THE CONSTITUTION AND A NATIONAL INDUSTRIAL RELATIONS REGIME

GEORGE WILLIAMS[*]

[*The federal Government is proposing to bring about a single national scheme for the regulation of industrial relations in Australia. This will raise a number of important constitutional questions that may need to be resolved by the High Court. These questions as examined in this article are: could a single national law for the regulation of industrial relations be passed under a head of Commonwealth power (in particular, under the Commonwealth's powers over corporations, interstate trade and commerce or external affairs); even such a law could so be enacted, would it nevertheless be struck down due to an express or implied constitutional limitation; and to what extent could the law override the State laws that already govern much of the field?*]

I INTRODUCTION

The idea of a single national scheme for the regulation of industrial relations in Australia has had longstanding support from the Howard Government.[1] The main impediment has been political. The Government has not controlled the Senate, the

[*] Anthony Mason Professor and Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales; Barrister, New South Wales Bar. Thanks to Anna Saulwick for her research assistance. This article has been developed from a paper delivered at *Industrial Relations Reform: Fair Go or Anything Goes?*, on 13 July 2005.

[1] PETER REITH, GETTING THE OUTSIDERS INSIDE—TOWARDS A RATIONAL WORKPLACE RELATIONS SYSTEM IN AUSTRALIA (1999); DEPARTMENT FOR EMPLOYMENT, WORKPLACE RELATIONS AND SMALL BUSINESS, BREAKING THE GRIDLOCK: TOWARDS A SIMPLER NATIONAL WORKPLACE RELATIONS SYSTEM (2000), 3 VOLS. The idea has also generated significant support in the business community and was the subject of a forum run by the Business Council of Australia. *See* BUSINESS COUNCIL OF AUSTRALIA, MELBOURNE, INDUSTRIAL RELATIONS FORUM: PROCEEDINGS (2001).

upper House in Australia's national Parliament, and has thus lacked the numbers to enact the change. This was demonstrated by the Workplace Relations Amendment (Termination of Employment) Bill 2002, a pilot proposal for a national law. That Bill, rejected in the Senate, would have amended the *Workplace Relations Act 1996* (Cth) as it related to harsh, unjust or unreasonable dismissal.[2] In doing so, it sought also to expand the coverage of the law in this area from 3.9 to 6.8 million employees (or from 49% to 85% of employees).[3]

While the Government gained control of the Senate from 1 July 2005, a key problem remains. That problem is whether such a scheme would be valid under the Australian Constitution and the extent to which it could displace the State laws that already provide extensive regulation on workplace matters. This involves three distinct constitutional questions:

1. could a single national law for the regulation of industrial relations be passed under a head of Commonwealth power;

2. even if it could so be enacted, would the law nevertheless be struck down due to an express or implied constitutional limitation; and

3. to what extent could the law override the State laws that already govern much of the field?

II HEADS OF POWER

The Federal Parliament can pass laws "with respect to" the 40 different areas listed in s 51 of the Constitution. These include matters ranging from taxation to marriage to quarantine, but do not include a general power over "workplace relations". The closest that s 51 comes to such an area is s 51(xxxv), which grants legislative power over "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

The conciliation and arbitration power has provided the basis over more than a century for federal laws on industrial relations: most notably, the *Commonwealth Conciliation and Arbitration Act 1904* (Cth), the *Industrial Relations Act 1988* (Cth) and the current *Workplace Relations Act 1996* (Cth). Each of these Acts has necessarily been limited in its coverage in being drafted to conform to the parameters of s 51(35). In particular, that power extends only to the techniques ("conciliation and arbitration") and only to the industrial disputes ("extending beyond the

---

[2] Workplace Relations Act, Part VIA, Division 3. *See* George Williams, *The First Step to a National Industrial Relations Regime? Workplace Relations Amendment (Termination of Employment) Bill 2002*, 16 AUSTRALIAN JOURNAL OF LABOUR LAW 94 (2003).

[3] EXPLANATORY MEMORANDUM TO THE WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL (2002) at para 31. *See also* SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION COMMITTEE, PROVISIONS OF THE WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2002 (2003).

limits of any one State") to which it refers.[4] It is clearly an insufficient basis for the type of national law that the Howard Government is proposing, which might, among other things, apply to all disputes, interstate and not, and involve the setting of minimum working conditions directly by legislation.[5]

In seeking to enact a national scheme that will move away from a focus on conciliation and arbitration, the Government will need to rely primarily upon its other powers. These may include s 51(i) ("Trade and commerce with other countries, and among the States") and s 51(xxix) ("External affairs").[6] In respect of Victoria, which in 1996 referred its power in the field to the Commonwealth,[7] the Federal Parliament will also reply upon s 51(xxxvii) ("Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law"). Apart from Victoria, and with the possible exception of the trade and commerce power,[8] the Commonwealth will need to rely on a further source of power to achieve its policy aims. It will thus turn to its power in s 51(xx) to make laws with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".[9]

A *Trade and Commerce Power*

The trade and commerce power is limited in its scope because of the High Court's insistence that a distinction be maintained between intra and interstate trade and commerce, and that the power only be used to regulate the latter. Federal control of intrastate trade has been permitted where a physical nexus between it and interstate trade can be demonstrated,[10] but not in other circumstances.[11] The mere fact that intrastate commercial activity has economic consequences for interstate or international trade and commerce will not bring the former within the Commonwealth's legislative power under s 51(i). The "artificial and unsuitable" nature of this distinction has been acknowledged and accepted because of a perception that it is an unavoidable consequence of "a distinction adopted by the

---

[4] *See generally* TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS Ch 19 (3rd ed. 2002). The power also includes an implied incidental aspect: Grannall v Marrickville Margarine Pty Ltd, (1955) 93 CLR 55, 77 per Dixon CJ, McTiernan, Webb and Kitto JJ ("every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject-matter").

[5] See Australian Boot Trade Employees Federation v Whybrow & Co (No 2), (1910) 11 CLR 311, which held that the making of a "common rule" for a whole industry was not an exercise of the power of conciliation and arbitration.

[6] *See* generally on these powers GEORGE WILLIAMS, LABOUR LAW AND THE CONSTITUTION (1998).

[7] Commonwealth Powers (Industrial Relations) Act, 1996 (Vic).

[8] *See* David McCann, *First Head Revisited: A Single Industrial Relations System under the Trade and Commerce Power*, 26 SYDNEY L. REV. 75 (2004).

[9] *See*, on the use of the corporations power in this context, Andrew Stewart, *Federal Labour Law and New Uses for the Corporations Power*, 14 AUSTRALIAN JOURNAL OF LABOUR LAW 145 (2001).

[10] Airlines of NSW Pty Ltd v New South Wales (No 2) (Second Airlines Case), (1965) 113 CLR 54.

[11] Attorney-General (WA) v Australian National Airlines Commission, (1976) 138 CLR 492.

constitution [that] must be observed".[12] It should be noted, however, that this distinction is not express on the terms of s 51(i), and it may be argued that "the implied distinction between the two types of commerce should not obliterate what is, at its heart, an explicit affirmative grant of power".[13]

It may be that the High Court's approach to this power will change given that its last major consideration of the power was in 1976 in *Attorney-General (WA) v Australian National Airlines Commission*.[14] Since that time, the Court has overhauled its approach to s 92, which also deals with interstate trade and commerce,[15] and has given a relatively broad and generous construction to other powers like that over external affairs. As Leslie Zines has stated in regard to s 51(i):

> I find it difficult to believe that the modern court would uphold the distinctions drawn by the earlier judges. That is because of the logical difficulties involved and the emphasis given in recent times to "practical reality" and the disapproval of formulas in a number of areas of constitutional interpretation. Regard to such considerations would result in the overthrow of the distinction between physical effects and pure economic effects which some judges have used to preserve the distinctions between the forms of trade as much as possible.[16]

The "Commerce Clause" in Article I, s 8, cl 3 of the United States Constitution, was the inspiration for the trade and commerce provision in the Australian Constitution, and has been given a broad construction by United States Supreme Court. While this jurisprudence might provide a basis for a broader approach to the Australian provision, the High Court has not yet applied it.[17] As Kitto J remarked in the *Second Airlines Case*:

> The Australian union is one of dual federalism, and until the Parliament and the people see fit to change it, a true federation it must remain. This Court is entrusted with the preservation of constitutional distinctions, and it both fails in its task and exceeds its authority if it discards them, however out of touch with practical conceptions or with modern conditions they may appear to be in some or all of their applications. To import the doctrine of the American cases into the law of the Australian Constitution would in my opinion be an error. [18]

On the other hand, if the trade and commerce power in the Australian Constitution

---

[12] Wragg v NSW, (1953) 88 CLR 353, 385-6.
[13] McCann, *supra* note 8, at 97.
[14] *Compare* Re Maritime Union of Australia; Ex Parte CSL Pacific Inc, (2003) 214 CLR 397.
[15] Cole v Whitfield, (1988) 165 CLR 360.
[16] Leslie Zines, *Engineers and the"Federal Balance"*, in HOW MANY CHEERS FOR ENGINEERS? 81, 86 (Michael Coper & George Williams eds., 1997).
[17] *See, for example,* Airlines of NSW Pty Ltd v New South Wales (No 2) (Second Airlines Case), (1965) 113 CLR 54, 113-115 per Kitto J. *Compare* Attorney-General (WA) v Australian National Airlines Commission, (1976) 138 CLR 492, 528-531 per Murphy J.
[18] Airlines of NSW Pty Ltd v New South Wales (No 2) (Second Airlines Case), (1965) 113 CLR 54, 115 per Kitto J.

were interpreted to extend more generally to intrastate trading and commercial activities it would likely provide a basis upon which the Commonwealth could enact an Australia-wide industrial relations regime. In this context, industrial matters would likely be seen as an important part of the dealings of commerce that were the subject of the power. Indeed, the employment relationship might itself be characterised as a commercial transaction involving the sale of labour.

B *External Affairs Power*

The 'external affairs' power includes (though is not limited to) the power to give domestic effect to obligations imposed by treaties to which Australia is a party. The *Industrial Relations Act Case*[19] is a striking example of the use of the external affairs power to implement industrial relations reform at the federal level. The terms of the legislation closely followed the requirements of the relevant international instruments, and expressly stated that their object was the implementation of Australia's obligations under those instruments. The range of matters dealt with by the amendments included the imposition of obligations on employers as to minimum wages,[20] equal pay,[21] termination of employment,[22] discrimination in employment[23] and parental leave,[24] and also provided for collective bargaining and a limited right to strike.[25] In upholding almost every aspect of the legislation that was based upon the external affairs power, the case demonstrated the considerable potential of the power to enable Commonwealth legislative action regarding industrial relations. However, the power can only be used to the extent that a government is willing to implement policies that are consistent with International Labour Organization and other international conventions. Such a fit is not always possible, and indeed unlikely to be the case in regard to the proposal put forward by the Howard Government, which have more of an emphasis upon individual contracts than collective bargaining. Indeed, as one commentator has remarked, the Howard Government possesses a "marked antipathy towards the ILO, and to standards emanating from that body".[26]

In order to be held valid by the High Court under the external affairs power, a law

---

[19] Victoria v Commonwealth, (1996) 187 CLR 416.

[20] These provisions were in accordance with the ILO MINIMUM WAGE FIXING CONVENTION 1970.

[21] These provisions were intended to implement a range of Conventions, such as the CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, and the INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS.

[22] These provisions were intended to give effect to the TERMINATION OF EMPLOYMENT CONVENTION, the DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION, and the FAMILY RESPONSIBILITIES CONVENTION.

[23] These provisions were intended to give effect to the DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION.

[24] These provisions were intended to give effect to the Family Responsibilities Convention and associated ILO Recommendations.

[25] These provisions had the object of implementing Australia's international obligations to provide for a right to strike, arising under various international instruments including the INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS.

[26] Breen Creighton, *The Workplace Relations Act in International Perspective*, 10 AUSTRALIAN JOURNAL OF LABOUR LAW 31, 32 (1997).

must be "reasonably capable of being considered appropriate and adapted to implementing the treaty".[27] Problems arise, for example, if the legislation exceeds what is reasonably required to satisfy Australia's obligations under the Convention;[28] perhaps if the legislation does not comply with *all* the obligations of the treaty[29] or if the treaty expresses some vague goal or ideal rather than prescribing a more specific course of action to be taken by signatory states.[30]

C *Corporations Power*

It appears that the current limited scope of the trade and commerce power and the lack of fit between the relevant international conventions and the Howard Government's policy proposals will mean that the Commonwealth instead relies primarily upon its power over corporations. A potential problem, however, is that the extent of this power is unclear. There are two important limitations on its power.

First, it is addressed only to corporations, and even then it is addressed only to certain types of corporations (that is, foreign, trading and financial corporations). High Court decisions mean that a corporation will fall within the power in most cases so long as it has substantial trading activities.[31] This will mean that almost all corporations will fall within the scope of the power. On the other hand, some corporations will not, such as corporations like charitable bodies that lack substantial trading activities. More importantly, the power does not encompass non-corporate entitles like partnerships, sole traders and unincorporated associations. Where such bodies operate a business within the limits of one State they may also escape regulation enacted under the interstate trade and commerce power in s 51(i). This will frustrate the attempt to enact a single national scheme covering all instances of employment.

Second, there is an unresolved division of opinion in the High Court as to which activities of the corporations in s 51(xx) can be regulated. It is sometimes said that two possible views, a narrow and a broad view, border the possible scope of the power:

---

[27] This requirement was expounded in Commonwealth v Tasmania (Tasmanian Dam Case), (1983) 158 CLR 1 and was endorsed in Victoria v Commonwealth (Industrial Relations Act Case), (1996) 187 CLR 416, 487 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

[28] Commonwealth v Tasmania (Tasmanian Dam Case), (1983) 158 CLR 1, 236-7 per Brennan J, 267 per Deane J.

[29] Victoria v Commonwealth (Industrial Relations Act Case), (1996) 187 CLR 416, 488: "It would be a tenable proposition that legislation purporting to implement a treaty does not operate upon the subject which is an aspect of external affairs unless the legislation complies with all the obligations assumed under the treaty."

[30] Victoria v Commonwealth (Industrial Relations Act Case), (1996) 187 CLR 416, 487 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

[31] R v Federal Court of Australia; Ex parte WA National Football League, (1979) 143 CLR 190; State Superannuation Board of Victoria v Trade Practices Commission, (1982) 150 CLR 282.

- Narrow View:[32] The clue is in the categories of corporations specified as being within power: "foreign corporations", and Australian-based "trading" or "financial" corporations. Thus the aspects or activities that the Commonwealth can regulate must have something to do with the characteristic that brings corporations within Commonwealth power. This would mean, for example, that only the trading activities of a trading corporation could be regulated and not any of the other activities of the corporation (such as the relationship between the corporation and its employees where this lies outside of its trading activities).

- Broad View:[33] There are no limits at all. Provided that a corporation has the characteristics that bring it within s 51(xx), any aspect or activity of that corporation can be regulated by the Commonwealth (including the relationship of a constitutional corporation with its employees).

A majority of the High Court has moved beyond the narrow view but has yet to accept the broad view of the power. In the *Tasmanian Dam Case*,[34] the Court held that s 51(xx) at least enables the Commonwealth to regulate the activities of trading corporations undertaken *for the purposes* of the trading activities of that corporation. Under this approach, it is likely that the Commonwealth can regulate some aspects of employment within a constitutional corporation (the degree is unclear) on the basis that such employment is for the purpose of the trading activities of the corporation. While the reasoning might enable the regulation of all actions of all of the employees of a constitutional corporation (each employee being taken on for the purpose of the trading activities of the corporation), the High Court has yet to hold this. Whether it ultimately does so will depend on the precise drafting (perhaps just a few key words in the statute) and application in practice of any new law.

A 1995 High Court decision on the power, *Re Dingjan; Ex parte Wagner*,[35] which dealt with a law in the industrial relations context, also fell short of the broad view. A 1992 amendment to the Industrial Relations Act 1988, (Cth) gave the Industrial Relations Commission the power to examine unfair contracts imposed on independent contractors. Such contracts could be set aside wholly or in part or varied under s 127b. By s 127A(1)(a)(ii), the power extended only to contracts for services

---

[32] *For example*, Actors and Announcers Equity Association v Fontana Films Pty Ltd, (1982) 150 CLR 169, 182 per Gibbs CJ ("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 . . . In other words, in the case of trading and financial corporations, laws which relate to their trading and financial activities will be within the power.").

[33] *For example*, Commonwealth v Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1, 149 per Mason J ("There is nothing in the context of s 51(xx) which compels the conclusion that the language in which the power is expressed should be given a restricted interpretation . . . [W]e should recognize that the power confers a plenary power with respect to the categories of corporation".).

[34] Commonwealth v Tasmania, (1983) 158 CLR 1.

[35] (1995) 183 CLR 323.

relating "to the performance of work by the independent contractor, other than work for the private and domestic purposes of the other party to the contract". By s 127C(1), the power extended to cases: "(a) in relation to a contract to which a constitutional corporation is a party; (b) in relation to a contract relating to the business of a constitutional corporation; (c) in relation to a contract entered into by a constitutional corporation for the purposes of the business of the corporation". By s 127C(2), "constitutional corporation" was defined by reference to s 51(xx) of the Constitution.

The relevant corporation, Tasmanian Pulp and Forest Holdings Ltd, was not itself a party to the relevant contract. Timber for the company's woodchip mill was harvested and transported to the mill by independent contractors, including Mr and Mrs Wagner. They, in turn, had entered into sub-contracts with Mr and Mrs Dingjan and Mr and Mrs Ryan. The sub-contractors sought review and variation of their contract under s 127A. Since the company was not a party to the contract, s 127C(1)(a) and (c) were not applicable. The only basis on which the Act could apply was s 127C(1)(b).

By 4:3, the Court found that s 127C(1)(b) could not be supported under s 51(xx). The lowest common position on the scope of s 51(xx) was that of McHugh J and (in dissent) Mason CJ, Deane and Gaudron JJ that "the power conferred by s 51(xx) extends, at the very least, to the business functions and activities of constitutional corporations and to their business relationships".[36] Otherwise, the Court adopted a different approach to the characterisation of a law under the corporations power. It determined whether the law was valid based upon whether it possessed a sufficient degree of relevance or connection to the corporations listed in the power. In this case, in the words of McHugh J as part of the majority, such a connection was lacking:

> It does not follow … that s 51(xx) authorises any law that operates on conduct that relates to the activities, functions, relationships or business of trading, financial or foreign corporations. The law must be a law 'with respect to' a corporation of the kind described by s 51(xx). That means that the law must have 'a relevance to or connection with' a s 51(xx) corporation. It is not enough, however, that the law 'should refer to the subject matter or apply to the subject matter' …
>
> 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 corpo-

[36] Re Dingjan; Ex parte Wagner (1995) 183 CLR 323, 365 per Gaudron J.

> ration 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 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).
>
> It is not enough, however, to attract the operation of s 51(xx) that the law merely refers to or operates upon the existence of a corporate function or relationship or a category of corporate behaviour.[37]

This approach suggests that an industrial relations law that operates upon the corporations listed in s 51(xx) in a way that is significant to them will be valid under the power. As McHugh J stated: "if, by reference to the activities or functions of s 51(xx) corporations, a law regulates the conduct of those who … work for … those corporations, it is unlikely that any further fact will be needed to bring the law within the reach of s 51(xx)". On the other had, to the extent that the law regulated employee entitlements or industrial matters that had little or no significance for the employing corporation the law would be invalid, as was the case with the law at issue in *Re Dingjan; Ex parte Wagner*.

The scope of s 51(xx) was again raised in the High Court in 1996 in the Industrial Relations Act Case,[38] a challenge to changes brought about to the Industrial Relations Act, 1988, (Cth) by the *Industrial Relations Reform Act 1993* (Cth) and the *Industrial Relations Amendment Act (No 2) 1994* (Cth). Although three States instituted proceedings to challenge the validity of the new legislation, only Western Australia challenged those provisions that primarily relied on s 51(xx), and at the hearing that challenge was abandoned. As was stated in that case: "Subject to one possible exception [as to secondary boycotts], it was conceded in argument by Western Australia . . . that the Parliament has power to legislate as to the industrial rights and obligations of constitutional corporations . . . and their employees".[39] Accordingly, the validity of such legislation was "not in issue".[40]

Uncertainty about the scope of the corporations power means that it cannot be said with confidence that a law that sought to regulate the full range of industrial matters that can arise between employers and employees in a s 51(xx) corporation would be a valid enactment under the power. This uncertainty is magnified by the fact that the issue will be determined by a High Court composed entirely of judges who did

---

[37] (1995) 183 CLR 323, 368-369.
[38] Victoria v Commonwealth, (1996) 187 CLR 416.
[39] Victoria v Commonwealth, (1996) 187 CLR 416, 539.
[40] Victoria v Commonwealth, (1996) 187 CLR 416, 540. The only significant context in which the Court found it necessary to enter upon detailed discussion of s 51(xx) was that of "secondary boycotts". The original provisions upheld in Actors and Announcers Equity Association v Fontana Films Pty Ltd, (1982) 150 CLR 169 had substantially been re-enacted, but with additional protections for trade unions. In holding both the "boycott" provisions and the ancillary protections for trade unions valid, the Court simply applied *Actors Equity*.

not sit on the last major decision on the power, *Re Dingjan; Ex parte Wagner*.[41] Moreover, most of the current members of the Court have not even delivered judgments on like powers in s 51 so as to enable an assessment of their likely approach to s 51(xx). The scope of the power thus remains very much open.

III CONSTITUTIONAL LIMITATIONS

The powers of the Federal Parliament are subject to a number of express and implied limitations arising from the Constitution. The express limitations include s 116, which provides for freedom of religion,[42] and s 92, which states that "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free". Neither of these provisions, nor any of the other express restrictions in the Constitution, are likely to stand in the way of the Commonwealth enacting a new federal industrial relations law.

On the other hand, the implied immunity of the States from certain Commonwealth laws will have an important impact. That immunity will strike down a federal law that imposes a "special burden" on the States so as to curtail their capacity "to function as governments".[43] This limitation was applied in the context of federal industrial laws in *Re Australian Education Union; Ex parte Victoria*.[44] The High Court held that a Commonwealth law could not regulate the capacity of State governments to:

> determine the number and identity of the persons whom it [the State] wishes to employ, the term of employment of such persons and, as well as, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds. An impairment of a State's rights in these respects would, in our view, constitute an infringement of the implied limitation.[45]

In addition, the limitation struck down Commonwealth regulation of the terms and conditions of employment of those engaged in higher levels of government, including "minimum wages and working conditions".[46] This finding has since been applied in the *Industrial Relations Act Case*,[47] where the Court found that the "minimum wage" provisions introduced into the Industrial Relations Act breached the immunity insofar as they affected employees at the higher levels of State gov-

---

[41] McHugh J retires on 30 October 2005. Justice Susan Crennan from Victoria will take up the empty position on the Court.
[42] Section 116 provides: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth".
[43] Austin v Commonwealth, (2003) 215 CLR 185, 249 per Gaudron, Gummow and Hayne JJ applying Melbourne Corporation v Commonwealth, (1947) 74 CLR 31.
[44] (1995) 184 CLR 188. *See also* CFMEU v Newcrest Mining Ltd, [2005] NSWIRComm 23.
[45] Re Australian Education Union; Ex parte Victoria, (1995) 184 CLR 188, 232.
[46] Re Australian Education Union; Ex parte Victoria, (1995) 184 CLR 188, 233.
[47] Victoria v Commonwealth, (1996) 187 CLR 416.

ernment.[48]

If a new law were not drafted to take account of this gap in federal power, it would not likely mean that the whole law was invalid. Instead, the Court would "read down" the law to its remaining valid operation in accordance with s 15A of the *Acts Interpretation Act 1901* (Cth).[49]

IV OVERRIDING STATE LAWS

Section 109 of the Constitution provides: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of any inconsistency, be invalid".[50] The High Court had held that where a State law is overridden due to s 109 it is not "invalid" in the sense that the State Parliament lacked the power to pass it. Instead, the State law, though enacted with full validity, merely ceases to operate.[51] This means that, if the federal law giving rise to the inconsistency is repealed, the State law resumes its normal legislative effect.

As federal legislation and awards have entered into the field of industrial relations, s 109 has meant that they have steadily rendered inoperative the State legislation and awards that had occupied the field. This is in part due to the willingness of the High Court to find an inconsistency between State and federal laws. Inconsistency can be shown not only by the fact that the two laws provide contrary directions, but merely by the fact that the federal law "covers the field". In such a case, there need not be any contradiction between the two enactments. It may even happen that both require the same conduct, or pursue the same legislative purpose. What is imputed to the Commonwealth Parliament is a legislative intention that its law shall be all the law there is on that topic. In that event, what is "inconsistent" with the Commonwealth law is the existence of any State law at all on that topic. This test makes s 109 a much more powerful instrument for ensuring the supremacy of Commonwealth law.

The High Court has further held that inconsistency can be 'manufactured' by express words in a federal statute. In *Botany Municipal Council v Federal Airports*

---

[48] *See also* CFMEU v Newcrest Mining Limited, [2005] NSWIRComm 23.

[49] Section 15A states: "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

[50] In the case of Australian Capital Territory legislation the effect of s 109 is replicated by s 28 of the Australian Capital Territory (Self-Government) Act, 1988, (Cth). Northern Territory legislation also falls away in the face of conflicting Commonwealth legislation, even though the Northern Territory (Self-Government) Act, 1978, (Cth) is silent on the issue. *See, for example*, Federal Capital Commission v Laristan Building and Investment Co Pty Ltd, (1929) 42 CLR 582, 588 per Dixon J; Webster v McIntosh, (1980) 32 ALR 603, 605-606 per Brennan J; R v Kearney; Ex parte Japanangka, (1984) 158 CLR 395, 417-419 per Brennan J; Attorney-General (NT) v Minister for Aboriginal Affairs, (1989) 90 ALR 59, 75 per Lockhart J.

[51] Carter v Egg and Egg Pulp Marketing Board (Vic), (1942) 66 CLR 557, 573 per Latham CJ.

Corporation[52] the High Court unanimously held that the Commonwealth could, by regulation, expressly render inoperative several recited New South Wales laws that impacted upon the building of a third runway at Sydney Airport. In a unanimous judgment, the Court stated: "There can be no objection to a Commonwealth law on a subject which falls within a head of Commonwealth legislative power providing that a person is authorized to undertake an activity despite a State law prohibiting, restricting, qualifying or regulating that activity."[53]

In light of this unanimous decision,[54] it is clear that a Commonwealth industrial relations law could be expressed to directly override State laws in the same area. However, State laws would still only be affected "to the extent of the inconsistency". Thus, State laws would remain in operation to the extent that they dealt with matters outside of the scope of federal power. The extent to which State laws on industrial relations may still operate after any new federal law will also depend upon the terms of that federal law and the extent to which it leaves any room for those State laws (such as if a decision were made that the new federal law could not override certain existing State employee entitlements).[55] Nevertheless, whatever doubt there is about the scope of Commonwealth power to enact a national industrial relations scheme, it is clear that a validly enacted law can override State industrial laws.

V CONCLUSION

The Commonwealth lacks a head of power that will provide a clear basis for the enactment of a single national scheme for the regulation of industrial relations in Australia. While existing heads of power, especially those over certain corporations and interstate trade and commerce, might be used to greatly expand the coverage of federal law on the subject, they are likely to be insufficient to enact a comprehensive national industrial relations scheme.

The key unresolved question is the scope of the federal Parliament's corporations power and how it will be interpreted by the High Court. At the very least, the corporations power, even in combination with that over interstate trade and commerce, will not be able to extend to industrial matters arising out of some businesses, such as partnerships, that trade within the confines of one State. Of course, if the federal law were carefully drafted to fall within the narrowest accepted scope of its power, it would likely be valid. However, if the law were drafted in this way it would not extend to many of the matters that would be expected to fall within a comprehensive national law on the subject.

It is clear, however, that, even if the High Court gives the relevant heads of Com-

---

[52] (1992) 175 CLR 453.
[53] Botany Municipal Council v Federal Airports Corporation, (1992) 175 CLR 453, 465.
[54] *See also* Bayside City Council v Telstra Corporation Ltd, (2004) 216 CLR 595.
[55] *See* George Williams, *The Return of State Awards – Section 109 of the Constitution and the Workplace Relations Act 1996 (Cth)*, 10 AUSTRALIAN JOURNAL OF LABOUR LAW, 170 (1997).

monwealth power a generous construction, a new federal law cannot regulate some of the industrial conditions of State public servants, especially at the higher levels of government. On the other hand, where the federal law is valid, it will be capable of displacing any current State laws in the same field.

The interaction of the Constitution and industrial law in Australia goes back to the very early days of Federation. Indeed, explorations of their power over the field by State and federal governments have provided many of the most important constitutional decisions in the history of the High Court. These decisions can often involve turning points in constitutional doctrine and federal relationships,[56] and demonstrate how difficult such matters can be to predict the outcome.

A salutary example from a related area is the attempt by the Commonwealth to enact a single national corporations law, the *Corporations Act 1989* (Cth), under its corporations power. At the time, it was widely believed that the law would be held valid by the High Court, and the Commonwealth passed the Act without support from the States, such as in the form of a co-operative scheme or a referral of power. In 1990, the issue was resolved in a way that reasserted limits on Commonwealth power. In the *Incorporation Case*,[57] the High Court held by 6 to 1 that the corporations power does not enable the Commonwealth to regulate the incorporation of companies. The decision meant that the Commonwealth could not, by itself, establish a national corporations regime, but could only do so in co-operation with the States. Today, such co-operation provides the foundation for Australia's national corporations law. In the field of industrial relations, this may ultimately provide a better model for achieving a single national law.

[56] The classic example is the decision of the High Court in the Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case), (1920) 28 CLR 129.
[57] New South Wales v Commonwealth, (1990) 169 CLR 482.