

# PRECEDENT AND POLICY: AUSTRALIAN INDUSTRIAL RELATIONS REFORM IN THE 21<sup>ST</sup> CENTURY USING THE CORPORATIONS POWER

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*[This article will discuss the topical issue of whether the Commonwealth, in Australia's federal system of government, can rely on its so-called "corporations power" in order to pass planned industrial relations laws. The Federal Government has recently indicated its plans to introduce a national system of industrial relations regulation in Australia. While the detail of the proposed legislation is not currently to hand, the planned changes raise a controversial issue whether the Australian Government would permit such regulation. This article considers the corporations power as justification for the proposed laws.]*

## I INTRODUCTION

This article considers the chances of success of the proposed challenge by the States to the attempt by the Commonwealth to (largely) nationalize the industrial relations system through the use of the corporations power. Though a challenge might be politically understandable, it concludes there is little support for such a challenge in the current jurisprudence on the interpretation of the section. The States would need to re-open the debate on principles established by majority in several High Court decisions on the corporations power. The proposition that the Commonwealth might use its corporations power to regulate industrial conditions is far from novel.

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As well as the precedents, the article will consider policy arguments in favour of a broad or narrow approach to the section. It is concluded there are sound policy reasons for interpreting the corporations power in a broad way, given the Commonwealth's need to manage the economy. A broad view of the corporations power to regulate industrial relations would also be supported by the American constitutional experience, albeit in a different context. Policy arguments are submitted to be particularly relevant to interpretation of the *Constitution*.

## II BACKGROUND

The Commonwealth has indicated it plans some important changes to the process by which minimum working conditions are established, changes to guaranteed minimum rights, and to encourage individual negotiation of contracts at the enterprise level. These changes would greatly affect the role of the Industrial Relations Commission in establishing and reviewing minimum wages, and the principle of collective bargaining. The States have indicated their intention to mount a High Court challenge to the validity of the legislation. This is not surprising, given the strong opposition to the changes from the union movement. Rights such as collective bargaining and an award safety net are articles of faith in the union movement. The Australian Labor Party currently holds office in every State and Territory in Australia.<sup>1</sup>

In essence, the Government's policy is that the proposed legislation<sup>2</sup> will protect five basic conditions:

- Minimum and award classification wages (established by the proposed Australian Fair Pay Commission);
- Annual leave;
- Personal/carer's leave;
- Parental leave; and
- Maximum ordinary hours of work.

Other entitlements will be a matter for negotiation, preferably by way of individual negotiation between employer and employee, but also by way of collective bargaining if agreed. Unions may or may not take part in the negotiation process.

The idea is to move away from the current system of awards being made at both Federal and State level. The Federal Government claims this process is extremely complex, especially for employers carrying on business across state lines who may

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<sup>1</sup> The new New South Wales Premier, Morris Iemma, announced as soon as he took office on 2 August that it was his intention to challenge the legislation in the High Court of Australia. Tasmanian Premier Paul Lennon announced new legislation on 6 August to guarantee workers' conditions, including annual leave, paid breaks, sick leave, redundancy, and the 38-hour week. Other States are expected to follow suit. States' legislation of this nature could expect to be challenged under s109 once the federal laws are enacted.

<sup>2</sup> This is based on statements the Government has made about the proposed law. At the time of writing, the bill is not available.

be dealing with a number of different awards and tribunals for a relatively few number of employees, and even intrastate employers who might have employees on different awards, and a combination of Federal and State awards.<sup>3</sup> There are currently 2300 federal awards and 1700 State awards in Australia. The Federal Government proposes to virtually abolish this two-tiered system of award determination – there will be few State awards and tribunals dealing with industrial relations matters. Awards will also be simplified, and unfair dismissal laws will be limited only to employers of more than 100 staff. Firms will also be able to offer a longer probationary period of employment.<sup>4</sup>

Perhaps surprisingly, the High Court has never had to decide whether or not the Commonwealth can use its corporations power (s 51(20)) to comprehensively regulate the working conditions of those who are engaged in employment with a corporation. While it is clear that the Commonwealth can rely on other heads of power to legislate in this area<sup>5</sup> particularly the external affairs power and the trade and commerce power,<sup>6</sup> the use of the corporations power is less certain.<sup>7</sup> The issue arose to some extent in *Victoria v Commonwealth (Industrial Relations Act Case)*;<sup>8</sup> however in that case the plaintiff conceded without challenge that s 51(20) could be used to regulate working conditions of employees of a corporation:

If, *as is conceded*, the Parliament can legislate pursuant to s51(20) ... as to the industrial rights and obligations of employees and employer corporations of the kind specified in s51(20) ... it can also legislate ... as to the conditions to attach to those rights and obligations.<sup>9</sup>

<sup>3</sup> “The current system of overlapping federal and State awards is too complex, costly and inefficient. Employers and employees frequently face a patchwork of regulation ... (national laws on industrial relations are) a next logical step towards a workplace relations system that supports greater freedom, flexibility and individual choice”: Prime Minister John Howard, *Address to the Menzies Research Centre* 11/4/2005, <<http://www.pm.gov.au/news/speeches/speech1320.html>> (last visited 25 August 2005).

<sup>4</sup> During periods of probation, unfair dismissal laws do not apply.

<sup>5</sup> The Court has confirmed that existing s 51(35) will not be relevant in interpreting regulation of industrial relations using other heads of power: *Pidoto v Victoria*, (1943) 68 CLR 87 (High Court of Australia, 1943) and *Re Pacific Coal Pty Ltd; Ex Parte Construction, Forestry, Mining and Energy Union*, (2000) 172 ALR 257 (High Court of Australia, 2000).

<sup>6</sup> For a full discussion, refer David McCann, *First Head Revisited: A Single Industrial Relations System Under the Trade and Commerce Power* 26 SYDNEY L. REV. 75 (2004).

<sup>7</sup> For a discussion of all possible heads of power that might support an industrial relations law, see William Ford, *The Constitution and the Reform of Australian Industrial Relations*, 7 AUSTRALIAN JOURNAL OF LABOUR LAW 105 (1994) and William Ford, *Reconstructing Australian Labour Law: A Constitutional Perspective*, 10 AUSTRALIAN JOURNAL OF LABOUR LAW 1 (1997).

<sup>8</sup> (1996) 187 CLR 416.

<sup>9</sup> (1996) 187 CLR 416, 539 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. Andrew Stewart in *Federal Labour Law and New Uses for the Corporations Power*, 14 AUSTRALIAN JOURNAL OF LABOUR LAW 145 (2001) considers the use of s 51(20) in the industrial relations context in light of the *Industrial Relations Act Case*, and see George Williams and Amelia Simpson, *The Expanding Frontiers of Commonwealth Intervention in Industrial Relations*, 10 AUSTRALIAN JOURNAL OF LABOUR LAW 222 (1997).

In this case, the Commonwealth was *conceded* to be able to legislate on collective bargaining by relying on the corporations power.<sup>10</sup> The corporations power certainly supports a law concerning the review of an unfair contract with an independent contractor, at least where a 'constitutional corporation' is a party.<sup>11</sup> It is new territory, however, whether the corporations power allows the Commonwealth to set five guaranteed working conditions, and to take away most of the powers of State tribunals, by vastly reducing the number of State awards.

It is true that the Commonwealth is given limited direct ability under the *Constitution* to regulate industrial relations, under the s 51(35) power.<sup>12</sup> However, the power would be unlikely to support any of the changes the Federal Government is proposing to make. Section 51(35) presumes that an industrial relations issue must be created by a dispute, and then requires the involvement of a third party in making a decision to resolve the dispute.<sup>13</sup> The crux of the new changes, further encouraging individual workplace agreements between employer and employee, is directly at odds with this way of dealing with workplace issues. The 'dispute' is in almost all cases created by the serving of a log of claims by a union. The Federal Government's changes are designed to give employees a choice about union membership, rather than presume that there will be a relevant union that will "bring on" the dispute.<sup>14</sup> Decisions about working conditions must be made by a third party, rather than the parties themselves. Further, the decision made by the third party binds only those who are parties to the dispute.<sup>15</sup> In other words, s 51(35) is likely to be completely useless to the Commonwealth in implementing its desired changes.

This article will be confined to an analysis of whether the mooted changes are likely to be found constitutional or not by the High Court under s 51(20). Other possible heads of power will not be considered. Further, the author does not pass judgment on the desirability or otherwise of the proposed laws. This is, of course, a political matter, and a matter that is not relevant to the question of their constitutionality.

It will be necessary to discuss how the corporations power has come to be interpreted, in order to assess its ability to support workplace relations laws. This dis-

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<sup>10</sup> Further, to legislate on minimum conditions of employment, unfair dismissal, discrimination, the right to strike and leave entitlements by implementing an international convention, relying on the external affairs power.

<sup>11</sup> *Re Dingjan and Others; Ex Parte Wagner*, (1995) 183 CLR 323 (High Court of Australia, 1995).

<sup>12</sup> The head of power relates *only* to conciliation and arbitration for the prevention and settlement of an industrial dispute extending beyond the boundaries of any one State.

<sup>13</sup> The court has said that 'conciliation and arbitration' requires the involvement of a third party. The author does not see how this can be related to an individual workplace agreement negotiated between employer and employee.

<sup>14</sup> The presumption that the only way that workplace arrangements can be made is by creating a 'dispute' may also be seen as unnecessarily confrontational. In many cases, employers and employees may be able to reach a mutually satisfactory arrangement.

<sup>15</sup> That head of power does not, according to the authorities, allow for a common rule to be made to all in a particular industry: *R v Kelly; ex parte Victoria*, (1950) 81 CLR 64 (High Court of Australia, 1950), *Australian Boot Trade Employees' Federation v Whybrow and Co*, (1910) 11 CLR 311 (High Court of Australia, 1910).

cussion will be confined to comments in the various corporations head cases that relate particularly to the industrial relations issue. Part A of the article considers what arguments the States might use in challenging the validity of the Commonwealth's proposed laws. Part B of the article considers the Commonwealth's arguments to support the law, quite apart from arguments based on the case law. Again, these arguments are presented on the assumption that particularly in relation to constitutional interpretation, the High Court should take into account factors other than simply precedent.

### III POSSIBLE ARGUMENTS AGAINST COMMONWEALTH REGULATION OF IR UNDER S 51(20)

#### A *Internal/External Distinction*

The very first case dealing with the corporations power contains interesting dicta comments about the ability of the Commonwealth to regulate the industrial conditions of a corporation's employees. Though the decision itself is largely<sup>16</sup> discredited due to the influence on it of the reserved powers heresy,<sup>17</sup> some members of the court considered whether the power might be available to regulate industrial relations. Those who did reached different conclusions. On the one hand, Griffith CJ commented that:

The Commonwealth Parliament can make any laws it thinks fit with regard to the operation of the corporation, for example may prescribe what officers and servants it shall employ, what shall be the hours and conditions of labour, what remuneration shall be paid to them.<sup>18</sup>

On the other hand, Isaacs J found that:

Viewing a corporation as a completely equipped body ready to exercise its faculties and capacities, it must be that outward exercise which naturally and inevitably remains as the subject of federal control. This disposes of the contention that, if these sections be valid, the Commonwealth Parliament would be entirely at large, and that a schedule of wages and hours could be prescribed for these corporations, so also as to the qualifications

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<sup>16</sup> Although its finding that s 51(20) could not be used to legislate over the incorporation process has been upheld: *New South Wales v Commonwealth (Incorporation Case)*, (1990) 169 CLR 482 (High Court of Australia, 1990).

<sup>17</sup> As an example, Griffith CJ commented that s 51(20) "empowers the Commonwealth to prohibit a trading or financial corporation formed within the Commonwealth from entering into any field of operation, but does not empower the Commonwealth to control the operations of a corporation which lawfully enters upon a field of operation, the control of which is exclusively reserved to the States" (354). The doctrine of reserved powers was officially killed off in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*, (1920) 28 CLR 129 (High Court of Australia, 1920), although some claim its ghost still walks.

<sup>18</sup> *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 348 (High Court of Australia 1909).

of their directors; all that is purely internal management and equipment, and in no way directly affects the exercise of their capacities of trading or their financial operations or other public capacities, nor is it incidental to the control of their activities.<sup>19</sup>

Viewing the corporations power as he did, Isaacs J also maintained that the creation of corporations was a matter for the States. He in effect linked the two ideas, that the Commonwealth could not regulate incorporation, nor internal management of the company, for the same reason – that the power presupposed the existence of corporations, including the setup of their internal structures, including staffing. It operated thus on something the corporation, already established and staffed, did with an external body, particularly members of the public.<sup>20</sup>

Though the Convention Debates do not strongly assist in this viewpoint, there is some support for this position in the writings of Moore. He said, writing in 1910, that:

The recognition, the field of operations, and the management, the winding up and dissolution – all the inherent qualities which distinguish the juristic from the natural person, would thus be submitted to federal law. But there the Commonwealth would leave it; and the actual carrying on of business by the corporation, and the legal relations with outsiders to which it gives rise – its property, its contracts, and its liabilities would be under the sole control of the State laws.<sup>21</sup>

It is considered perhaps the States' strongest argument in challenging the validity of the Commonwealth's proposal, in terms of reasoning. The difficulty with it is that it is effectively too late to return to this argument – it has not been made again since 1909, and has effectively been overruled in cases such as *Strickland v Rocla Concrete Pipes Ltd.*<sup>22</sup> Nor is it supported by the plain text of the *Constitution*, to which a majority of the Court has made it clear they will look in assessing constitutionality.

<sup>19</sup> *Huddart, Parker and Co Pty Ltd v Moorehead*, (1909) 8 CLR 330, 396. The other justices did not consider the issue, though Higgins J commented that 'It is for the State Parliament to regulate what contracts or combinations a corporation may make in the course of the permitted business' (at 414). This comment might also have included employment contracts.

<sup>20</sup> However, this is not supported by a consideration of the history of the provision. It was based on s 15(i) of the Federal Council of Australasia Act 1885 (Imp), which was incorporated in cl 52 of the Constitution presented to the 1891 Convention. These provisions referred to a power to legislate in respect of the status ... of foreign corporations and corporations formed in any State or part of the Commonwealth. It was at the 1891 Convention that the word 'trading' was added to the general power over corporations. See also S Corcoran, *Corporate Law and the Australian Corporation: A History of s 51(20) of the Australian Constitution*, 15 JOURNAL OF LEGAL HISTORY 131 (1994).

<sup>21</sup> SIR W HARRISON MOORE, *THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA* 471 (1910). However, it is unclear to what extent this view was influenced by the High Court's decision the year before in *Huddart Parker*, affected as it was by the now-discredited reserved powers doctrine. Immediately after the quote above, Harrison Moore adds "this is partly decided, partly supported by the majority of the High Court in *Huddart Parker*".

<sup>22</sup> (1971) 124 CLR 529.

## B *The Head is Confined to Trading Activities*

A related but distinct argument is that s 51(20) should be read narrowly according to a trade/non-trade divide. Some judges, perhaps mindful of the ‘federal balance’,<sup>23</sup> have advocated that only laws relating to trading activities of trading corporations will be within the s 51(20) head of power. Or, as Gibbs CJ said, ‘in other words ... the nature of the corporation to which the laws relate must be significant as an element in the nature or character of the laws’.<sup>24</sup> Dawson J saw the legislation in *Tasmanian Dams* as unsupported by s 51(20) because there was nothing in the way the Act related to corporations in the fact they were trading corporations – he concluded they were merely ‘pegs upon which Parliament has sought to hang legislation on an entirely different topic’, although the premise behind this comment may be questioned, with respect.<sup>25</sup> Wilson J found the legislation unsupported by the corporations power, because the substance of the law did not sufficiently relate to the characteristics of trading corporations.<sup>26</sup>

On the other hand, others have flatly rejected the limit, with Mason J in *Actors Equity* countering that a constitutional grant of legislative power should not be read pedantically. Nothing in the *Constitution* required that only trading activities could be regulated.<sup>27</sup> He considered a middle position in *Tasmania Dams*, that the Commonwealth could regulate and prohibit acts and activities engaged in by a trading corporation for the purposes of engaging in its trading activities.<sup>28</sup> Deane J in the

<sup>23</sup> For example, Gibbs CJ in *Actors’ and Announcers Equity Association v Fontana Films Pty Ltd*, (1982) 150 CLR 169 (*Actors’ Equity*) justified his narrow view of the scope of s 51(20) as not including a complete code of laws regarding corporations, “having regard to the federal nature of the *Constitution*” (at 181).

<sup>24</sup> Or “the fact that the corporation is a foreign (or trading) corporation should be significant in the way in which the law relates to it”: *Actors’ and Announcers Equity Association v Fontana Films Pty Ltd*, (1982) 150 CLR 169, 182-183. He adhered to this view in *Commonwealth v Tasmania (Tasmanian Dam Case)*, (1983) 158 CLR 1, 118, Wilson and Dawson JJ reached a similar conclusion (202, 316-317).

<sup>25</sup> *Commonwealth v Tasmania (Tasmanian Dam Case)*, (1983) 158 CLR 1, 316-317. To the extent that this comment suggests that laws can have only one characterization, the comment is with respect submitted not to be correct. For example, Stephen J in *Actors Equity* noted “valid laws of the Commonwealth may possess several characters and the fact that one or more of such characters is not within a head of Commonwealth power will not spell validity ... the task is not to single out one predominant character of a law which, because it can be said to prevail over all others, leads to the attaching to the law of one description only as truly apt” (at 194). Refer also to *Strickland v Rocla Concrete Pipes*, (1971) 124 CLR 468 and *Re F; Ex Parte F*, (1986) 161 CLR 376, 387 confirming that a law “can possess more than one character in the sense that it can properly be characterized as a law with respect to more than one subject matter” (Mason and Deane JJ). Dawson J expressed a similar view in *Re Dingjan; Ex Parte Wagner* (1995) 183 CLR 323, 346.

<sup>26</sup> *Commonwealth v Tasmania (Tasmanian Dam Case)*, (1983) 158 CLR 1, 202.

<sup>27</sup> *Actors’ and Announcers Equity Association v Fontana Films Pty Ltd*, (1982) 150 CLR 169, 207; to like effect *Murphy J* (at 212). Brennan J in the case agreed that a law regulating both trading and non-trading activities would be supported by s 51(20) (at 222). The judges adhered to this view in *Commonwealth v Tasmania (Tasmanian Dam Case)*, (1983) 158 CLR 1; *Mason J* (at 148-149), *Murphy J* (at 179). Mason CJ expressed similar views in later cases, including *Re Dingjan; Ex Parte Wagner*, (1995) 183 CLR 323 334.

<sup>28</sup> *Commonwealth v Tasmania (Tasmanian Dam Case)*, (1983) 158 CLR 1, 148. Brennan J agreed that activities conducted by a corporation for the purposes of its trading functions could be regulated under s

same case dismissed as unrealistic an attempt to draw a line between trading and non-trading activities, on the basis that the Commonwealth could regulate the former but not the latter. The categories were in his view clearly linked.<sup>29</sup>

States who seek to challenge the Commonwealth's ability to legislate on industrial relations under its s 51(20) power may seek to adopt the narrow view that the Commonwealth can only legislate regarding trading activities. If this is accepted, it follows as a reasonable proposition that the Commonwealth cannot regulate employment conditions of employees. This would be on the basis that the employment process is not in itself a trading activity (unless the corporation is a job placement agency), but rather a means to an end of trading activity.

However, such a change in the Court's approach, while possible, is submitted to be unlikely. It has been accepted since the *Tasmanian Dams* case that the Commonwealth's corporations power extends, at least to some extent, further than merely regulating trading activities. There is (or has been) majority support for the position that the Commonwealth can regulate activities done by a corporation for the purposes of its trading activities.<sup>30</sup> The alleged distinction between trading activities and non-trading activities has, rightly in the author's view, been subjected to strong criticism<sup>31</sup> that it is an artificial distinction. It can be a very difficult line to draw. Clearly, the corporation employs staff 'for the purposes of its trading activities'. The *raison d'être* of the corporation is to trade, and it is obvious that a corporation cannot do anything on its own – it requires people through which to conduct activities.

It seems relatively uncontroversial that the Commonwealth can regulate the employment of employees under s 51(20), since this activity (namely the employment process including on what conditions the employee is hired) is an action done for the purposes of trade,<sup>32</sup> at least where it is carried out by an organization that is a trading corporation. There should be no constitutional objection then to the Commonwealth mandating some minimum terms and conditions, establishing a body to establish a level of fair pay, and to simplifying awards.

### C *Limits Based on Discrimination/Sufficient Connection*

It is true that in the context of considering precisely the issue of the application of s 51(20) to support an industrial relations law, the High Court in *Re Dingjan; Ex*

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51(20) *ibid* at 241, without deciding whether non-trading functions unconnected with trade could be regulated. Presumably, Murphy and Deane JJ would agree that the Commonwealth could regulate activities done for the purpose of trade, so this is a majority position in the case.

<sup>29</sup> Commonwealth v Tasmania (Tasmanian Dam Case), (1983) 158 CLR 1, 270.

<sup>30</sup> Commonwealth v Tasmania (Tasmanian Dam Case), (1983) 158 CLR 1, per Mason, Murphy Brennan and Deane JJ.

<sup>31</sup> For example, Deane J in Commonwealth v Tasmania (Tasmanian Dam Case), (1983) 158 CLR 1, 269-270.

<sup>32</sup> Three of the judges from the Tasmanian Dams case would justify it further on the basis that the Commonwealth can in any event regulate the non-trading activities of corporations.



*Parte Wagner*<sup>33</sup> imposed some boundaries on the use of the corporations power in this context. Yet even though the law was struck down, it is submitted the States might find the case more of a hindrance than of assistance in seeking now to prevent the Commonwealth from legislating in this area.

The case involved a challenge to industrial relations laws purported to be based on the corporations power. Section 127A(2)(1) of the *Industrial Relations Act 1988* (Cth) gave the Australian Industrial Relations Commission (AIRC) power to review a contract involving an independent contractor on the grounds it was unfair, harsh or against the public interest. The power was confined to contracts to which a constitutional corporation was a party, and in respect to a contract relating to the business of a constitutional corporation. A majority of the court found the law not to be supported by s 51(20).

Brennan J in the majority found the law had to discriminate against constitutional corporations and other persons.<sup>34</sup> It had to have a differential effect on constitutional corporations. Here the law went further – it allowed the AIRC to vary contracts, even where neither party to the contract was a constitutional corporation. Exercise of the power to vary the contract may not affect the business of the corporation at all.<sup>35</sup> However, Brennan J noted in his judgment that:

A law conferring power to vary or set aside a contract between a constitutional corporation and an independent contractor for work to be done for the purposes of the corporation's business where the contract is harsh or unfair ... would be a law supported by s51(20).<sup>36</sup>

Another judge in the majority in the *Dingjan* case, McHugh J, indirectly confirmed the Commonwealth's ability to legislate on working conditions of constitutional corporations:

So, where a law seeks to regulate the conduct of persons other than s 51(20) corporations or the employees, officers or shareholders of those corporations, the law will generally not be authorized by s51(20) unless it does more than operate by reference to the activities, functions, relationships or business or such corporations.<sup>37</sup>

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<sup>33</sup> Re *Dingjan*, (1985) 183 CLR 323.

<sup>34</sup> Kirby J in *Re Pacific Coal Pty Ltd; Ex Parte Construction, Forestry, Mining and Energy Union*, (2000) 172 ALR 257 (High Court of Australia, 2000) also applied a discrimination test to an interpretation of the corporations power.

<sup>35</sup> Toohey J's formulation was similar – the law was invalid because it could apply to contracts that did not affect the business of the corporation or any of its activities: *Re Dingjan*, (1985) 183 CLR 323, 354; similarly McHugh J required a relationship between a contract and the business of a s 51(20) corporation: *Re Dingjan*, (1985) 183 CLR 323, 370.

<sup>36</sup> *Re Dingjan*, (1985) 183 CLR 323, 339.

<sup>37</sup> *Re Dingjan*, (1985) 183 CLR 323, 370. Further, in the earlier case of *Actors Equity*, Murphy J in dicta stated the corporations power extended to laws dealing with industrial relations, and would support laws about the wages and conditions of employees, and other industrial matters.

Clearly, the three minority judges Mason CJ Deane and Gaudron JJ<sup>38</sup> believed the Commonwealth could regulate at least some work relationships between employer and employee, since they validated the legislation under the corporations power. Thus, five of the seven High Court judges in this 1995 case have expressly confirmed the Commonwealth's use of the corporations power to regulate at least some aspects of work relationships.<sup>39</sup>

So it is true that the case recognized the Commonwealth's power to legislate on industrial relations via s 51(20) was circumscribed by the discrimination/sufficient connection test. The problem for the States is that in doing so, the High Court implicitly or explicitly confirmed that the Commonwealth *could* regulate the working arrangements of constitutional corporations. In other words, the Commonwealth could pass a law allowing for a review of a work contract with a constitutional corporation, provided the law focused directly on constitutional corporations, and could not apply to contracts where that corporation was not an immediate party.

#### D *Provisional Conclusion*

It is concluded that the States do not have any strong grounds on which to challenge the constitutional basis for the Commonwealth regulating the industrial conditions of employees of corporations under s 51(20).

### IV ARGUMENTS THAT THE COMMONWEALTH REQUIRES BROAD POWER OVER CORPORATIONS – PRINCIPLE

The arguments presented by those judges who have advocated a broad view of the corporations power tend to involve one or more of the following:

- giving the words of the section their plain meaning as the *Engineers* case requires, the power is not subject to any expressed limits, in particular the ability to regulate trading corporations is not limited only to its trading activities, and in any event such a distinction would be difficult to establish and somewhat artificial since non-trading activities are usually carried out in anticipation of or to facilitate trading activities

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<sup>38</sup> Gaudron J also stated this view in *Re Pacific Coal*, (2000) 172 ALR 257 (High Court of Australia, 2000): "I have no doubt that (the corporations power) extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations".

<sup>39</sup> The remaining two judges, Dawson and Toohey JJ, did not expressly state whether or not the Commonwealth could use the power to regulate industrial relations matters. They decided on the ground of lack of connection between the organisation's corporate status and the law; it might have been thought that if they did have an objection to the Commonwealth's ability to legislate in this way, they would have indicated so – they did not.

- words in the *Constitution* should not as a matter of principle be read in a narrow and pedantic way
- apparently clear words in the *Constitution* should not be read down to preserve some individualized notion of the ‘federal balance’ and where that balance might most appropriately be struck, such a concept arguably harking back to the ‘bad old days’ of reserved powers reasoning, as well as being inherently uncertain and subjective.<sup>40</sup>

The author respectfully agrees with the above arguments, and would now like to add some further arguments justifying a strong federal government power to regulate the activities of corporations based on the nature of the corporate entity.

### A *Nature of Corporate Activity*

One policy argument in favour of strong regulation of corporate activity (in other words a broad reading of the Commonwealth’s corporations power)<sup>41</sup> concerns the nature of corporations. This relates to the current matter for discussion, given that the broader the interpretation of the corporations power, the greater the likelihood that it will be considered to include regulation of employment rights and obligations of employees of corporations.

It is true there has not been a great deal of discussion in the s 51(20) cases about this rationale for a broad view of the corporations power. One reference however occurs in the judgment of Mason J in the *Tasmanian Dams* case where His Honour explains:

there is much to be said for the view that one of the objects of s51(20) was to enable Parliament to regulate transactions between the categories of corporation mentioned and the public, indeed to enable Parliament to protect the public, should the need arise, in relation to the operation of such corporations;<sup>42</sup>

and perhaps Deane J was talking about the same thing when he said:

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 activities are any

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<sup>40</sup> It is also implied that a principle of dual characterization applies, that as long as a law is about (and sufficiently connected with) a head of power, it is not relevant to its characterization that it is also about another topic that is not within power.

<sup>41</sup> National regulation is linked with strong regulation given it is uniform. A corporation could not thus avoid the regulation by narrowing its operations to a particular part of Australia.

<sup>42</sup> *Commonwealth v Tasmania (Tasmanian Dam Case)*, (1983) 158 CLR 1, 148.

less appropriate to be placed under the legislative control of a national government than are their trading activities.<sup>43</sup>

Some view corporations as potentially quite evil, not constrained in their behaviour by any kind of morality and requiring strong control, which is equated with a broad national power to regulate corporations, with implications for the current question.<sup>44</sup>

It is asserted that only the national government can exercise the kind of strong control that is necessary over a corporation. The history of corporate law in Australia has reflected an eventual recognition of the need for federal regulation of the topic, and a movement away from the original position where State law regulated companies. Corporations Law is now largely a federal responsibility, and the functions of the former State Corporate Affairs Commissions have been transferred to a federal body. It would be consistent with the overall trend in corporate regulation in Australia since federation to assert that the Commonwealth should also have power over industrial relations relating to corporations.

### B *Control Over Corporations is an Essential Tool in Managing the Economy*

Given the growing importance of corporations and that the corporate form is the main means by which business is carried out, one might argue that Commonwealth requires broad control over corporations as a tool in managing the economy, particularly in light of the lack of direct constitutional power the Commonwealth has over 'the economy'.

Some High Court judges over the years have referred to the need for the Commonwealth to be able to manage the economy effectively, as a reason for giving a broad interpretation of Commonwealth powers, and (with the same effect) broad interpretation of limits on State power. Particularly in relation to the s 90 prohibition on the State levying customs and excise duties, some members of the Court have indicated that the section should be read broadly, in order to give the Commonwealth broad

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<sup>43</sup> *Commonwealth v Tasmania (Tasmanian Dam Case)*, (1983) 158 CLR 1, 269-270.

<sup>44</sup> For example, economist Adam Smith wrote in his *WEALTH OF NATIONS* (1776) that because managers could not be trusted with others' money, "negligence and profusion" would result from having businesses organized as corporations. Justice Brandeis echoed the sentiment in 1933 when he claimed that corporations were "Frankenstein monsters" capable of doing evil (*Louise K Liggett Co et al v Lee, Comptroller et al* (1933) 288 US 517, 548, 567; refer also to JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 60 (2004). Interestingly, in the preamble to the *Norris-La Guardia Act*, part of the Roosevelt New Deal labour legislation, restrictions on employer's property rights were justified on the ground that 'under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate ... association, the individual worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labour, and thereby to obtain acceptable terms and conditions of employment'. In other words, regulators believed it was justified to allow corporations to be regulated in terms of industrial relations in the interests of protecting the rights of workers.

control over the taxation of commodities so that the execution of whatever tax policy the Commonwealth chose could not be thwarted by State action.<sup>45</sup>

First suggested by Dixon J in 1949, the suggestion was supported by Barwick CJ in *Western Australia v Chamberlain Industries Pty Ltd*.<sup>46</sup> Mason J in the *Hematite Petroleum*<sup>47</sup> and *Philip Morris*<sup>48</sup> cases also referred to economic arguments favouring Commonwealth control over taxation levels as a key component in its management of the economy. If the States could impose excise duties, Mason J claimed in the former case, the Commonwealth's ability to protect and stimulate home production and influence domestic price levels might be compromised, if a broad view of the prohibition were not taken.<sup>49</sup>

These economic arguments in favour of broad Commonwealth power over a key economic plank were accepted by High Court majorities in the most recent s 90 cases,<sup>50</sup> including two justices who are currently on the High Court. Of those dissenting judges who did not accept that view, none remain on the High Court.

The point is this then in relation to the corporations power – the Commonwealth's ability to regulate corporations must be read broadly because corporations dominate economic activity in Australia,<sup>51</sup> and the Commonwealth is responsible for the economy. If the Commonwealth could not regulate all that a corporation does (or at least anything the corporation does for the purposes of trade), it would lose the ability to regulate a key plank of economic activity in Australia. It is submitted that most Australians have an expectation that it is the Commonwealth Government that primarily manages the economy in Australia. The High Court has by majority accepted this argument supports a broad reading of s 90 (having the effect that the Commonwealth is freer from State interference). It should by analogy and for similar reasons support a broad reading of other economic powers, including s51(20), to prevent State Governments from interfering in the Commonwealth's management of the economy.

<sup>45</sup> *Parton v Milk Board (Victoria)*, (1949) 80 CLR 229 (High Court of Australia, 1949).

<sup>46</sup> (1970) 121 CLR 1, 17 stating that the wide view of the s90 prohibition was consistent with the control of the national economy as a unity which knows no State boundaries, by a legislature without direct legislative power over the economy.

<sup>47</sup> *Hematite Petroleum Pty Ltd v Victoria*, (1983) 151 CLR 599 (High Court of Australia, 1983) (*Hematite Petroleum*).

<sup>48</sup> *Philip Morris Ltd v Commissioner of Business Franchises*, (1989) 167 CLR 399 (High Court of Australia, 1989).

<sup>49</sup> *Hematite Petroleum Pty Ltd v Victoria*, (1983) 151 CLR 599, 631; Deane J said that s 90 eliminated State boundaries as barriers in the path towards economic and national unity.

<sup>50</sup> *Capital Duplicators Pty Ltd v ACT*, (No2), (1993) 178 CLR 561 (Mason CJ Brennan Deane and McHugh JJ)(High Court of Australia, 1993); *Ha v New South Wales*, (1997) 189 CLR 465 (Brennan CJ McHugh Gummow and Kirby JJ)(High Court of Australia, 1997).

<sup>51</sup> The Federal Government estimated that corporations employed 85% of non-farm labour in Australia (BREAKING THE GRIDLOCK: TOWARDS A SIMPLER NATIONAL WORKPLACE RELATION SYSTEM – DISCUSSION PAPER 1: THE CASE FOR CHANGE (Canberra, October 2000, by then Minister for Employment, Workplace Relations and Small Business Peter Reith).

This argument is submitted to support a broad reading of s 51(20) generally, but in the particular context of industrial relations, the argument may be stronger – it is essential in order for the Commonwealth to properly regulate the economy that it be able to regulate the industrial conditions of workers, at least those who work for the large majority of employers who are incorporated. If the argument is accepted that the Commonwealth needs broad control of taxation of commodities to influence price levels of goods, inflation etc in the economy, surely the same argument goes for working conditions and pay scales. The price of goods is clearly affected by the costs of producing them, and primary among these costs is labour cost.<sup>52</sup> By regulating labour costs, it indirectly affects the price of goods, hence demand and inflation. The High Court has recognized these economic issues are the legitimate concern of the Commonwealth, and some members have taken them into account in interpreting the *Constitution*. The author submits this process should continue, and be applied to the corporations context.

More fundamentally, real wages and relative wage levels affect the competitiveness of Australian business. Though the author concedes that the economy is affected by a multitude of factors such that the influence of one single factor is a matter of conjecture, many economists point to the link between labour market regulation and the economic health of a nation.<sup>53</sup> Some have argued that decisions on a minimum wage level in Australia, in the past an important role of the Australian Industrial Relations Commission, have significant impact on the economy.<sup>54</sup> According to one estimate, Australia's current minimum wage translates to 100 000 extra unem-

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<sup>52</sup> Interestingly, Australia's minimum wage of \$484 is higher than that of Great Britain (\$455), Japan (\$334), France (\$452), Germany (\$452), New Zealand (\$341), Ireland (\$491), Canada (\$206) and the United States (\$5.15 per hour). A 2005 Report by the United Kingdom Low Pay Commission found that of 13 OECD countries for 2004, Australia had the highest adult minimum wage relative to full time earnings: NATIONAL MINIMUM WAGE: LOW PAY COMMISSION REPORT (2005). Without judging what is an appropriate level of minimum wage, these differences clearly impact on Australian businesses, and affect the ability of Australian organizations to compete in a globalised economy. It, together with other matters such as leave entitlements and weekly working hours, are surely the legitimate concern of the Commonwealth. Why should Australians have different leave entitlements, breaks and weekly working hours depending on which State they happen to live in?

<sup>53</sup> As a recent example, Hans-Werner Sim Director of the Ifo Institute for Economic Research in Munich, writing in the AUSTRALIAN FINANCIAL REVIEW newspaper, wrote of the German economy in *Ill-Prepared Germany is Still in a State of Shock* (9 August 2005, 55) that "In order for the country (Germany) to meet the challenges and to continue to grow, it would have to make its labour markets flexible. Only if wages adjust downward to accommodate the new international environment can German workers become competitive again". (Australia's minimum wage is higher than that of Germany). More broadly, further growth in productivity in Australia has been tied to microeconomic reform, including labour market regulation: GLENN OTTO, PRODUCTIVITY GROWTH AND ECONOMIC POLICY IN AUSTRALIA, Research Paper No 19 1997, Department of the Parliamentary Library, Information and Research Services.

<sup>54</sup> Andrew Leigh *Employment Effects of Minimum Wages: Evidence from a Quasi-Experiment*, 36 AUSTRALIAN ECON REV 361 (2003), Dolado et al, *The Economic Impact of Minimum Wages in Europe*, 23 ECONOMIC POL 319 (1996). An argument that Australia's minimum wage must be reduced appears in, for example, Des Moore, *Why Labour Market Players Should Have Freedom to Contract*, 38 AUSTRALIAN ECON REV 192 (June)(2005), pointing to the "employment-detering effects from the 20 commandments they have imposed" (referring to the current 20 allowable matters in awards and criticizing some members of the judiciary as "social justice gurus"), also Des Moore, *The Effects of the Social Welfare System on Unemployment*, 23 BULLETIN OF LABOUR 275 (1997).

ployed Australians, compared with the equivalent minimum wages in the United States and United Kingdom.<sup>55</sup> Mark Wooden similarly concludes:

The actions of AIRC, however, in persistently raising the federal minimum wage over time indicate that either it does not care about the jobless or that it believes there is no relation between the price of labour and the quantity demanded ... the AIRC has little or no expertise that would enable it to make sound decisions which take account of the economic effects of minimum wage increases.<sup>56</sup>

The Organisation of Economic Co-Operation and Development (OECD) concluded in regards to the Australian economy that:

Labour productivity has been affected through over-manning, poor work organization, unnecessary loss of machine time, high maintenance costs, time lost over demarcation disputes and/or heavy time loss by management in industrial relations matters. Capital productivity may also have been reduced by constraints on the number of hours plants can be economically operated as a result of restrictive award conditions.<sup>57</sup>

It has also concluded that the responsiveness of money wages to changes in productivity were higher in countries with decentralized wage systems. Productivity-based wage growth is generally seen as a positive and sustainable attribute in a nation's economy.

Referring to the Australian economy in the 1990s, Sloan argues that:

Only radical change which involves dismantling of key features of the industrial relations system, in particular reconfiguring the award structure, will produce labour market arrangements which are compatible with an internationalized economy.<sup>58</sup>

<sup>55</sup> Matthew Ryan, *Workplace Relations Reform, Prosperity and Fairness*, 38 AUSTRALIAN ECON REV 201, 209 (2005), applying work carried out for the United States Federal Reserve by Donald Tulip DO MINIMUM WAGES RAISE THE NAIRU?, 38 FINANCE AND ECON DISCUSSION SERIES, Federal Reserve Board, Washington DC (2000).

<sup>56</sup> *Workplace Relations Reform: Where to Now?*, 38 AUSTRALIAN ECON REV 176, 178-179 (2005); cf Chris Briggs and John Buchanan, *Work, Commerce and the Law: A New Australian Model?*, 38 AUSTRALIAN ECON REV 182 (2005).

<sup>57</sup> OECD ECONOMIC SURVEYS: AUSTRALIA 1999-2000.

<sup>58</sup> Judith Sloan, *Until the End of Time: Labour Market Reform in Australia*, AUSTRALIAN ECON REV 65, 66 (1992). Jeff Borland and Graeme Woodbridge *Wage Regulation: Low-Wage Workers and Employment*, in *RESHAPING THE LABOUR MARKET: REGULATION, EFFICIENCY AND EQUALITY IN AUSTRALIA* (Sue Richardson ed., 1999) conclude that the overall effect of deregulation of wage rates in Australia would be to increase employment of low-wage workers in Australia by 10-15% (at 119). Bob Gregory, Eva Klug and Yew May Martin, in *Labour Market Deregulation, Relative Wages and the Social Security System* in Sue Richardson, *id.*, similarly conclude deregulation of wage-setting for low-paid workers would result in increased employment of between 60 000 and 90 000 people (at 221).

While certainly Australia has enjoyed several years of 'economic sunshine' including low inflation, many give credit for this to the reforms to the economy, including the introduction of decentralized wage fixing, carried out in the early to mid 1980s. As new challenges arise, for example the incredible rates of growth of Asian economies in recent years, from countries with very low wage levels, continuing reforms are necessary. It is submitted that Australia's very good performance in recent years has been despite, and certainly not because of, current labour regulation arrangements in Australia.<sup>59</sup>

While it is very difficult to quantify the actual impact on the economy, some studies have attempted to do so. For example, Don Harding's study for the Melbourne Institute of Applied Economic and Social Research involved surveying more than 1800 enterprises of all sizes in Australia. The particular brief in that study was to determine the impact of unfair dismissal laws on all types of business in Australia. Harding found that current unfair dismissal laws cost Australian business \$1.3 billion, or about 0.2% of GDP. This was considered to be a conservative estimate.<sup>60</sup> The laws were said to adversely affect most the employment prospects of the unemployed and low-skilled. Without judging whether this is a price worth paying, the research clearly shows how laws directly affect the economy.

Another means of quantifying the effect of labour market regulation on the economy is to consider how the introduction of individual and collective workplace bargaining in recent years in Australia has impacted productivity. Matthew Ryan, economist with respected researchers Access Economics, estimated that in the absence of such workplace bargaining and with all other things being equal, Australia's productivity growth would have been almost 1% lower each year through 1994-2002.<sup>61</sup>

What is clear is that a decision on the deregulation or regulation of the labour market is an important tool of economic policy.<sup>62</sup> These are essential economic issues

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<sup>59</sup> "In an age when our productivity must match that of global competitors, forcing Australian firms to comply with six different workplace relations systems is an anachronism that we can no longer afford", Prime Minister John Howard, *Address to the Menzies Research Centre*, 11 April 2005, <<http://www.pm.gov.au/news/speeches/speech1320.html>> (last visited 25 August 2005); see also William Ford, *Politics, the Constitution and Australian Industrial Relations: Pursuing a Unified National System*, 38 AUSTRALIAN ECON. REV. 211 (2005).

<sup>60</sup> DON HARDING, *THE EFFECT OF UNFAIR DISMISSAL LAWS ON SMALL AND MEDIUM SIZE BUSINESSES* Melbourne Institute of Applied Economic and Social Research, University of Melbourne (2002).

<sup>61</sup> *Workplace Relations Reform, Prosperity and Fairness*, 38 AUSTRALIAN ECON. REV. 201 (June)(2005)

<sup>62</sup> A further example of the prevailing view appears in a recent article *Industrial Relations Reform in THE WEEKEND AUSTRALIAN* on 6-7 August 2005 by Brad Norington:

Bob Hawke's Labor government began the job, but it had to be left to a conservative government to impose enough reform in industrial relations to make Australia competitive in a globalised world. Hawke and his Treasurer Paul Keating .. realized that the nation's future prosperity depended on far-reaching economic modernization. The alternative was to ... maintain a closed, insular, low-productivity nation that relied on its wealth of natural resources to survive while ignoring significant economic developments abroad ... The greatest test for Australian workplaces is how they compare with the rest of the world as the nation tries to compete on open market terms. (at 28).



for the Commonwealth. It is not just desirable, it is a necessity that the Commonwealth must be able to regulate them. This is submitted to justify a broad view of the corporations power.

### C *The American Constitutional Jurisprudence*

Before considering whether the American constitutional case law can provide any assistance to resolving this issue of Australian constitutional law, some caveats must be entered. Firstly, the relevant American cases do not refer to a corporations power but a general commerce clause – the American *Constitution* contains no reference to specific power over corporations, nor any equivalent to regulating industrial conditions as the Australian *Constitution* does in s 51(35). It should also be conceded that some past High Court justices have occasionally rallied against the introduction of interpretations of the United States commerce clause in assessing Australian constitutional heads.<sup>63</sup>

However, the author does not believe these comments preclude a consideration of the related United States provisions. The founding fathers in Australia were clearly influenced by the United States *Constitution* in drafting our *Constitution*. It seems ridiculous (with respect) to refuse to even consider whether the American experience might be relevant in interpreting the local document, though the author concedes that differences in drafting and context need to be borne in mind – no-one is suggesting that the Australian High Court unquestioningly follow American jurisprudence, but to the extent that common issues arise, the experience of other nations is surely worth at least considering.

The United States clause allows the federal government to regulate interstate and overseas commerce, and has been subject to much judicial interpretation. In the landmark 1937 case of *National Labour Relations Board v Jones and Laughlin Steel Corporation*,<sup>64</sup> the United States Supreme Court upheld provisions of the *National Labour Relations Act* which penalized unfair labour practices affecting interstate commerce. The Court found that even though manufacture was not strictly speaking ‘commerce’,<sup>65</sup> and even where the practices affected intrastate commerce, the Federal Government could still regulate it:

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Prime Minister Howard himself in an address to the Sydney Institute in July tied workplace reform to productivity improvements in a global economy where specialization and flexibility was increasingly valued. At one time these comments would have enjoyed bi-partisan support, with the Hawke-Keating years featuring real labour market reform, including the move to enterprise bargaining. The current Labor Opposition Leader has not indicated whether he supports broad labour market reform, but has indicated he is not opposed to individual workplace bargains (Australian Workplace Agreements): Kim Beazley, *The ALP and Economic Reform*, in *SUSTAINING PROSPERITY* (Peter Dawkins and Michael Stutchbury ed, 2005).

<sup>63</sup> *Airlines of New South Wales Pty Ltd v New South Wales*, (No 2) (1965) 113 CLR 54, 115 (Kitto J). However, the author does not think that comments by one judge precludes a discussion of the possibilities.

<sup>64</sup> (1937) 298 US 1.

<sup>65</sup> the same decision was reached by the Australian High Court in *Grannall v Marrickville Margarine Pty Ltd*, (1955) 93 CLR 55 (High Court of Australia, 1955).

Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens or obstructions, Congress (has the) power to exercise that control.<sup>66</sup>

So the reasoning is that although Congress may not have power over activities when separately considered, if the activities have such a close and substantial relation to something within power that their control is essential or appropriate to protect the thing within power from burdens of obstructions, Congress can regulate the activities.<sup>67</sup> This has been applied in the United States to justify industrial relations laws relying on the commerce clause. Supporting the relevance of this decision in Australia, the High Court has confirmed the Commonwealth may use its general commerce power to regulate industrial relations.<sup>68</sup>

The analogous argument to the *Jones* ratio here is this – although generally industrial relations laws, except in the very limited context allowed for by s 51(35), is not per se within the Commonwealth's power, workplace rights and responsibilities (of employees of corporations, at least) have such a close and substantial relation to something within power (ie corporations) that their control is essential or appropriate to protect the thing within power from burdens or obstructions (ie to protect corporations from having to comply with a multitude of different State laws on the topic).

Although this is as far as the author currently argues the point, it may even be used to justify why the Commonwealth should be able to regulate the working conditions of all employees, whether they work for corporations or not. This might be justified on the basis of the incidental power, supported by the United States jurisprudence. Given that at least 85% of employers are corporations, it might be considered incidental to regulate also the working conditions of the small number of other employees. It has also been found in the United States that under the commerce clause, Congress can regulate even commerce that is for a farmer's own consumption, and not interstate or overseas trade or commerce at all. This regulation was justified on the basis that the production still affected the broader market for that commodity.<sup>69</sup>

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<sup>66</sup> (1937) 298 US 1, 34-35.

<sup>67</sup> This is similar to the High Court of Australia in the trade and commerce area finding that the Commonwealth can regulate intrastate trade and commerce, if it is so closely connected with interstate or overseas trade and commerce that the Commonwealth must by necessity regulate all of it: see, for example: *Swift Australian Co Pty Ltd v Boyd Parkinson*, (1962) 108 CLR 189 (High Court of Australia, 1962) and *Redfern v Dunlop Rubber Australia Ltd*, (1964) 110 CLR 194 (High Court of Australia, 1964)

<sup>68</sup> *Re Maritime Union of Australia; ex parte CSL Pacific Shipping Inc*, (2003) 214 CLR 397 (High Court of Australia, 2003): "a ship journeying for reward is in commerce, those who co-operate in the journeying of the ship are in commerce and the wages of those persons and the conditions of their employment relate to that commerce"; refer also to *Australian Steamships Ltd v Malcolm*, (1914) 19 CLR 298 (High Court of Australia, 1914).

<sup>69</sup> *Wickard v Filburn*, (1942) 317 US 111 (United States Supreme Court, 1942); although the High Court did not seem to appreciate this kind of argument by extension in *Re Dingjan and Others; Ex Parte*

Analogously, one might argue that the employment conditions offered by non-corporate employers affect the employment market for corporate employers, so for this reason, the Commonwealth Government should be able to regulate all industrial conditions, whether the employer is a corporation or not.<sup>70</sup> The effect of this approach would certainly be to reduce complexity for businesses attempting to comply with their responsibilities. A business would need to comply only with one set of rules.

### D Duplication

The extent of duplication in the current system, which includes both federal and state award making, a Federal Industrial Relations Commission and one in each State and Territory, has been well documented and does not require much elaboration here. Suffice to say that one current High Court justice has described it as a ‘Serbonian bog of technicalities’,<sup>71</sup> and reviews conducted (importantly, from both sides of politics) have found it overly complex, involving substantial overlap, duality and cost.<sup>72</sup> It has been pointed out the current complex system favours experienced repeat players, including large unions and employers, at the expense of individual employees and small business employers. It is said to exclude the voice of the ‘small, poor and unsure participants’.<sup>73</sup>

Duplication, a problem in itself, may also lead to unequal treatment of disputants in different jurisdictions, and forum shopping, seen in other contexts as generally inefficient and undesirable.<sup>74</sup> Territorial disputes are inevitable - it is not surprising that many of the s109 inconsistency cases have involved questions of industrial relations.<sup>75</sup> As McCann puts it

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Wagner, (1995) 183 CLR 323 (High Court of Australia, 1995), where the Court found that it was essential in order to rely on s 51(20) that the contract being reviewed involve a constitutional corporation. A less direct link was not permitted.

<sup>70</sup> However, the author notes the High Court’s judgment in *Re Dingjan* that the corporations power may be restricted only to the regulation of working conditions of employees of corporations, and does not (as yet) extend to the regulation of workplace agreements that may have nothing to do with constitutional corporations. This view, if accepted in future, would preclude the adoption of the Wickard reasoning in Australia.

<sup>71</sup> Kirby J in *Re Pacific Coal*, (2000) 203 CLR 346, 422 (High Court of Australia, 2000). In an article in the WEEKEND AUSTRALIAN on 6-7 August 2005, Geoff Elliott started with “This country’s regulation of industrial relations remains arguably the most complex in the developed world, and is rare in its national and statewide awards and enforcement of laws by bodies such as the Australian Industrial Relations Commission” (at 28).

<sup>72</sup> REVIEW INTO AUSTRALIAN INDUSTRIAL RELATIONS LAW AND SYSTEMS (COMMITTEE) AUSTRALIAN INDUSTRIAL RELATIONS LAW AND SYSTEMS: REPORT OF THE COMMITTEE ON REVIEW (Canberra: AGPS, 1985) Vol 2, at 270 (Hancock Report); BREAKING THE DEADLOCK: TOWARDS A SIMPLER NATIONAL WORKPLACE RELATIONS SYSTEM – DISCUSSION PAPER 1: THE CASE FOR CHANGE (Canberra, October 2000)(Peter Reith, then Minister for Employment, Workplace Relations and Small Business).

<sup>73</sup> McCann, *supra* note 6, at 82.

<sup>74</sup> For example, in the area of conflict of laws, *John Pfeiffer Pty Ltd v Rogerson*, (2000) 203 CLR 503 (High Court of Australia, 2000).

<sup>75</sup> For example, *Australian Boot Trade Employees Federation v Whybrow and Co*, (1910) 10 CLR 266 (High Court of Australia, 1910), *Federated Seamen’s Union v Commonwealth Steamship Owners’*

Six poorly resourced and administratively burdened systems, each struggling to maintain national coherency in policy and practice, may merely exhibit a drag effect on economic performance and the achievement of workers' rights<sup>76</sup>

The existing system may be hard to justify on any grounds.

## V CONCLUSION

This article has considered the chances of success of the proposed challenge by the States to the attempt by the Commonwealth to (largely) nationalize the industrial relations system through the use of the corporations power. It concludes there is little support for such a challenge in the current jurisprudence on the interpretation of the section. In particular, a majority of the High Court has accepted that, at least, the Commonwealth can regulate not only the trading activities of corporations, but activities carried out for the purpose of trading. The hiring of employees, and resolution of the terms on which an employee is engaged, is clearly an activity carried out for the purpose of trading.

Quite apart from the precedents as they stand, there are sound policy reasons for interpreting the corporations power in a broad way. These concern the need for strong regulation of corporate activity given the nature of a corporation, the need for the Commonwealth to properly manage the economy, and the extent of complexity of the current systems with a large amount of overlapping and inefficiency. A broad view of the corporations power to regulate industrial relations would also be supported by the American constitutional experience, albeit in a different context.

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Association, (1922) 30 CLR 144 (High Court of Australia, 1922), Clyde Engineering Co v Cowburn, (1926) 37 CLR 466 (High Court of Australia, 1926), Ex Parte Maclean (1930) 43 CLR 472 (High Court of Australia, 1930), Colvin v Bradley Bros Pty Ltd, (1943) 68 CLR 151 (High Court of Australia, 1943), Wenn v Attorney-General (Vic), (1948) 77 CLR 84 (High Court of Australia, 1948), Australian Broadcasting Commission v Industrial Court (SA), (1977) 138 CLR 399 (High Court of Australia, 1977), Ansett Transport Industries (Operations) Pty Ltd v Wardley, (1980) 142 CLR 237 (High Court of Australia, 1980), Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union, (1983) 152 CLR 632 (High Court of Australia, 1983), Viskauskas v Niland (1983) 153 CLR 280 (High Court of Australia, 1983), University of Wollongong v Metwally, (1984) 158 CLR 447 (High Court of Australia, 1984), Dao v Australian Postal Commission, (1987) 162 CLR 317 (High Court of Australia, 1987), Telstra Corporation Ltd v Worthing, (1999) 197 CLR 61 (High Court of Australia, 1999)

<sup>76</sup> McCann, *supra* note 6, 80-81.