

The new era of uniform industrial relations: How far does the corporations power extend?

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The substantive provisions of the *Workchoices*¹ amendments to the *Workplace Relations Act*² commence in a few short days.³ The Act has been described by the Prime Minister as containing the most sweeping industrial reforms since the *Conciliation and Arbitration Act* 1904. This is no political rhetoric. The *Workchoices Act*, all 600 pages of it, completely overhauls the *Workplace Relations Act* and heralds historic changes to the regulation of industrial relations in this country.

Royal Assent to the Act was received just before Christmas, and only days later New South Wales commenced proceedings in the High Court challenging the constitutional validity of the Act. Each of the remaining States and some union organisations have joined the challenge.⁴

As is invariably the case with industrial relations, the debate has been heated.⁵ The union movement has decried *Workchoices* as barbaric. A former Prime Minister has proclaimed it as 'wrong, unfair, unAustralian and immoral'⁶. Professor McCallum has said the legislation sacrifices fairness at the altar of the 'free market god'.⁷ On the other hand, it has been overwhelmingly embraced by business groups as the first step in removing

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¹ *Workplace Relations (Workchoices) Act* 2005 (*Workchoices or Workchoices Act*)

² A reference to sections or parts of the 'Act' or 'WR Act' or *Workchoices* in this paper is a reference to the Act as amended by the *Workchoices Act* but before it is renumbered pursuant to the power granted in Schedule 5 of the Act.

³ A number of provisions commenced on 14 December 2005. See s2 *Workchoices Act*. At the time of writing it is unknown when the other provisions will commence as the proclamation date has not been announced. It has been said by Minister Andrews to be some time in March 2006.

⁴ *Workplace Express*, 'State Governments reveal details of High Court Challenges to Work Choices Act', 20 January 2006. Although at the time of writing Victoria is yet to file its writ.

⁵ Creighton & Stewart, *Labour Law*, 4th Ed., Federation Press Sydney, 2005 at 124 for succinct account of the industrial relations debate.

⁶ *From Deakin to Howard – A Tarnished Vision*, 19th Lionel Murphy Memorial Lecture, Bob Hawke, Sydney, October 26, 2005.

⁷ Ron McCallum, Weekend Essay, *Australian Financial Review*, 1-2 October 2005. See also Ron McCallum, 'The Australian Constitution and the Shaping of our Federal and State Labour Laws', 10 (2) *Deakin Law Review* 2005, p 461

the complexity, cost and duplication in the existing system.⁸ Of course, some have said it does not go far enough.⁹ These are clearly matters about which reasonable minds differ.

I do not propose to venture a view about its merits. The question is whether the Constitution will permit a new era of uniform industrial relations to flourish. This is also something about which reasonable minds will differ!

The arbitration power: an extraordinary contribution - but significant limitations

In order to look to a new era, it is necessary to look to the past. This requires a brief consideration of where the regulation of industrial relations began: the conciliation and arbitration power.¹⁰

In the same way that the arbitration power has received disproportionate attention in the constitutional jurisprudence of this country, the proposal to include the proposed section 51(35) in the Constitution received disproportionate attention in the 1897/98 Convention Debates.¹¹ The transcripts of the Debates reveal there was as much controversy surrounding the regulation of industrial relations then as there is now.¹² There was extended argument during the Debates about whether the Commonwealth Parliament should have the power as proposed - or anything like it.¹³ The proposal succeeded (in the end only very narrowly)¹⁴ only because a number of the opponents¹⁵ of the power were persuaded by its proponents that the power was very confined and

⁸ 'On Balance, IR reforms pass the test' (Editorial), *Australian Financial Review*, 2 November 2005 at 62.

⁹ *Workchoices* has been condemned by the Right as a 'failure due to its complexity and its 'continuing acceptance of the Marxist dogmas inspired by the trade union movement of the 1880s and 1890s and their contemporary supporters from the intellectual classes': President's Report (by Ray Evans) of the HR Nichols Society 2005 Annual General Meeting, 5 December 2005.

¹⁰ For detailed history of the arbitration power see J Macken *Australian Industrial laws : The Constitutional Basis*, Law Book Co, 1980, at 1 – 14. See also G Williams, *Labour Law and the Constitution*, Federation press, 1998.

¹¹ Records of the Australasian Federal Conventions of the 1890s at www.aph.gov.au/senate/pubs/records.htm, Melbourne Session, March 1898 at 208. George Reid remarked that 'no part of this Bill has received more careful consideration...than this particular clause'.

¹² *Ibid.* See the Adelaide Session, April 1897, commencing at 782 and Melbourne Session, March 1898, commencing at 180.

¹³ In response to a number of significant and long lasting industrial disputes during the late 1800s, a number of colonies had developed wages (or conciliation and arbitration) boards which had become effective at settling the disputes. It was the existence of these boards (which had been modeled on a similar system in operating in New Zealand) that prompted the debate about arbitration power in the Convention Debates.

¹⁴ At the final Melbourne Session by 22 votes to 19, having been defeated at the Adelaide Session, 22 votes to 12.

¹⁵ Above n 11, Melbourne Session, March 1898 at 208.

would be used by the Commonwealth only in very limited circumstances.¹⁶ There is no doubt that the architects of the Constitution assumed that the States would be responsible for the regulation of industrial relations generally. The intention was that the Commonwealth should only be permitted to make laws supporting the resolution (by conciliation and arbitration) of a small number of interstate industrial disputes.¹⁷ Of course, that did not turn out to be the case, but that is another story about the expansion of the arbitration power over the first century of federation.

The presumption embodied in the arbitration power - that minimum terms and conditions of employment are set through a compulsory bargaining process, and in the absence of agreement, resolved by an independent umpire - has been said by supporters of the arbitration power to have greatly contributed to the forming of the Australian identity of egalitarianism and commitment to a 'fair go.'¹⁸ Conciliation and arbitration has been described as "one of the three pillars" of Australian social and economic policy throughout last century.¹⁹ If that is so, it has significantly outlived what were said to be the remaining pillars - the White Australia policy and tariff protection. Of course, it is this extraordinary entrenchment that accounts for the ferocity of opposition to the final abandonment of conciliation and arbitration as the first premise in Australian industrial relations.²⁰

Unlike most other section 51 powers, the arbitration power is a purposive power.²¹ The result is it has more limitations than other plenary powers.²² Despite these limitations - that an industrial dispute exist, that the dispute

¹⁶ Above n 11, Melbourne Session, March 1898, at 208 – 209. Ultimately, HB Higgins (whose passionate and compelling support for the proposition was what carried the day) was the better advocate. However, George Reid said that the requirement that the dispute be, in effect, an interstate dispute 'put a premium on one side enlarging the dispute' which would expand the 'evil' which the provision is designed to stop. It was a matter 'best dealt with by laws passed by the various states'.

¹⁷ Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, The Australian Book Company, 1901 at 645 – 647.

¹⁸ McCallum, above n 7.

¹⁹ Creighton, *One hundred years of the conciliation and arbitration power: A province lost?*(2000) 24 Melbourne University Law Review, 839 at 864.

²⁰ The abandonment really began in the 1990s when the Keating Government's reforms based on the corporations power saw a move towards enterprise based bargaining and away from industry wide award making.

²¹ For example, the defence power is another purposive power.

²² The original limited operation of the term 'industrial dispute' was overturned by the High Court in *R v Coldham; Ex Parte Australian Social Welfare Union* (1983) 153 CLR 297 when the Court decided that all types of employees, including white collar employees could be involved in an 'industrial dispute'.

extend beyond the territorial limits of a State,²³ and that the dispute be resolved by prescribed means – the power has managed to spawn a system of federal regulation of industrial relations covering up to 50% of the Australian workforce.²⁴ However the prescriptions have continued to limit the Commonwealth’s ability to use the power to make laws with respect to employment more generally. This has led to the development and maintenance of dual systems of industrial relations regulation in five of the six states²⁵ – a frustrating situation for policy makers and many stakeholders in the industrial relations sphere.²⁶

The most significant constraint, so far as the Commonwealth is concerned, is that the arbitration power has prevented the Federal government from having any direct control over wages policy – an area in which it legitimately has considerable interest.²⁷

A unitary industrial relations system: A long time coming

Despite the powerful contribution of the arbitration power to the political, social and constitutional fabric of this country, a uniform system of industrial relations supported by alternative Commonwealth powers has been a long time coming.

In the first half of the last century there were a total of six failed referenda attempting to amend the arbitration power to give more power to the Commonwealth - the first as early as 1911 and the last in 1946.²⁸ There was a hiatus in the post war period when the Commonwealth largely gave up on constitutional change in this area. However by the late 1970s and early 1980s labour law academics - no doubt inspired by the High Court’s pronouncements on the corporations power in the *Concrete Pipes*²⁹ case and then in the *Tasmanian Dam*³⁰ case – had begun to champion a

²³ This extends to “paper disputes” which have long been accepted by the High Court as falling within the terms of section 51(xxxv): see *R v Commonwealth Court of Conciliation and Arbitration; Ex Parte GP Jones* (1914) 18 CLR 224; *Attorney General (Qld) v Riordan* (1997) 192 CLR 1

²⁴ See M Kirby, ‘Industrial regulation in the Frozen Continent’ (1989) 2 AJLL 1 at 16 – 17.

²⁵ By operation of sections 107 and 109 of the Constitution.

²⁶ Creighton and Stewart, above n 5. The authors observed that there is constant tension between the various systems and that the participants in the systems have exploited that tension when it is expedient to do so.

²⁷ *Ibid* at 85. As explained by Creighton and Stewart, above n5, this accounts for the ‘phenomenon’ of the national wage case.

²⁸ In 1911, 1913, 1919, 1926, 1944 and 1946. See also *Victoria v Commonwealth* (1996) 187 CLR 416 at 564 - 566 per Dawson J.

²⁹ (1971) 124 CLR 468.

³⁰ (1983) 158 CLR 1.

single, national system of industrial relations based on alternative heads of power, including the corporations power.³¹

In 1993 and 1994, the Keating Government amended the *Industrial Relations Act* 1988 to impose obligations upon employers concerning matters such as minimum wages, equal pay, discrimination and enterprise based agreement making.³² The bulk of the provisions have since been upheld as valid under the external affairs power.³³ Some of these provisions relied (and continue to rely) on the corporations power.³⁴ With the exception of one case, to which I later refer, the provisions relying on the corporations power have not received serious scrutiny from the High Court.³⁵ However it is a matter much overlooked in the current public debate that the existing federal industrial regime has been supported by the corporations power for well over a decade,³⁶ and that it began with the Keating Government.³⁷

In 1996 (and in a significant development in terms of looking to the future) the Kennett Government referred most of Victoria's industrial powers to the Commonwealth.³⁸ Victorian employees have by and large been working under the federal system ever since³⁹ - despite the Bracks

³¹ See for example J O'Donovan, 'Can the Contract of Employment be regulated through the Corporations Power?' (1977) 51 *Australian Law Journal* 234; G Smith and R McCallum, 'A Legal Framework For the Establishment of Institutional Collective Bargaining in Australia' (1984) 26 *Journal of Industrial Relations* 3. Also, in 1988 the Constitutional Commission recommended that s51 (35) be reworded to give the Commonwealth power to legislate generally with respect to 'industrial relations'.

³² Williams, above n 10 at 101 and 120.

³³ *Victoria v Commonwealth* (1996) 187 CLR 416 ('*Industrial Relations Act Case*').

³⁴ The Howard Government has continued the Keating Government's reliance on the corporations power. For summary see Creighton and Stewart, above n 5 at 106 – 107.

³⁵ The provisions based upon the corporations power did not receive much attention from the High Court in the *Industrial Relations Act Case* due to a concession made in argument. See further commentary in body of paper below.

³⁶ Williams, above n 10 at 122 for summary of provisions in then *Workplace Relations Act* relying on the corporations power. Those provisions included and continue to include provisions with respect to freedom of association, various types of collective agreements and individual agreements (Australian Workplace Agreements), termination of employment, the fairness of independent contracts, and the award rationalisation process.

³⁷ Of course, the scale of those reforms was nothing like *Workchoices*, but at the time there was (relatively speaking) little fuss at the prospect of the Commonwealth relying on the corporations power to enact laws about industrial relations.

³⁸ The power was referred pursuant to s 51(37) of the Constitution. A number of matters were excluded from the Victorian referral including workers compensation, occupational health and safety, apprenticeships, long service leave, public holidays, and equal opportunity laws, and 'the number and identity and appointment of employees in the public sector': see *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic), section 5.

³⁹ *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic) and the *Workplace Relations and other Legislation Amendment Act* (No 2) 1996 (Cth). The reference was subject to certain conditions and expressly preserved the right of Victoria to regulate various employment related aspects of the public service in Victoria.

Government coming into power campaigning on the basis that it would take the power back.⁴⁰

However, it was not until 1999 when Peter Reith (as the then Federal Minister for Employment & Workplace Relations) proclaimed the desirability of a single system of industrial relations as a 'no brainer'⁴¹ that there emerged for the first time the possibility of a centralist industrial relations agenda being led by a conservative Federal Government. Since then, a uniform system of industrial relations has probably only been waiting on a majority in the Senate.

Workchoices: A major overhaul with the corporations power at its core

The Explanatory Memorandum of the *Workchoices* Act states as one of its purposes the creation of 'a national workplace relations system based on the corporations power which will apply to the majority of Australia's employers and employees'.⁴² In a few days, the Workplace Relations Act will comprehend a uniform system of industrial relations covering around to 80% of the Australian workforce.⁴³

The amended *Workplace Relations Act*, like the existing Act, is dependent upon alternative heads of power such as the external affairs, territories, referral and the trade and commerce powers. However what sets *Workchoices* apart from the old regime is the massive shift to the corporations power as the primary source of power. So, although *Workchoices* raises myriad constitutional questions⁴⁴ the *central* constitutional question is the content of the corporations power. The *Workchoices* regime will stand or fall on this question.

⁴⁰ In 2000, the Bracks Government attempted to take back some of the powers it had referred, but the Fair Employment Bill 2000 was defeated in the Victorian Legislative Council on 4 April 2001.

⁴¹ Minister Reith's address to the National Press Club, 24 March 1999. This highlighted the complexities and technicalities of the federal system for (especially) small businesses and its reliance on paper disputes, logs of claims, roping in awards etc.

⁴² Explanatory Memorandum, Workplace Relations Amendment (Workchoices) Bill 2005 at 1.

⁴³ K. Andrews, *Second Reading Speech: Workplace Relations Amendment (Workchoices) Bill 2005*, House of Representatives, Debates, 2 November 2005 at 38 -43. Previously, it has been estimated that total award and registered agreement coverage on non farm employees was at 87% with approximately half estimated to be covered by federal awards or agreements: *Breaking the Gridlock: Towards a Simpler Workplace Relations System, Discussion Paper 1, The Case for Change*, DEWR, Canberra, 2000, App D; Although, in 1997 the ABS estimated that 26% of the workforce were employed by partnerships or other non company arrangements such as sole traders.

⁴⁴ There are a number of constitutional issues that arise which are not related to the scope and effect of the corporations power. One of those is the extraordinary power given to the Minister to make regulations amending the Act in relation to certain State and territory laws which are excluded by *Workchoices* (and other matters). There are some significant issues surrounding the constitutionality of those provisions.

The Commonwealth has engaged the corporations power by expressing the amendments to apply to '*employers*' and through that definition to '*employees*'. An employer is defined to include a '*constitutional corporation*'⁴⁵ [being a section 51(20) corporation] *so far as it employs, or usually employs, an individual* .

Substantive changes have occurred across the entire *Workplace Relations Act*, repealing several parts of the former Act and replacing them with several new parts - amounting to what can be fairly described as a comprehensive emasculating of the old industrial relations regime.⁴⁶ Significant new Parts of the Act include a Part creating a new national minimum employment 'Standard', enshrining 5 minimum terms and conditions of employment for all employees - including a minimum wage no longer set by the AIRC but by the new Australian Fair Pay Commission;⁴⁷ a Part creating a streamlined system of collective and individual agreement making, allowing for registration of industrial agreements without the involvement of the AIRC;⁴⁸ a Part governing prerequisites to and the conduct of industrial action;⁴⁹ a Part dealing with the treatment of awards, including their preservation and rationalisation.⁵⁰ There are also significant amendments to the existing provisions relating to termination of employment.⁵¹ The Act expressly excludes most (in some cases specifically identified) State and territory industrial and employment

⁴⁵ See definition of 'constitutional corporation' at section 4 WR Act.

⁴⁶ Not all of the *Workchoices* 'central planks' relying on the corporations power have been referred to here. Other central provisions seek to establish and regulate trade unions and employer associations under the new regime: see Part Schedule 1B, WR Act (Items 18, 18B and 18D). There will be argument concerning whether the provisions are supported by the implied incidental power (as was the case with the registration/ 'incorporation' of such organisations pursuant to the arbitration power) and/or whether the provisions fall foul of the principles espoused in the *Incorporation Case*.

⁴⁷ Part VA, WR Act, which enshrines basic rates of pay and casual loading (Division 2), a system of maximum ordinary hours of work (Division 3), annual leave (Division 4), personal (sick, carer's and compassionate leave) (Division 5) and parental and related leave entitlements (Division 6). This Part also regulates the AFPC in relation to its wage fixing role, although Part 1A, WR Act establishes the AFPC.

⁴⁸ Part VB WR Act.

⁴⁹ Part VC, WR Act.

⁵⁰ VI, WR Act.

⁵¹ VIA, WR Act.

laws.⁵² The effect of this is to make State industrial relations regimes largely redundant.⁵³

The corporations power: an ever widening story

In assessing the scope of the corporations power, there are two central issues: *who* and *what* the corporations power can regulate. The first – who, or the types of corporations that can be regulated – draws attention to the meaning of the words ‘*foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth*’ in section 51(20). The second issue – what type of conduct can be regulated – focuses on those perennial words ‘*with respect to*’ those corporations.

The ‘who’ question

The question of who (or the types of corporations) section 51(20) can regulate is the simpler question. The question of what is a ‘trading or financial’ corporation has been the subject of extensive litigation.⁵⁴ As a result, the law is largely settled. The approach of the Court in *State Superannuation Board*⁵⁵ and the *Tasmanian Dam*⁵⁶ case and by the Federal Court in its consideration of this issue reveals a broad and pragmatic approach – regardless of whether the ‘activities’⁵⁷ or ‘purpose’⁵⁸ test (or an amalgam of them) is applied.⁵⁹ Put simply, most corporations in Australia are either trading and/or financial corporations. If making money is a part of a corporation’s charter or what it actually does, then it likely to be a trading or financial corporation. In the unlikely event that the Court shifts its current approach, a narrow rather than wide

⁵² Section 7C of WR Act provides that the WR Act excludes specific state and territory industrial laws, with a number of notable, specified exceptions such as equal opportunity laws, superannuation, workers compensation, long service leave, industrial action affecting essential services. See also Part VIAAA, WR Act which provides that a state law or award or an order of a State authority has no effect where it requires an employer to pay redundancy pay if it employs fewer than 15 employees: See also *Unions NSW v Crater Holt Harvey Wood Products Australia Pty Ltd* [2006] NSWIRCCComm 2 where a ‘gap’ has already been identified in relation to unfair dismissal provisions. See also, Inquiry into the Boeing Dispute at Williamtown, Report to the Minister by the Industrial Relations Commission of New South Wales, 17 February 2006, especially at para 230 onwards.

⁵³ See *Dao v Australian Postal Commission* (1987) 162 CLR 317, *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR. It will likely be argued by the States that this is a bare attempt to exclude State legislative power rather than regulate a field of activity. See also commentary in body of paper below re State immunities.

⁵⁴ The question of what is a foreign corporation has not been the subject of extensive litigation, but see *New South Wales v Commonwealth* (‘*Incorporation Case*’) (1990) 169 CLR 482 at 498.

⁵⁵ *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR

⁵⁶ (1983) 158 CLR 1 per Mason J at 156, Murphy J at 179, Brennan J at 240 and Deane J at 293.

⁵⁷ See *Quickenden v O’Connor* (2001) 184 ALR 260.

⁵⁸ See *Fencott v Muller* (1983) 152 CLR 570.

⁵⁹ Recent decisions suggest that there is a preference for the activities test.

interpretation of this question will only have the effect of diminishing the numbers or categories of employers and employees who will fall within the new regime – and in relative terms not by much. It would not have a serious impact on the efficacy of the *Workchoices* legislation.⁶⁰

The ‘what’ question

The much more critical question of ‘what’ type of activity or conduct s 51(20) comprehends is not *entirely* settled. By contrast, a narrow approach by the Court to this question has the potential to decimate the entire *Workchoices* regime. In practical terms will be no ‘new era’ of uniform industrial relations – or at least not in reliance on the corporations power.

So, the question is: are laws that provide for (say) a regime of workplace agreements, or 5 minimum standards of employment, or the conduct of industrial action, laws which if expressed to apply to constitutional corporations or their employees, laws *with respect to* those corporations?

A betting person would put money on the answer being yes. This is based on the simple observation that since *Concrete Pipes*,⁶¹ when the Court overturned the reserved powers fallacy embodied in *Huddart Parker v Moorehead*⁶² the ratio of most High Court and Federal Court section 51(20) cases lend support to an outcome which validates the laws. It was in *Concrete Pipes* that Barwick CJ ordained that section 51(20) is ‘not to be approached in a narrow or pedantic manner.’⁶³

The *Incorporation Case*⁶⁴ need not be included in this assessment, because in that case the question was directed to the subject matter of section 51(20) (i.e. the ‘who’ question).⁶⁵ Thus, the *Incorporation Case*, with its ‘literal’ approach and result, is perfectly coherent with a broader outcome on the question of the type of activities can be regulated under s 51(20).

⁶⁰ For examples of a case held not to be a trading corporation see *Forbes v Australian Yachting Federation Inc.*(1996) 131 FLR.

⁶¹ (1971) 124 CLR 468.

⁶² *Huddart Parker v Moorehead* (1908) 8 CLR 330

⁶³ *Ibid* at 490.

⁶⁴ *Incorporation Case* above n54. It has been said this case reflects a ‘narrow’ approach to s51(20), whereas the more defensible view is that the Court was unable to read something into the express words of section 51(20) which was not there.

⁶⁵ *Ibid* at 501 – 502.

The first significant attention paid by the Court to the corporations power in a quasi-industrial context was in 1982 in the *Actors Equity* case.⁶⁶ The entire Court upheld the enactment of the then section 45D of the *Trade Practices Act* - a measure characterised by the Court as protecting the trading activities of corporations from secondary boycott conduct by trade unions. Of course, that case concerned the conduct of third parties, and not the conduct or activities of corporations themselves.⁶⁷ But divergent views began to emerge within the Court about whether section 51(20) could support laws with respect to activities undertaken by constitutional corporations other than trading or financial activities.

In the following year the *Tasmanian Dam*⁶⁸ case confirmed the divergence. A majority upheld the validity of a provision in the *World Heritage Properties Conservation Act 1983* which operated to stop the damming of the Franklin by being expressed to apply to certain conduct of the corporation 'for the purpose of its trading activities.'⁶⁹ Mason, Murphy and Deane JJ held that section 51(20) supported laws relating to any activities of trading corporations, not just their trading activities.⁷⁰ In a bit of judicial stargazing Murphy J noted that section 51(20) laws 'could extend to laws dealing with industrial relations so that the Commonwealth could legislate directly about wages and conditions of employees and other industrial matters'.⁷¹ Brennan J found the law could be upheld on a narrower view of the scope of section 51(20).⁷² His Honour restricted section 51(20) to laws supporting activities done for the purpose of trading activities, and he considered that the building of the Franklin dam was for the purpose of trading activities. Gibbs CJ, thought the law must relate to trading activities and did not think that the building of the Franklin dam for the purpose of generation of electricity was for the purpose of the corporation's trading activities.⁷³ Wilson and Dawson JJ also favoured an ultra narrow test, requiring that a law with respect to a *trading* corporation must be concerned with its *trading activities*.⁷⁴

The reasoning of Brennan J bears the result that the law validated in the *Tasmanian Dam* case was ultimately upheld on a narrower view of the corporations power - namely that section 51(20) will support non trading

⁶⁶ (1982) 150 CLR 169.

⁶⁷ See also *Industrial Relations Act* case, below n 110 at 556 - 558.

⁶⁸ (1983) 158 CLR 1.

⁶⁹ *World Heritage Properties Conservation Act 1983* (Cth), section 10(4).

⁷⁰ *Tasmanian Dam Case*, above n 68, per Mason J at 148 - 153, per Murphy J at 179 - 180 and Deane J at 268 - 272.

⁷¹ *Ibid* at 212.

⁷² *Ibid* at 239 -242.

⁷³ *Ibid* at 117 - 118.

⁷⁴ *Ibid* per Wilson J at 199 - 202 and per Dawson J at 314 - 318.

activates of a corporation if those acts were done for the purposes of trade. But, it should be noted that in upholding the law as valid, Brennan J viewed broadly the type of conduct that constituted an act done for the purposes of trade.

The last occasion upon which the Court gave serious consideration to the corporations power in an industrial context was in 1995. *Re Dingjan; Ex Parte Wagner*⁷⁵ concerned the validity of provisions in the predecessor to the WR Act,⁷⁶ empowering the AIRC to review contracts imposed upon independent contractors on the grounds of unfairness. One of the alternative⁷⁷ bases upon which review provision could be invoked was that the impugned contract merely '*relat[ed] to the business of a constitutional corporation*'⁷⁸. In this case the constitutional corporation, which owned and operated a timber mill, was not a party to the impugned contract. Mrs and Mrs Wagner were unincorporated independent contractors to the company, whose contract required them to harvest and transport woodchips to the mill. The Wagners in turn subcontracted this job to the Dingjans and the Ryans (also unincorporated independent contractors) - who commenced proceedings in the AIRC seeking a review of their sub-contract with the Wagners.

This time, a majority of four found the law invalid on the basis that there was insufficient connection with between the provision and section 51(20).

Again, there were divergent views about the scope of section 51(20). The dissentients, Mason CJ, Deane and Gaudron JJ each propounded a broad approach to section 51(20). Mason CJ declared that s51 (20) was not limited to trading and financial activities of those corporations.⁷⁹ Gaudron J (with whom Deane J agreed) said a law was valid so long as it is '*expressed to operate on or by reference to the business functions, activities or relationships of corporation*'.⁸⁰

McHugh J was in the majority in striking down the provision. However His Honour favoured a broad approach requiring only that for the law to be

⁷⁵ (1995) 183 CLR 323.

⁷⁶ The then *Industrial Relations Act* 1988 (Cth): ss127A – 127C.

⁷⁷ *Ibid.* Section 127C(1)(a) and (c) required that the provision applied to contracts to which a corporation was a party. These provisions were not challenged because the relevant corporation in this case was not a party to the impugned contract.

⁷⁸ *Ibid.* s127(1)(b)

⁷⁹ (1995) 183 CLR 323 at 333 - 336.

⁸⁰ *Ibid* at 364 – 367.

'with respect to' a corporation it must have 'some' significance *for the activities, functions, relationships or business of the corporation*.⁸¹ On the facts though, McHugh J considered the law too remote because it had no significance or practical connection to the constitutional corporation.

Dawson J maintained his preference for the ultra narrow view stated in the *Tasmanian Dam* case.⁸² Brennan and Toohey JJ both considered the connection between s51 (20) and the provision too remote.⁸³ Brennan J thought the remoteness issue best resolved by the imposition of a 'discrimination' test, requiring that the law have a particular or differential effect on constitutional corporations as opposed to other persons.

The Dingjan ratio

Although the Court struck down the law in *Dingjan*, its ratio supports a test requiring a connection or significance (perhaps only 'some' significance) of the law to *the activities, functions, relationships or business of a corporation*. This test has been applied by two single judges in different cases in the Federal Court since *Dingjan*.⁸⁴ Although, in the appeal in one of those cases, *Quickenden v O'Connor*, Black CJ and French J upheld the law (which related to industrial agreements between trade unions and constitutional corporations) as valid on the narrower view of s51 (20) expounded by Brennan J in *Dingjan*.⁸⁵

In *Dingjan* the Court began to move away from a test which looked to the activities regulated by the law to a test requiring the law to have a certain connection or relevance to a constitutional corporation.⁸⁶ Even so, there remains a live issue about the extent to which, if any, the "what" question in section 51(20) is to be resolved by reference to the "who" question.

⁸¹ *Ibid* at 367 – 372.

⁸² Dawson J reasoned that unlike the taxation, quarantine and immigration powers, the corporations power is more limited in its scope because the constitution describes the subject matter by reference to a category of persons, at 345.

⁸³ *Ibid* per Brennan J at 338, but applying the "discrimination test" at 336 - 337. Toohey J considered that the law could not be 'merely tenuous' to the corporations power at 352 – 353.

⁸⁴ See *Rowe v TWU* (1998) 160 ALR 66 at 74 – 5 per Cooper J, and *Quickenden v O'Connor* (1999) 166 ALR 385 per Lee J at 390.

⁸⁵ (2001) 184 ALR 260 per Black CJ and French J at [39] where the Court held that '*a law that applies expressly and specifically to constitutional corporations in their capacity as such corporations or to other persons or bodies in their dealings with such corporation or their conduct in relation to them. A fortiori a law is a valid exercise of the power under s 51(xx) if it confers rights or powers or imposes duties or liabilities peculiarly on such corporations or those who deal with them or engage in conduct affecting them in connection with those dealings or that conduct*'. See also Carr J at [115] where His Honour appears to have taken an approach more consistent with the broader test.

⁸⁶ Williams, above n 10 at 18.

Speculating about how the Court will approach any aspect of its task *Workchoices* is dangerous. However it is safe to assume that the laws to describes above will be characterised laws which regulate the employment relationships between (or industrial relations of) constitutional corporations and their employees.⁸⁷ On that basis, the broader ratio of *Dingjan* supports the validity of the laws⁸⁸ - because the laws can surely be accepted to have some significance for (and indeed practical impact on) the relationship between a constitutional corporation and its employees.⁸⁹ However, even if the Court were to adopt the narrower tests propounded by Brennan J the central planks of *Workchoices* would still, be upheld. That is because the laws satisfy the 'discrimination test.' Also, to the extent the activities test might be used, the act of employment itself, or the activities undertaken by employees of corporations would, using the approach favoured by Brennan J, most likely be judged to be activities undertaken by the corporation *for the purpose of* the corporation engaging in trading or financial activities.

To guarantee a complete annihilation of *Workchoices* on this front, the States really need the Court to retreat to an ultra narrow position that section 51 (20) can only support laws about the trading and financial activities of constitutional corporations. This is entirely possible, but the odds must be against it.⁹⁰

⁸⁷ The New South Wales statement of claim pleads that the central provisions of the Act 'regulate the employment relationships of, and industrial disputes between, employers and employees as defined in ss.4AA and 4AB'.

⁸⁸ This view has also been expressed by Andrew Stewart, 'Federal Labour Law and New Uses for the Corporations Power', *8th Annual Labour Law Conference*, 16 June 2000 at 11. There are some aspects of the laws which may be judged not to have sufficiently significant connection or practical impact on constitutional corporations and/or might not be judged to be protective of constitutional corporations. See for example Part IX, Division 5 of WR Act which restricts rights of entry for occupational health and safety purposes under State legislation.

⁸⁹ This is so in respect of the laws to which I have referred to in the body of the paper. However there is some doubt about whether the proposition holds for the provisions which seek to restrict rights of entry of union officials under state laws: see Part IX, Division 5, WR Act. These provisions could be judged not to have sufficient connection or practical operation on the business of constitutional corporations. Also, although expressed to apply to constitutional corporations, the provisions might be characterized to be laws about the conduct of third parties, and might not pass the discrimination test as in *Dingjan* (but note the result in *Actors Equity*).

⁹⁰ It is also noted that in the *Industrial Relations Act* case, below n 110 in connection with the question of the validity of aspects of provisions in the *Industrial Relations Act* 1988 relying on the corporations power, Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ accepted (without so much as blinking) a concession made by Western Australia that the Commonwealth had power to make laws regulating '*the industrial rights and obligations of constitutional corporations*'. On the basis of the concession the Court went on to hold that if the Commonwealth did have such power, then it could also make laws concerning the terms and conditions attaching to those rights and obligations. See at 539, 558 – 56 and 566.

The originalist argument: It will need to be original

But that may not be the end of the story. Even if the Court takes the view that on its face, the corporations power extends sufficiently to support *Workchoices*, the States have a final shot at what has been dubbed the 'originalist' argument.⁹¹

In the publicity surrounding the High Court challenge, the States have declared that one of the arguments they will make in the High Court is that the framers of the Constitution intended that the States regulate industrial relations, and did not intend that the corporations power be used to legislate with respect to anything touching upon corporations.⁹² The argument will no doubt be more rigorous than this, because it has been settled since 1904⁹³ that having regard to the intentions of the founders as disclosed in the Convention Debates is not part of the legitimate methodology to interpret the Constitution.⁹⁴

In order for the originalist argument to prevail the States will need to successfully contend that there can be discerned in the Constitution itself – namely the arbitration power – an implication that the States have (clearly not all but some) exclusive power to regulate industrial relations. The very existence of the implication itself, whilst readily discernable and plain enough on its face, may engender debate.⁹⁵ That is because *Engineers* tells us; there is no implication in the Constitution that the States have a reserved power to make laws in any area.⁹⁶

A concession made in a previous case, without the benefit of argument or the Court's scrutiny (strictly speaking) has no utility for any party in a subsequent case. But one can not help but think that the States must regard the concession as entirely unhelpful.

⁹¹ The Court will not need to address the originalist issue if it embraces the 'ultra narrow test' on the scope of section 51(20). Logically, it does not arise.

⁹² A number of media reports have indicated that various State Attorney's General, or relevant Ministers when announcing the respective challenges, have referred to an argument along these lines. But see also where this argument has been articulated more carefully by J Shaw and M Ciolek, 'The Constitutional Question', *The State of the States 2005*, Evatt Foundation, 2005 at 45.

⁹³ *Tasmania v Commonwealth* (1904) 1 CLR 329 at 332.

⁹⁴ Although in the *Incorporation Case*, above n 54 the Court used the Convention Debates to look at the drafting history of section 51(20) to determine the meaning of the words 'formed within the limits of the Commonwealth' at 501. However, in this case it is not the meaning of the words in section 51(35) which is in issue.

⁹⁵ It might be suggested that the implication is so strong that it should be treated as an express limitation. In such a case the express limitation found in the arbitration power would give way to the general principle (i.e. the corporations power). See *Bank Nationalisation* case, below n 103 and Pearce and Geddes, *Statutory Interpretation in Australia*, 5th Edition, Butterworths, 2001 at 113.

⁹⁶ *Amalgamated Society of Engineers v Adelaide Steamship Company* (1920) 28 CLR 129 at 154 per Knox CJ, Isaacs, Rich, and Starke JJ observing that it is "fatal" to read section 107 in such a way. The resolution of this issue depends upon the stage at which the relevant interpretative tools are engaged.

In any event, and assuming the Court accepts that the implication arises, the argument must proceed that section 51(20) is to be construed and read down by reference to this implication.⁹⁷ Again, this will pose some difficulty for the States because the implication is of the textual kind. Again, as *Engineers* tells us, implications arising only in the text (or 'unexpressed assumptions'⁹⁸) must give way to express provisions – in this case the corporations power. On this note the Commonwealth might ask rhetorically: is there any good reason why, as a matter of construction, the Commonwealth can not validly use the specific gift it has been given in the corporations power to regulate the States' residue from 51(35)? The States will have to find one.

The Court will read down plenary powers said to infringe structural implications that are said to '*inhere in the instrument... and [are] an integral element*'⁹⁹ of the Constitution – such as those implications recognised in the *Melbourne Corporation*¹⁰⁰ case or the *Political Advertising*¹⁰¹ case.

But the States will not be able to point to an example of the Court reading down an express section 51 power to take account of an implication in another section 51 power.

So, for example, in the *Concrete Pipes* case, it did not matter that the secondary boycott laws held to be supported by the corporations power would not have been permitted under the trade and commerce power. In *Pidoto v Victoria*¹⁰² the Court held that the words of the arbitration power did not limit the defence power in section 51(6) – although that was a case decided in war time where it might be expected that the defence power be given its very fullest interpretation. And although the Court held that the corporations power did give way to the limitation contained in the banking power in the *Bank Nationalisation Case*,¹⁰³ –

⁹⁷ It is not clear whether the implication would need to be a necessary implication in order to get to this point: see *Australian Capital Television Pty Ltd v The Commonwealth*; *New South Wales v The Commonwealth* (1992) 177 CLR 106 per Mason CJ at 135 (the '*Political Advertising Case*').

⁹⁸ *Ibid* at 135.

⁹⁹ *Political Advertising Case* (1992) 177 CLR 106. In the present case, the implication is not a structural implication. As Mason CJ said in that case about another textual implication: 'The founders assumed that the Senate would protect the States, but in the result it did not do so'.

¹⁰⁰ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

¹⁰¹ (1992) 177 CLR 106.

¹⁰² *Pidoto v Victoria* (1943) 68 CLR 87. It was held that the Commonwealth Court of Conciliation and Arbitration could resolve an industrial dispute without an interstate element by virtue of the Commonwealth's defence power which was not affected by the limitations section 51(35).

¹⁰³ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.

that limitation is an express limitation¹⁰⁴ on Commonwealth power, and not a mere implication.

Somewhat ominously for the States, Gleeson CJ has already made clear his view of the originalist argument when it arose in another context (but did not need to be decided) in the *Pacific Coal Case*¹⁰⁵:

If, in a given case, legislation were validly enacted pursuant to that power [being *the corporations power*], then it would not be affected by any negative implication or prohibition of the kind [*in the arbitration power*]. Secondly, there is no principle that Parliament can never do indirectly what it cannot do directly. Whether or not Parliament can do something indirectly, which it cannot do directly, may depend upon why it cannot do it directly. In law, as in life, there are many examples of things that can be done indirectly, although not directly. The true principle is that "it is not permissible to do indirectly what is prohibited directly".....There is, however, no such prohibition. [*in the arbitration power*].

Putting it plainly, the originalist argument will need to be very original to make it stick.¹⁰⁶ The States might hope that the Court will be prepared to do one of two things. The first is to make a 'one off' exception or allowance to the *Engineers* doctrine and the usual rules of constitutional construction. This might be achieved by reasoning that the implication in the arbitration power is so strong so as to warrant being treated as an express limitation. The second is that the Court could approach the matter more broadly by reverting back to, now largely discarded notions of a concern for the 'federal balance'.¹⁰⁷

Again, its possible. But a betting person would keep their money on the Commonwealth.

An implied immunity? Next to impossible.

It has been said,¹⁰⁸ and it has been pleaded,¹⁰⁹ that the provisions which seek to exclude the operation of State and territory industrial laws could be struck down for infringing the second limb of the *Melbourne Corporations* doctrine: that the law is a law of general application which

¹⁰⁴ Section 51(13) provides the Commonwealth can make laws with respect to '*banking other than state banking*'.

¹⁰⁵ *Re Pacific Coal Ltd: Ex parte CFMEU* (2000) 203 CLR 346 at [29].

¹⁰⁶ See Booker and Glass, below n 107.

¹⁰⁷ See Actors Equity Case, above n 66 per Gibbs CJ. See also P Prince and T John, "The Constitution and Industrial Relations. Is a Unitary System Achievable?", Australian Parliamentary Library, Research Brief, 28 October 2005 at 50 – 54., citing Booker and Glass, 'The Engineers Case' in H.P. Lee and George Winterton (eds) *Australian Constitutional Landmarks*, Cambridge University Press, at 34.

¹⁰⁸ Shaw and Ciolek, above n 92, but acknowledging that the argument was 'weak'.

¹⁰⁹ This has been pleaded in the context of the application of section 7C, WR Act which excludes the operation of State and Territory laws.

operates to curtail or destroy the continued existence of the States or their capacity to function as Governments. The argument is that by destroying the State industrial regimes, the States' functions or capacities are curtailed. This argument appears impossible to make out on current authority. In the *Industrial Relations Act* case,¹¹⁰ Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ confirmed that the States were not immune from Commonwealth industrial relations laws except insofar as those laws prevented the States from determining the number of persons they wish to employ, the terms of their appointment, the number and identity of employees to be made redundant, and the terms and conditions of employment of those employed at high levels of government.¹¹¹ There is nothing in *Workchoices* that is directed to these matters.

It is also very difficult to see how Victoria could, with hand on heart, make such an argument. An expansion of the *Melbourne Corporation* doctrine so as to give further immunity to States from Commonwealth industrial relations laws in circumstances where, for more than a decade, Victoria has relinquished its industrial powers to the Commonwealth – and it appears to have been business as usual in Victoria, is almost incomprehensible.

Constitutional and political legacy: Constitutionally, likely to be fizzer

It is difficult to predict the legacy of a case before the Court has handed down a decision. But there is some things that can already be said about the constitutional and political legacy of *Workchoices*.

The challenge has been billed as the most important constitutional case in a generation.¹¹² With its cast of thousands, it will undoubtedly be the biggest muster the Court has seen for some time. And no matter which way the Court goes, this case will be a significant constitutional law case for the non legal or political implication that (if successful) the Commonwealth might be excited into regulating other areas through the corporations power.

But if the Court upholds the central planks of the legislation the case will not likely fall into the ranks of constitutional law landmarks such as the

¹¹⁰ *Victoria v Commonwealth* (1996) 187 CLR 416 ('The *Industrial Relations Act*' case).

¹¹¹ *Ibid* at 497 - 503. and at 560 – 561 (upholding *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 231.

¹¹² 'Stating their Case on Workchoice', *Australian Financial Review*, 8 February 2006, at 6.

Engineers case, *Melbourne Corporation*, or the *Tasmanian Dam*¹¹³ case, the *Political Advertising* case or *Mabo*.¹¹⁴ That is because this is not news. After the dust has settled, most commentators will likely conclude that it did no more than confirm the existing jurisprudence on the corporations power which is underpinned by the 'centralist logic'¹¹⁵ of *Engineers* and orthodox methods of constitutional construction.

On the other hand, an outright rejection of *Workchoices* by the Court has the potential to have more profound constitutional implications if it in any way signaled a retreat from these things.¹¹⁶

If there ever was an opportunity for the Court to make such a retreat – to reign in *Engineers* – this is it.¹¹⁷ And whilst history suggests that conservative Courts might lend a more favourable ear to 'States' rights' or 'federal balance' arguments, the States would not be taking great comfort from this for three reasons.¹¹⁸

The first is that if 'States' rights' have gone out of fashion, then there is no reason why this would not be reflected to some extent in the Court. The second is that conservative Courts tend to defer to the Parliament where they can, on the basis that the legislature, having derived its power directly from the people, is the more legitimate source of power. The third reason is that whilst a narrow interpretive approach to the Constitution is often perceived to have greater affinity with the 'strict and complete legalism' associated with conservative Courts¹¹⁹, in this case it is just as easy to arrive at a broader view of the corporations power by appealing to 'legal' method as it is to arrive at a narrower view. As Professor Zines has said: *Engineers* itself emphasized '*legalism... [and] spoke strongly against having regard to social consequences, possible abuse of power or broader social and political theories of federalism... It strongly supported the ordinary rules of statutory construction, emphasized the express*

¹¹³ Brennan and Bennett, below n 122. The authors opined that the *Tasmanian Dams* case is the case that will be forever regarded as most dramatically expressing the "centralist logic" of *Engineers*.

¹¹⁴ *Mabo v Queensland [No 2]* (1992) 175 CLR 1

¹¹⁵ Brennan and Bennett, below n 122.

¹¹⁶ *Actors & Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 per Gibbs CJ; see also and more generally M. Coper and G. Williams (eds), *How Many Cheers for Engineers?*, Federation Press, Sydney, 1997 and especially the article by Booker and Glass, 'What makes *Engineers* a classic?' for criticisms of the *Engineers* doctrine, at 63.

¹¹⁷ That is, other than the retreat that occurred in the *Melbourne Corporation* case.

¹¹⁸ See for example Workplace Express "High Court attitude to Coalition plan very uncertain," 21 November 2005 citing paper delivered by George Williams at the "Fair Go or Anything Goes? Conference.

¹¹⁹ This is considered by some to be largely a fiction. See for example Justice K Mason, 'What is wrong with top down legal reasoning?', The 2004 Sir Maurice Byers Lecture, 26 February 2004.

provisions of the constitution and the distinction between legal and political or policy judgments'.¹²⁰

In other words, the Court will not need to engage in any form of (so called) 'judicial activism' or 'top down legal reasoning'¹²¹ in order to uphold *Workchoices*.

From a historical perspective, a uniform system of industrial relations based substantially on the corporations power and supported by a range of other powers has been inevitable since the *Engineers* case.

The only mildly surprising thing is that this unapologetically centralist reform agenda is being aggressively led by a conservative Government, the traditional the defender of the States - and being just as aggressively opposed by Labor, traditional proponent of all things central.¹²² Some would say that this simply reflects the commitment of the Coalition to the destruction of the arbitration power, and Labor's commitment to its preservation.

However that is too simplistic. It is more likely that this development signals the death of 'States' rights' as significant force in the mainstream political discourse in this country. There is nothing too surprising about this. It has, after all, been over 80 years since the *Engineers* case. Also, with Communism no longer regarded as a serious threat to western democracy, gone is the old post-war notion (often peddled by States rights advocates) that the States exist to protect the citizenry from a big, central government and its dangerous links to Communism. Now, the democratic world over, centralism is no longer immediately associated with government interference. The rationale for centralism more frequently lies in the quest for efficiency - which, unsurprisingly, is one of the stated justifications for *Workchoices*.

A new era? Messy without referrals

And finally, what of the new era?

Assuming the Court validates the substantive provisions of *Workchoices*, the new regime will not be entirely uniform. The industrial obligations of many non corporate entities not situated in either Victoria or the Territories

¹²⁰ L Zines, *The High Court and the Constitution*, 4th Edition, Butterworths at 8.

¹²¹ *McGinty v Western Australia* (1996) 186 CLR per McHugh J.

¹²² S Bennett and S Brennan, *Constitutional Referenda in Australia*. Australian Parliamentary Library, Research Paper No 2, 1999, for a succinct explanation of the Labor Party's 'urging' to change the Constitution and the Liberal Party's traditional defence of the Constitution.

will still be regulated by the States. It is hardly a complete solution. The Federal Government has made it clear that it regards *Workchoices* as a first step, and would like to receive referrals of power from the States.¹²³ That will not occur in the current political climate. However, if the Victorian experience is anything to go by, when the political moons align, the States will eventually refer their powers to the relevant Federal Government. (By this I suggest that if *Workchoices* withstands the challenge, Federal Labor will not abandon the corporations power as a means of regulating industrial relations when it takes office.)¹²⁴

Once referred, there will be two significant barriers to clawing back the referred powers. The first is financial, and the second (and related to the first) is the barrier of political expediency. It seems unlikely that State Governments will consider it expedient to claw back already referred industrial relations powers, if by doing so they are able to regulate no more than 15 - 20% of their constituency.

And so it may be that it could take a decade or two - perhaps longer - before we witness a truly uniform system. It will be messy for a while, and just how messy depends on the level of success the States have in the areas of the challenge I have not addressed, and the pace at which the States refer their powers. But that is the price we must pay for an absence of political leadership (on both sides) in the federal sphere to effect the bipartisan support that is required for constitutional change concerning industrial relations – a matter about which, until *Workchoices* came along, there was almost universal agreement.

On that note, there are some who say that for the Commonwealth to obtain the power to regulate industrial relations by means other than a referendum amounts to constitutional vandalism.¹²⁵ In answer to that, it is worth reflecting on the fact that irrepressible forces have brought Australia into the twenty first century both entirely homogeneous and highly corporatised. This is not something the founders would have envisaged. Incredibly, and despite its crustiness, the Constitution has so far been able to adapt to progress and change. The *Workchoices* challenge will

¹²³ Explanatory Memorandum, above n 42 at 10.

¹²⁴ Whilst Federal Labor has been an outspoken critic of *Workchoices*, the author is unaware of any pledge or suggestion by Federal Labor that that it will abandon the corporations power as a means of regulating industrial relations. It is likely to use the power to continue to support a unified system. Of course, Labor would likely make significant changes to the substantive provisions of *Workchoices*.

¹²⁵ Brennan and Bennett, above n 122. The authors noted that ‘The High Court’s decision in the *Concrete Pipes* case achieved for corporations law what Commonwealth governments had sought unsuccessfully in referenda on five separate occasions. Professor Coper has demonstrated that on at least four other occasions the High Court has written into constitutional law propositions earlier rejected by the people at referenda, in areas as diverse as aviation, marketing schemes for primary products and freedom of speech’.

provide yet another opportunity to test the capacity of the Constitution to continue to meet the needs of what is in form a federation of States, but which looks and acts much more like a politically, socially and economically integrated nation state.