; Owen 2005; Prince and John 2005; and Williams 2005).

The Drafting of the Australian Constitution *and Corporations Power*

The drafting of the Australian Constitution was a process that spanned the decade of the 1890s and for its time involved an extensive exercise in public participation (La Nauze 1972; Irving 1997; Hirst 2000). The distillation of political agreements into constitutional text involved compromise and was based upon a number of premises. A guiding concern for many of the framers was the creation of a nation without compromising the autonomy of the self-governing colonies. This sentiment is evident in the deliberation over the nature of the Commonwealth Parliament's authority over corporations.

Arguably the most influential documents in the drafting of the Australian Constitution were those provided by three delegates to the Constitutional Convention held in Sydney in 1891. Drafted by Andrew Inglis Clark, Charles Cameron Kingston and Sir Samuel Griffith respectively, they became the foundations upon which the 1891, 1897-8 drafts and final 1901 Constitution where built. The Inglis Clark and Kingston constitutional drafts were prepared in advance of the 1891 Convention and were obviously

intended to influence as well as inform its deliberations. Both Inglis Clark and Kingston devised a close relationship between trade and commerce (ultimately section 51(i)) and the corporations power. In the case of Inglis Clark this was predictably the influence of his understanding of the United States Constitution and the example provided by the *Federal Council Act* Kingston would have provided a greater reach for the 'Federal Parliament' through the trade and commerce power. For Kingston the parliament was not limited by the interstateness of the trading activity. He concluded in his 1891 draft constitution that the Parliament would preside over:

PART XII (V)

(b) Trade and commerce

and

(n) The rights and status of companies and corporations in colonies other than the colony in which they have been established.

Griffith, who chaired the Drafting Committee and the Constitutional Committee of the 1891 Convention, used Inglis Clark's draft (and possibly Kingston's draft, see Castles 2001: 261) as a starting point, provided a summary of the decisions that were taken at the start of the drafting process. According to Griffith the Constitutional Committee agreed to provide the parliament with power:

1. To regulate Trade and Commerce with other countries, and among the several States.

and

24. The Status in any State of Foreign Corporations, and Corporations formed in other States (Williams 2005: 58).

A combination of, these initial suggestions with slight modifications, were to be carried through into the final version of the Constitution of 1901. But what was in the mind of the framers when deliberation over the text took place? Little guidance can be found in the debates of the conventions.

At the 1891 Convention little discussion was had about the nature of the corporations power. Griffith, in his imperious manner, dismissed an attempt by James Munro the Victorian delegate to extend the reach of the power to include 'the registration or incorporation of companies' (Official Report 1891: 686). For his part Griffith indicated that 'it is sometimes difficult to say what is a trading corporation', though in terms of the mechanism for incorporation, that – he concluded - was best left to the States. 'I think the states may be trusted to stipulate how they will

https://doi.org/10.1177/103530460601600204 Published online by Cambridge University Press

incorporate companies, although we ought to have some general law in regard to their recognition' (Official Report 1891: 686). With that, debate over the clause was at an end.

At the 1897 Convention held in Adelaide the corporations power again received only passing consideration. By this stage the draft clause read: 'Foreign corporations and trading corporations formed in any State or part of the Commonwealth'. The limited reach of the power to deal with only 'trading' corporations prompted another Victorian, Sir George Turner to suggest that the power be extended to all corporations, or at least, to include the addition of 'financial' corporations (Official Record 1897: 792). For his part Sir Edmund Barton, now the acknowledged leader of the Convention and Chair of the Drafting Committee, responded by alluding to comments made by Griffith six years before. That is the word "'corporations,' as it existed, covered municipal corporation, the term was changed to 'trade corporations'" (Official Record 1897: 793-4). Ultimately faced with the two alternatives offered by Turner the Convention decided to insert the word 'financial' into the clause (Official Record 1897: 794).

The clause was not considered at the Sydney session of the Convention in 1897 and was not considered, apart from its adoption, by the Melbourne session of 1898. The only amendment that was made was by the Drafting Committee with the substitution of the words 'within the limits of the Commonwealth' for previous expression 'in any State or part of the Commonwealth'.

What can be said with certainty about the intentions of the framers is very little. The distinction that was being drawn by Inglis Clark, Kingston and Griffith between the regulation of the 'rights' and 'status' of a corporation did not survive the drafting process beyond 1891. What can be inferred from this amendment may be significant, but is at best speculative. The Convention debates similarly provide little guidance as to the limits to which the corporation could be regulated. For their part Quick and Garran briefly expanded on the meaning of the key words in the section. 'To trade' they concluded 'means to buy and sell; to be engaged in the exchange, barter, traffic, bargain, or sale of goods, wares, and merchandize, or to carry on commerce as a business. The Federal Parliament may legislate concerning trading corporations formed within the limits of the Commonwealth' (Quick and Garran 1901: 606).

Looking beyond the pre-Federation period an account of the intention of the framers can be found in the report of the 1929 Royal Commission into the Constitution. In it the Commissioners indicate that the assumed intentions of the framers had now been cast into doubt by the High Court.

The Report noted that:

> It is uncertain what is the exact scope of the power conferred on the Commonwealth parliament by paragraph (xx) of section 51, but it seems certain that this paragraph was thought by the members of the Convention to confer power to pass a company law for the whole of Australia as the term company law is generally understood. The uncertainty as to the present position arise from the diversity of opinions expressed by different Justices of the High Court who took part the decision of *Huddart Parker & Co. Pty Ltd v Moorhead* (8 C.L.R. 330), but all five Justices agreed that the Commonwealth Parliament under this paragraph has no power to make laws with respect to the creation of corporations. This decision is described by Sir Robert Garran as one of the surprises of the Constitution, and the Commission is informed that a bill for a Commonwealth Act dealing with companies had been prepared before the decision was pronounced but was subsequently abandoned (Royal Commission 1929: 207).

What then is to be concluded from the above brief survey of the drafting of the Constitution and what are the implications for the latest amendments to the *Workplace Relations Act 1996*? A threshold issue is what status do the framers have when interpreting the constitution? Whether or not the intention of the drafters of the Constitution should play any substantive role in the interpretation of various sections of the document remains a significant jurisprudential issue (Craven 1990: 166; Goldsworthy 1997: 1 and 2000: 677; Kirby 2000: 1; Craven 2003: 87). The High Court in *Cole v Whitfield* (1988) 165 CLR 360 has countenanced a relatively modest role for history in the determination of the original problem that confronted the framers rather than the substitution of that intention for contemporary interpretation. However, even those adherents to a 'strong' originalism would find the express intention of the framers with regard to section 51 (xx) slim pickings.

The conclusion that can be drawn from the recorded discussion of the framers chiefly turned on the kind of corporations that were to be included within the scope of the power rather than what activities could be regulated. The absence of discussion by the framers of the intricacies of the power arguably related to the importance that the corporate entity was given in 1890s. Measured by the time allocated to it and the acrimony that it engendered, during the conventions, control over the rivers for transport,

https://doi.org/10.1177/103530460601600204 Published online by Cambridge University Press

for example, was a more significant issue. By the standards of the time the corporations power was but of passing interest to the framers. Its importance today is directly related to the rise of the corporate entity. In short, a grasp for original intent, which may be one tactic in challenging an expansive reading of the corporations power, will ultimately be frustrated by the inconclusive enacted intention.

Reserve Powers and the Corporations Power

As indicated by the 1929 Royal Commission it was the High Court's decision in *Huddart Parker & Co. Pty Ltd v Moorhead* (1909) 8 CLR 330 in 1909 that was to shape the development of corporate law in Australia. In that case the question was whether or not sections 5(1) and 8(1) of the *Australian Industries Preservation Act 1906* (Cth) were within the scope of the corporations power. Those sections dealt with anti-competitive and monopolistic activities by constitutional corporations. The High Court, influenced by the concept of 'reserve powers of the States' that limited the otherwise literal reach of the scope of the power, held invalid the sections with only Isaac J dissenting (Zines 1997: 1-10).

Labouring under this view of the Constitution Griffith CJ noted the text of section 51 (xx) 'ought not to be construed as authorizing the Commonwealth to invade the field of State law as to domestic trade, the carrying on of which is within the capacity of trading and financial corporations formed under the laws of the State' (at 330, 354 see also Barton J: 366, 374). To have accepted a contrary view would, according to Griffith CJ, permitted the Commonwealth to 'prescribe what officers and servants it shall employ, what shall be the hours and conditions of labour, what remuneration shall be paid to them' (at 348). Similar statements were expressed by Barton and O'Connor JJ. What relevance that *Huddart Parker* has today turns on the views of Isaacs J in dissent and to a lesser degree Higgins J, who was at this time uneasy about the limits being placed on the Commonwealth. Both judgments signify the direction that the States arguably need to manoeuvre the case law in order to challenge the validity of the *Workplace Relations Act 1996*. The difficulty here being to advance a limited reading of the scope of the power, without relying on arguments inspired by reserve power thinking.

Isaacs J favoured what he described as the 'ordinary principles of construction'. In doing so he came to the view that the power was expansive subject to two sets of limitations. These limitations, as will be discussed below, were ultimately proved to be incorrect by subsequent High Court decisions. However, they remain significant as markers in the development

of the jurisprudence.

The first of these views relates to the kind of corporations that could be regulated by the section. Isaac J placed great store on the text and felt that the section was limited to 'foreign, trading and financial' corporations. Thus outside the reach of the power where companies 'constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes' (at 393).

The second of Isaac J's limitations related to what aspects of the corporation that could be regulated. In coming to a conclusion on this issue Isaacs J drew a distinction between the internal operations of the corporation and its 'actual exercise of their corporate power'. The former was beyond power whereas the latter was entrusted to the Commonwealth so that the parliament could affect 'the regulation of the conduct of the corporations in their transactions with or as affecting the public' (at 395).

Famously in his judgment, Higgins J mocked the Crown's argument, suggesting that the broad interpretation that was being urged would produce 'extraordinary' results that would be 'big with confusion' (at 409). For Higgins J a distinction could be drawn between section 51 (i) and section (xx), which made the former exclusive of the latter (1909) 8 CLR 330: 410-1). Putting this now heretical view to one side Higgins J continued:

> If it [the Crown] is right, the Federal Parliament may enact that no foreign or trading or financial corporation shall pay its employees less than 10s. per day, or charge more than 6 per cent. interest, whereas other corporations and persons would be free from such restrictions. If it is right, the Federal Parliament can enact that no officer of a corporation shall be an Atheist or a Baptist, or that all must be teetotallers. If it is right, the Federal Parliament can repeal the Statute of Frauds for contracts of a corporation, or may make some new Statute of Limitations applicable only to corporations. Taking the analogous power to make laws with regard to lighthouses, if the respondent's argument is right, the Federal Parliament can license a lighthouse for the sale of beer and spirits, or may establish schools in lighthouses with distinctive doctrinal teaching, although the licensing laws and the education laws are, for ordinary purposes, left to the State legislatures (at 409-10).

These two judgments provide a spectrum within which the power can be viewed. While Isaacs J was willing to expand the reach of the power, he provided two significant limitations. Those limitations were drawn form the text and the nature of the corporation and its external relationship to

the world. At the other end of the spectrum are the 'outrageous' results suggested by Higgins J. Put in more sober terms by Griffith CJ, who suggested that but for the reserve powers doctrine: '[A]ny law in the form "No trading or financial corporation formed within the Commonwealth shall," or "Every trading or financial corporation formed, etc., shall," must necessarily be valid, unless forbidden by some other provision of the Constitution' (at 348). Ultimately the ends of the power, which Griffith CJ suggested, remain to be determined by a majority of the High Court.

Post-*Engineers* and the Corporations Power

As noted above the decision in *Huddart Parker* was fatally infected by the reserve power doctrine. Ultimately the High Court was to overturn it and the related implied immunities of instrumentalities doctrine in the *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129. In doing so the Court endorsed Isaacs J exhortation to subject the text of the Constitution to the orthodox rules of use of statutory interpretation unencumbered by unnecessary implication.

The fact that the High Court dramatically changed the interpretative emphasis in 1920 was understandable. As is well known the change in Australian society after the First World War meant that there was little prospect of a return to a minimalist Commonwealth presence (see *Victoria v Commonwealth* (1971) 122 CLR 353, 395-6 (Windeyer J)). What is remarkable was that it took a further seventy years after the *Engineers' case* for a challenge to the Commonwealth's use of the corporation power. In *Stickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 the Court was faced with similar anti-competitive restrictions in the *Trade Practices Act 1965* (Cth) to those that it had held invalid in *Huddart Parker*. In overturning the decision in *Huddart Parker* members of the High Court were rightly reluctant to expand upon the limits of the power. As Barwick CJ acknowledged the power was not restricted solely to the trading activities of trading corporations:

No doubt, laws which may be validly made under s. 51 (xx.) will cover a wide range of the activities of foreign corporations and trading and financial corporations: perhaps in the case of foreign corporations even a wider range than that in the case of other corporations: but in any case, not necessarily limited to trading activities. I must not be taken as suggesting that the question whether a particular law is a law within the scope of this power should be approached in any narrow or pedantic manner (at 490)

All members of the Court agreed that *Huddart Parker* was incorrectly

decided (McTiernan J 499, Menzies J 510, Windeyer J 512, Owen J 513, Walsh J 515 and Gibbs J 522). Like Barwick CJ all were reluctant to indicate the possible width of the scope of the power. Having cleared away *Huddart Parker,* the issues highlighted by Isaacs J in regard to the power remained unresolved.

What is a Constitutional Corporation?

Before turning to the more significant question of the scope of the power, it is worth considering briefly the first of Isaac J's issues; namely whether the power is limited to foreign, trading or financial corporations.

In the Second Reading Speech the Minister for Employment and Workplace Relations, the Hon. Kevin Andrews noted the coverage of the Act.

We live in an integrated national economy and it makes no sense whatsoever to adopt anything other than a national approach to workplace relations. By using a combination of constitutional heads of power, Work Choices will cover up to 85 per cent of employees across Australia (Andrews 2005: 3).

As discussed above, the Act centrally relies on the corporation power in regulating the corporation as an employer and the terms and conditions of employees of such a corporation. Leaving to one side employees and employers in Victoria and the territories, which are covered by the referral of power or section 122, it is critical to determine what a constitutional corporation is.

In the case law there is little decided upon what constitutes a 'foreign corporation' beyond the obvious fact that it is 'a corporation formed outside the limits of the Commonwealth' (*NSW v Commonwealth* (1990) 169 CLR 482, 498). In terms of its trading and financial component the High Court has had to determine when an incorporated body is a company for the purposes for section 51 (xx).

In general, a corporation will be 'trading' within the meaning of the section if those trading activities represent a 'substantial' or 'significant' element of the activities of the corporation. As Mason J noted in *R v Federal Court of Australia; ex parte WA National Football League* (1979) 143 CLR 190:

> Not every corporation which is engaged in trading activity is a trading corporation. The trading activity of a corporation may be so slight and so incidental to some other principal activity, viz religion or education in the case of a church or school, that it could not be described as a

https://doi.org/10.1177/103530460601600204 Published online by Cambridge University Press

> trading corporation. Whether the trading activities of a particular corporation are sufficient to warrant its being characterized as a trading corporation is very much a question of fact and degree (at 234).

While giving due recognition of the differences between financial and trading corporation activities, the High Court has confirmed that it will employ a similar 'activities' test in determining whether a financial corporation falls within the meaning of section 51 (xx) *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282.

The *State Superannuation* case confirmed that those activities need not be the predominant or primary activities of the corporation, rather the trading activity need only be significant. As Mason, Murphy and Deane JJ noted:

> [J]ust as a corporation may be a trading corporation, notwithstanding that its trading activities are entered into in the course of carrying on some primary or dominant undertaking, so also with a corporation which engages in financial activities in the course of carrying on its primary or dominant undertaking (at 305).

In *Fencott v Muller* (1983) 152 CLR 570 the Court dealt with the situation when the corporation had not traded, or had just begun to trade. In such instances a majority of the Court (Mason, Murphy, Brennan and Deane JJ) stated that the character of the corporation was to be found in other indicia such as its constitution, memorandum and articles of association which may reveal the purpose or objects of the corporation (at 602).

What the above indicates is that the limitations, which Isaacs J first suggested in *Huddart Parker* were overly restrictive. Indeed, subsequent case law has demonstrated that companies operating in non-commercial environments may be within the reach of the power due to their significant trading or financial activities. So for instance, public universities (*Quickenden v O'Connor, Commissioner of Australian Industrial Relations Commission* (2001) 184 ALR 260), benevolent societies such as the Australian Red Cross (*E v Australian Red Cross Society* (1991) 99 ALR 601) and local councils (*R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533) have all been held to be trading corporations, notwithstanding that their primary purpose was not commerical.

In terms of the *Workplace Relations Act 1996* it is clear that there will always be some doubt at the margins whether or not an incorporated body will be within the scope of the power. Doubts will always arise when the test for inclusion is founded upon questions of 'fact and degree' and an appreciation of what is a 'substantial' or 'significant' activity. That said, given the current broad definition taken by the Court very few corporations will fall outside the power.

By definition, the corporations power does not include non-corporate entities such as trusts, partnerships and unincorporated associations. Workers and employers of such non-corporate entities, with the exception of those employed in the Territories, Victoria and not engaging in interstate trade and commerce will be beyond the reach of the Act. On one estimate approximately 26 per cent of workers in the private sector are employed by unincorporated sole traders and partnerships (Prince and John 2005: 23; see also Creighton and Stewart 2005: 108 and Williams 2005: 503).

In recognition of this, the *Workplace Relations Act 1996* seeks to legislate for a system of transitional arrangement where 'non-constitutional corporations' in the current federal system may return to the State industrial system. Accordingly, the Commonwealth has established a transitional period of five years that will 'provide employers that are unincorporated businesses currently in the federal system a chance to decide whether they want to incorporate and remain in the federal system' (Australian Government 2005: 58). These transitional arrangements are contained in Schedule 6 of the Act and rely on the industrial relations power (51 (xxxv).

What can be concluded is that Isaac J's notion of the coprorations power being limited to trading and financial corportations, and thus not including such things as mining corporations, was overly restrictive of the power. Many charitable or not-for-profit corporations will have significant trading or financial activities. That fact alone will be enough to make them respondent to the strictures of the *Workplace Relations Act 1996.* The next next section of the paper will consider the direction that the High Court has taken to the corporations power since *Stickland v Rocla Concrete Pipes Ltd.*

Scope of the Power

The history the Commonwealth's regulation of social and economic policy in Australia has been one of expansion. This has been achieved despite limited formal constitutional amendment to the powers granted to the Commonwealth Parliament in section 51 and 52. With the exception of the 1946 and 1967 referenda that inserted section 51 (xxiiiA) and expanded

the reach of section 51 (xxvi) respectively the Commonwealth's enunciated powers are as they were in 1901. The centralisation of power in the Commonwealth has largely been the result of the High Court's interpretation of the Constitution, and assumption by the Commonwealth of responsibilities usually associated with the States.

The greater centralisation of power in the Commonwealth is evident in the area of industrial relations. In that and other areas of economic and social policy the Commonwealth has been able to regulate indirectly outcomes where it lacked direct legislative capacity. Aided by the process of dual characterisation, that is where a law may exhibit two characters, one within power and the other not, the Commonwealth has been capable of indirect regulation. For instance the inducement of investment in Commonwealth bonds (*Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1) or the imposition of environmental protect regimes (*Murphores Incoporated Pty Ltd v Commonwealth* (1976) 136 CLR 1) could be achieved, notwithstanding the Commonwealth lacking direct legislative power. What is remarkable about the approach adopted by Commonwealth with the amendments to the *Workplace RelationsAct 1996* is the decision to directly prescribe standards. No longer content to bring about workplace reform though indirect regulations, such as migration policy or taxation policy or regulate general work standards through its own employment practices, the Commonwealth has directly established corporate standards of employment.

As with many areas of constitutional law jurisprudence, the corporations power has predicably developed a broad and narrow view of the scope of the power (Williams 2005: 504). Generally, the various positions have fallen between those members of the Court who indicate that the scope of the power takes its character (and its limit) from the 'foreign, trading or financial' nature of the corporation. Alternatively, the power is described as being 'plenary' in nature and subsequently should not be limited by unexpressed assumptions.

As discussed above the High Court in *Stickland* left open the question of the ends of the power. At the very least, as Barwick CJ indicated it included regulation of the trading aspects of trading corporation. When the Court considered the power again in *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 a broad and narrow view of the power emerged.

For Mason J (with whom Aikins J agreed at 215) the power was to be given its widest possible meaning:

> Nowhere in the Constitution is there to be found a secure footing for an

https://doi.org/10.1177/103530460601600204 Published online by Cambridge University Press

> implication that the power is to be read down so that it relates to 'the trading activities of trading corporations' and, I would suppose, correspondingly to the financial activities of financial corporations and perhaps to the foreign aspects of foreign corporations. Even if it be thought that it was concern as to the trading activities of trading corporations and financial activities of financial corporations that led to the singling out in s. 51(xx) of these domestic corporations from other domestic corporations it would be mere speculation to say that it was intended to confine the legislative power so given to these activities. The competing hypothesis, which conforms to the accepted approach to the construction of a legislative power in the Constitution is that it was intended to confer comprehensive power with respect to the subject matter so as to ensure that all conceivable matters of national concern would be comprehended. The power should, therefore, in accordance with that approach, be construed as a plenary power with respect to the subjects mentioned free from the unexpressed qualifications which have been suggested (at 207-8).

As we have seen already, Justice Murphy in this case had a similarly expansive view of the power.

The narrower view of the power was advanced by Gibbs CJ (with whom Wilson J agreed at 215). For Gibbs CJ the Court needed to proceed with caution in order to maintain 'the proper reconciliation between the apparent width of s. 51(xx) and the maintenance of the federal balance which the Constitution requires' (at 219). He concluded that: 'The words of par. (xx) suggest that the nature of the corporation to which the laws relate must be significant as an element in the nature or character of the laws, if they are to be valid' (at 219). The commentary by Gibbs CJ and Mason J merely restate the respective positions and did not resolve the issue.

The next significant development came with the High Court's decision in *Commonwealth v Tasmania* (*'Tasmanian Dam Case'*) (1983) 158 CLR 1. The case involved numerous constitutional questions. In terms of the corporations power the issues was the validity of section 10 of the *World Heritage Properties Conservation Act 1983* (Cth). This section prohibited foreign corporations, corporations formed within a Territory or a trading corporation formed within the Commonwealth, without the permission of the responsible Minister from undertaking the work needed to construct a dam including excavation work and the cutting down or removal of trees.

Section 10(4) similarly prevented those activities when they were 'for the purposes of its trading activity'.

Three members of the Court (Mason, Murphy and Deane JJ) upheld section 10 in its entirety expressing again a broad view of the power. Justice Deane noted:

> Nor, in my view, is there any reason in logic or history for so confining the grant of legislative power contained in s 51(xx). No one with knowledge of the political and other non-trading activities of trading corporations in and since the days of the East India Company would suggest that the non-trading activities of trading corporations are any less appropriate to be placed under the legislative control of a national government than are their trading (at 269).

Justice Brennan advanced a view that for a law to be valid with respect to section 51 (xx) it must discriminate in its treatment of the corporation as against other persons. He said:

> Laws with respect to trading corporations are laws with respect to artificial persons. To be such a law, the law must discriminate: that is to say, it must be a law which operates to confer a benefit or impose a burden upon those persons when its operation does not confer a like benefit or impose a like burden on others (at 240).

For Brennan J in its language and operation section 10(4) imposed such a differential treatment and thus the legislation was held to be valid. Justices Wilson and Dawson dissented holding to the narrower view of the power.

Ultimately, the case stands for the proposition that the Commonwealth can regulate those things that are done by a constitutional corporation for the purposes of trading activities. At this point it is worth considering whether or not the employment of workers and the regulations of their terms and conditions are acts done for the purposes of trade. As the wide view of the power indicates most, if not all, activities undertaken by a trading or financial corporation are done for the purposes of their trading or financial activities. Lindell felt in the aftermath of the *Tasmanian Dam* case that such a view was 'at least highly arguable' (Lindell 1984: 232). He suggests: 'Its potential significance is easy to grasp since it would provide a more direct means of controlling wages and conditions of employment in disregard of the limitations which surround the power to make laws under s 51 (xxxv)' (at 232).

On the view that things done in preparation for trade are within the scope of the power then arguable those provision relating to 'greenfields agreements' (for example section 330 of the Act) for the employment of individuals are closely related to the preparation of corporation for its trading activities. Such a conclusion as a matter of logic cannot be limited to 'greenfield' employment situations. It would only be possible to distinguish the ratio in the *Tasmanian Dam* case if a narrow, and ultimately artificial, line was drawn between the capital works done for the purposes of trading activities, and the employment of workers to undertake the trade.

Significant in the development of the jurisprudence in the area post-*Tasmanian Dam* has been the search for some logical end to the reach of the power. Dennis Rose commented again in the aftermath of the *Tasmanian Dam* case rejecting the wide view of the power may no longer be worth the effort. To do so:

> Would only give rise to troublesome distinctions and uncertainties in practices – for example, in applying a Commonwealth law to employees working in management positions where they are dealing with all the activities of a corporation. The limits on constitutional power might not be worth the social price involved in distinctions that are complex and artificial in the real world (Rose 1994: 254).

Such views, voiced in 1994, highlighted what was believed to be the inevitable ends of the power and the futility in arid line drawing exercises in determining artificial limits on the Commonwealth's power.

The next instalment in the area was the High Court's consideration of section 127C(1)(b) of the *Industrial Relations Act 1988* (Cth) in *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323. Under section 127C(1) of the Act the Australian Industrial Relations Commission was empowered to review a contract for service on the grounds that it was unfair, harsh or against the public interest. In particular the Act provided for review of a contract made '(b) in relation to a contract relating to the business of a constitutional corporation.' The facts in the case were that Tasmanian Pulp & Forest Holdings Ltd contracted with Mr and Mrs Wagner, who in turn, entered into a sub-contract with Mr and Mrs Dingjan and Mr and Mrs Ryan to supply logs to Tasmanian Pulp. By a majority of 4:3 the High Court (Brennan, Dawson, Toohey and McHugh JJ) held that the corporations power did not support section 127C(1)(b).

The case itself was not overly conclusive of the outer limits of the power. Members of the majority were generally concerned with the sufficiency of the connection between the law and the head of power.

Justice McHugh noted that merely referring to a constitutional corporation did not 'throw open the stream of power conferred by s 51(xx) (at 369). Similarly Dawson J highlighted that the legislatures' reference to the power was as 'a peg upon which to hang legislation' (at 347). That said, there was a general agreement that the power had a broad application. Mason CJ adhered to his view that the power was 'plenary' and that it 'extends to the enactment of laws dealing with activities undertaken for the purposes of the business of a constitutional corporation' (at 334). Likewise, Justices Toohey (at 252), Gaudron (at 264), and McHugh (at 268) highlighted the 'plenary' nature of the power. Justice Brennan adhered to his previous view that for a law to be one with respect to 51 (xx) it must discriminate between the corporation and other persons (at 337).

The light the case casts on the scope of the power relates to the particular activities that fell short of section 127C(1)(b) that were likely to be valid. Mason CJ maintained a wide reading of the power. For Gaudron J, with whom Deane J agreed, the power should not be construed by reference to unexpressed implications.

> When s 51(xx) is approached on the basis that it is to be construed according to its terms and not by reference to unnecessary implications and limitations, it is clear that, at the very least, a law which is expressed to operate on or by reference to *the business functions, activities or relationships of constitutional corporations* is a law with respect to those corporations (at 364, my emphasis).

Justice McHugh took a slightly narrower construction of the power emphasising the quality of the connection between the law and the constitutional corporation.

> Where a law purports to be 'with respect to' a s 51(xx) corporation, it is difficult to see how it can have any connection with such a corporation unless, in its legal or practical operation, it has significance for the corporation. That means that it must have *some significance for the activities, functions, relationships or business of the corporation*. 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). That is because the law, by regulating the activities, etc, is regulating the conduct of the corporation or those who deal with it. Further, if, by reference to the activities or functions of s 51(xx) corporations, a law regulates the conduct of those who control, work for, or hold shares or

https://doi.org/10.1177/103530460601600204 Published online by Cambridge University Press

> 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) (at 369, my emphasis).

Aggregating the broad view of Mason CJ, Deane, Gaudron and McHugh JJ it would appear that a law will be one with respect to a constitutional corporation when it has at least '*significance* for the activities, functions, relationships or business of the corporation.' As Andrew Stewart rightly suggested the term "'relationship' would plainly encompass a corporation's relations with its workforce and with any unions representing that workforce, matters which are also intimately connected with its 'activities', functions' or 'business'" (Stewart 2001: 12). A significant concession on the reach of Div 3 of Pt VIB of the *Industrial Relations Act* 1988 and its ability to regulate constitutional corporation was made by Western Australia in *Victoria v Commonwealth* (1996) 187 CLR 416, 539. The Court noted that 'Subject to one possible exception, it was conceded in argument by Western Australia (the only State to challenge the validity of Div 3 of Pt VIB in its statement of claim) that the Parliament has power to legislate as to the industrial rights and obligations of constitutional corporations (as defined in s 4(1) of the Act) and their employees (at 539).

Subsequent cases on the issue of the application of the industrial provisions to the constitutional corporation have confirmed that it is not a particularly onerous task in finding solid constitutional footing. A Full Federal Court in *Quickenden v O'Connor* (2001) 184 CLR 260, when considering the certified agreement provisions in Pt VIB Div 2 of the *Workplace Relations Act 1996* (Cth), held that the obligations created operated upon the constitutional corporation (the University of Western Australia). Chief Justice Black and French J concluded 'the rights and duties which define the relationship between a corporation and its employees are central to its functioning' (at 273). Similarly Carr J stated that the 'challenged provisions can be seen to operate directly on the constitutional corporation in relation to its day-to-day employment relations' (at 290).

In *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2001) 106 FCR 482 Kenny J upheld sections within Pt XA of the *Workplace Relations Act 1996* (Cth), which prevented corporations from discriminating against or victimising employees 'because they are, or are not, members or officers of industrial associations' was within the scope of section 51 (xx). After considering the High Court's previous decisions she concluded that:

> As far as the operation of the enterprise of a corporation is concerned, the relationship of the corporation to its own employees is directly

https://doi.org/10.1177/103530460601600204 Published online by Cambridge University Press

> germane to its business. This is not to say that all aspects of that employment relationship are permissible subjects of regulation under s51(xx), but, on the test favoured by Mason CJ, Deane, Gaudron and McHugh, the laws in question in this case are (at 492).

Given the above case law's emphasis upon the directness of the legislation's relationship to the business activities and functions of the constitutional corporation and the quality and significance of that connection, it is more than arguable that much of the thrust of the *Workplace Relations Act 1996* falls within the scope of section 51 (xx). For a law that directly regulate the wages and conditions of the employees of constitutional corporations is, in the words of Kenny J, 'directly germane to its business'.

Conclusion

In 1957 the then Deputy Leader of the Federal Parliamentary Labor Party, Mr Gough Whitlam gave the Chifley Memorial Lecture entitled *The Constitution versus Labor.* In it he bemoaned the plight of Labor Governments. 'The way of the reformer is hard in Australia. ...Labor has to persuade the electorate to take two steps before it can implement its reforms: first to elect a Labor government, then to alter the Constitution' (Whitlam 1965: 32). The Commonwealth's amendments to the *Workplace Relations Act 1996* has made for peculiar constitutional alliances. It is the Howard Government that now has the Whitlamesque passion for crashing or crashing through constitutional limitations and it is the Labor Opposition that is left to publicly defend federalism and the prevailing federal balance. Unlike Whitlam, the Howard Government will arguably not need to formally amend the Constitution, but rather, rely upon current constitutional jurisprudence.

The history of the interpretation of the corporations power, after an initial setback, has been one of expansion. Ignored by the Commonwealth until the late 1960s, the power, like the corporate entities it regulates, has been on the rise. The preponderance of judicial opinion points to a continuing broad reading of the power. It is this belief that has emboldened the Commonwealth's decision to directly regulate wages and employment conditions. If held valid, then a future Labor Government may not need to undertake Whitlam's precarious constitutional journey. The conclusion may be more dramatic for the States as they are further marginalised with

the Commonwealth establishing national policies rendering the States little more than service providers and builders (and fillers) of gaols.

References

Andrew, K (2005) Workplace Relations Amendment (Work Choices) Bill 2005, Second Reading Speech.

Australian Government (2005) *Work Choices: A New Workplace Relations System*, Canberra.

Castles, A.C. 'Clark, Kingston and the Draft of 1891' in R. Ely (ed), *A Living Force: Andrew Inglis Clark and the Ideal of the Commonwealth,* Centre for Tasmanian Historical Studies, Hobart, pp. 261-285.

Commonwealth Parliament of Australia, 22 October 1986, Hansard, p. 2490

Commonwealth of Australia (1929) *Report of the Royal Commission on the Constitution*, Commonwealth Printer, Canberra.

Craven G., (1990) 'Original Intent and the Australian Constitution – Coming Soon to a Court Near You', *Public Law Review,* 1: 166-185.

Craven G., (2003) 'Heresy as Orthodoxy: Were the Founders Progressivists?' *Federal Law Review,* 31 (1): 87-129.

Creighton, W.B., Ford, W.J. and Mitchell R.J. (1983) *Labour Law: Materials and Commentary* Law, Book Co, Sydney.

Creighton, B. and Stewart A. (2005) *A Labour Law*, Federation Press, Annandale, Sydney.

Goldsworthy, J. (2000) 'Interpreting the Constitution in its Second Century', *Melbourne University Law Review*, 24 (3): 677-710.

Goldsworthy, J. (1997) 'Originalism in Constitutional Interpretation', Journal? 25 (1): 1-50.

Gray, A. (2005) 'Precedent and Policy: Australian Industrial Relations Reform in the 21st Century Using the Corporations Power', *Deakin Law Review*, 10 (2): 440-59.

Hirst J (2000), *The Sentimental Nation: The Making of the Australian Commonwealth*

Irving, H. (1997) *To Constitute a Nation: A Cultural History of Australia's Constitution*, Cambridge University Press, Cam-

bridge, U.K.
Kirby, M. (2000) 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?', *Melbourne University Law Review*, 24:1-14.
Nauze, J. A. (1971) *The Making of the Australian Constitution,* Melbourne University Press, Carlton, Vic.
Lindell, G. (1984) 'The Corporations and Races Powers', *Federal Law Review*, 14 (3): 217-252.
McCallum, R.C. and Pittard M. J. (1995) *Australian Labour Law: Cases and Materials,* Butterworths, Sydney.
MaCallum, R (2005) 'The Australian Constitution and the Shaping of our Federal and State Labour Laws', *Deakin Law Review*, 10 (2): 460-69.
Neasey, F. M. (1969) 'Andrew Inglis Clark Senior and Australian Federation' *Australian Journal of Politics and History*, 15: 1-24.
Official Record of the Debates of the Australasian Federal Convention, 1891, George Stephen Chapman, Sydney.
Official Record of the National Australasian Convention Debates, 1897, C. F. Bristow, Adelaide.
Owen, R. 'The Constitution and the Law of Work in the New Economy: The Workplace Relations Amendment (Work Choices) Bill 2005 (Cth)', paper presented to the Public Law Weekend, ANU, 12 November 2005.
Prince, P. and John, T. (2005) 'The Constitution and Industrial Relations: Is a Unitary System Achievable?', Research Brief, Parliamentary Library: 1-77.
Quick J and Garran R.R. (1901) *The Annotated Constitution of the Australian Commonwealth*, Angus & Robertson, Sydney.
Reynolds, J (1958) 'A. I. Clark's American Sympathies and His Influence on Australian Federation', *Australian Law Journal*, 32: 62-75.
Rose, D. (1984) 'Commentary', *Federal Law Review*, 14 (3): 251-7.
Stewart, A. (2001) 'Federal Labour Law and New Uses for the Corporations Power', *Australian Journal of Labour Law*, 14: 1-24.

Whitlam, E. G. (1964), Labor and the Constitution, Victorian Fabian Society Pamphlet 11.
Williams G. (1998) *Labour law and the Constitution*, Federation Press, Leichhardt.
Williams, G (2005) 'The Constitution and a National Industrial Relations Regime', *Deakin Law Review*, 10 (2): 498-510.
Williams, J.M. (2005) *The Australian Constitution: A Documentary History*, Melbourne University Publishing, Melbourne.