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22 November 2006

The Work Choices decision

The High Court, by a 5:2 majority (Kirby J and Callinan J dissenting), has upheld the constitutional validity of the recent amendments to the *Workplace Relations Act 1996* (WRA) made by the *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices Act).

State of New South Wales v Commonwealth of Australia (Work Choices Case)

High Court of Australia, 14 November 2006
[2006] HCA 52

In upholding the constitutional validity of the Work Choices Act the Court has confirmed that the Commonwealth's power with respect to trading, financial and foreign corporations extends to:

— the regulation of the activities, functions, relationships and the business of a corporation

— the creation of rights, and privileges belonging to a corporation

— the imposition of obligations on a corporation.

In respect of these matters, the corporations power also extends to:

— the regulation of the conduct of those through whom a corporation acts, its employees and shareholders

— the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.

Background

Historically, Commonwealth laws regulating aspects of industrial relations have relied on s 51(xxxv) of the Constitution, which confers power on the Commonwealth Parliament to enact legislation with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. In more recent years, however, the Commonwealth has relied on other heads of power, including s 51(xx), for some aspects of its industrial relations legislation. Section 51(xx) confers power on the Commonwealth Parliament to enact legislation with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' (constitutional corporations).

Then in December 2005 the Commonwealth Parliament enacted the Work Choices Act, which created a substantially new federal industrial relations regime primarily in reliance on the corporations power.[1] Most significantly, the WRA (as amended by the Work Choices Act)

now directly regulates the industrial rights and obligations of constitutional corporations and their employees.

The States of New South Wales, Victoria, Queensland, South Australia and Western Australia and two trade union organisations challenged the constitutional validity of the WRA as amended by the Work Choices Act. The Attorneys-General of Tasmania, the Northern Territory and the Australian Capital Territory intervened in support of the plaintiffs' challenge to the constitutional validity of the law. The case was argued over six days by a record 39 counsel.

According to the Explanatory Memorandum for the Work Choices Act, use of the corporations power (together with the other powers relied on) for the new regime 'would mean that up to 85 per cent of Australian employees would be covered by the federal system'. The principal issue before the High Court was the validity of the extensive use of the corporations power to support the new federal regime.

The majority decision

Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ delivered a joint judgment upholding the validity of the legislation.

Scope of corporations power

After discussing previous High Court authority on the corporations power, developments in company and corporations law in the 19th century, the Convention Debates,[2] drafting history and various failed referendums[3] to amend both s 51(xx) and s 51(xxxv), the majority endorsed the statement by Gaudron J in *Re Pacific Coal Pty Ltd*[4] that the corporations power extends to:

> the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.

It follows that the power 'extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations': [178].

The plaintiffs had relied on three main lines of reasoning to argue that the corporations power should not be construed as supporting the WRA: [57].

- First, the corporations power was said to extend only to regulating the dealings of corporations with persons external to the corporation and not its internal relationships. The relationship between a corporation and its employees was said to be part of its internal relationships.
- Secondly, it was argued that the corporations power did not support a law merely because it conferred rights or imposed obligations on a corporation. Rather, 'the fact that the corporation is a foreign, trading, or financial corporation should be significant in the way in which the law relates to it': [140].
- Thirdly, it was argued that the corporations power had to be read down because of the presence of s 51(xxxv). The consequence was said to be that the Commonwealth Parliament could enact laws dealing with the industrial relations between a corporation and its employees only under s 51(xxxv) and not under the corporations power.

The joint judgment rejected each of these asserted limitations on the corporations power. Their Honours observed that underlying each of them ‘was a theme, much discussed in the authorities on the corporations power, that there is a need to confine its operation because of its potential effect upon the (concurrent) legislative authority of the States’: [54], [183]–[196]. They regarded this appeal to the ‘federal balance’ as carrying ‘a misleading implication of static equilibrium’.

The approach of the joint judgment was to determine the content of the power to legislate ‘with respect to’ constitutional corporations by applying settled principles of constitutional interpretation, beginning with the decision in the *Engineers’ Case*.[5] The *Engineers’ Case* discarded ‘an approach to constitutional construction that started in a view of the place to be accorded to the States formed independently of the text of the Constitution’ although it ‘did not establish that no implications are to be drawn from the Constitution’: [194]. One of those implications is that the Constitution requires the continued existence of the States ‘as separate bodies politic each having legislative, executive and judicial functions’: [194]. However, the implication ‘does not identify the content of any of those functions’.

Their Honours emphasised at several points the need to construe the constitutional text and said:

> The general principles to be applied in determining whether a law is with respect to a head of legislative power are well settled. It is necessary, always, to construe the constitutional text and to do that "with all the generality which the words used admit". The character of the law must then be determined by reference to the rights, powers, liabilities, duties and privileges which it creates. The practical as well as the legal operation of the law must be examined. If a law fairly answers the description of being a law with respect to two subject-matters, one a subject-matter within s 51 and the other not, it is valid notwithstanding there is no independent connection between the two subject-matters. Finally, as remarked in *Grain Pool of Western Australia v The Commonwealth*, "if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice". [142] (footnotes omitted)

It is apparent that their Honours did not regard the ‘fundamental and far-reaching legal, social, and economic changes in the place now occupied by the corporation, compared with the place it occupied when the Constitution was drafted and adopted’ as providing any basis for applying different principles in construing the text of s 51(xx): [67], see also [121]. The consequent extension in the range of activities that Commonwealth laws could now reach was a practical result of those changes but this fell well short of establishing that ‘the States could no longer operate as separate governments exercising independent functions’. The majority concluded that ‘the proposition, that a particular construction of s 51(xx) would or would not impermissibly alter the federal balance, must have content, and the plaintiffs made no attempt to define that content’: [196].

In rejecting the three particular ways in which the plaintiffs sought to restrict the scope of the legislative power in s 51(xx), the majority also reached the following conclusions.

— First, the suggested division between external and internal relationships found no support in the text of s 51(xx) ([94]–[95]), was ‘a distinction of doubtful stability’ and, even if were to be adopted, ‘there seems every reason to treat relationships with employees as a matter external to the corporation’: [66], see also [89]–[90].

— Secondly, the majority held that s 51(xx) is not, as some members of the Court had previously suggested, limited to the trading activities of trading corporations and the financial activities of financial corporations. That is not what s 51(xx) says: [169]. To the extent that the WRA prescribes norms regulating the relationship between constitutional corporations and their employees, or is directed to protecting constitutional corporations from conduct intended and likely to cause loss or damage to them, it can be

characterised as a law with respect to corporations without needing to satisfy any additional requirement that the nature of a corporation (as a trading, financial or foreign corporation) is significant as an element in the nature or character of the law: [198].

— Thirdly, there was no basis in the text and structure of the Constitution, or in the historical context in which s 51(xxxv) was included in the Constitution, for reading down s 51(xx) by reference to s 51(xxxv). The majority referred to the general principle that 'a law with respect to a subject-matter within Commonwealth power does not cease to be valid because it affects a subject outside power or can be characterized as a law with respect to a subject-matter outside power': [219], see also [204]. Although s 51(xxxv) confers power in relation to particular means (conciliation and arbitration) for the prevention and settlement of a particular class of industrial disputes (interstate disputes), its text expresses the scope of the power as a compound conception rather than containing a positive prohibition or restriction upon what would otherwise be within its scope. There was, then, no reason to read s 51(xx) as subject to any such prohibition or restriction: [203], [219]–[222].

WRA validly regulates industrial rights and obligations

As a result, the majority upheld the validity under the corporations power of the provisions of the WRA that regulate the industrial rights and obligations of constitutional corporations and their employees. These include provisions dealing with:

— minimum terms and conditions of employment covering matters such as rates of pay, maximum hours of work, and leave entitlements, which together constitute the 'Australian Fair Pay and Conditions Standard' in Part 7 of the WRA ([246]), and other provisions relating to minimum entitlements of employees: [251]

— the making of workplace agreements, in Part 8 of the WRA ([252]), including provisions:

  – prohibiting certain content from being included in the agreements and proscribing conduct in relation to prohibited content: [275], [416]

  – regulating industrial action to do with the making of collective Workplace Agreements in Part 9: [258]–[261]

— the minimum entitlements of employees in relation to termination of employment set out in ss 637 and 643 of the WRA ([278]), and the interim exclusion of certain corporations (small businesses) from State laws regarding redundancy pay effected by Part VIAAA : [270].[6]

The majority also upheld these provisions as supported by the Territories power (s 122) in so far as they apply to employers incorporated in a Territory, or employers that carry on an activity in a Territory so far as the employer employs, or usually employs, an individual in connection with the activity carried on in the Territory: [335]–[343].

Registration and accountability of organisations

Schedule 1 sets up a system of registration, incorporation and regulation of industrial organisations (i.e. unions and employer organisations). Registered organisations have a range of rights and privileges under the WRA, including to intervene in matters before the Australian Industrial Relations Commission (AIRC), to be parties to collective agreements and to seek certain relief under the Act. In return for such rights and privileges, however, registered organisations are required to comply with various standards set out in Schedule 1.

The majority upheld the validity of Schedule 1, stating that:

> If it be accepted, as it should be for the argument on this branch of the plaintiffs' case, that it is within the corporations power for the Parliament to regulate employer–employee relationships and to set up a framework for this to be achieved, then it also is within power to authorise

registered bodies to perform certain functions within that scheme of regulation. It also is within power to require, as a condition of registration, that these organisations meet requirements of efficient and democratic conduct of their affairs. [322]

Excluding State and Territory laws (s 16 of the Act)

Section 16 of the WRA deals with the exclusion of certain State and Territory laws. In particular, s 16(1) provides that the WRA is intended to apply to the exclusion of the State and Territory laws identified in s 16(1)(a) to (e) (such as 'a State or Territory industrial law', a term defined in s 4(1)) so far as those laws would apply in relation to an employee or employer. Section 16(4) then provides for additional State and Territory laws – that the WRA is intended to apply to the exclusion of – to be prescribed by regulation.[7]

The majority rejected an argument that s 16 of the WRA is invalid as a bare attempt to exclude State laws. The majority accepted the Commonwealth's argument that s 16 validly indicated the 'field' that the WRA covers, even though the Act does not make detailed provision about every matter within that field which is dealt with by State and Territory law: [369]–[370]. Section 16 is not materially different from other Commonwealth provisions that had been upheld in previous decisions of the High Court: [372].

Other issues

A number of other challenges made by the plaintiffs to the WRA were rejected, including to the following:

— ***Broad regulation-making powers:*** The operation of several provisions in the WRA depends on the making of regulations, for example as to what content is prohibited from being included in workplace agreements (s 356),[8] and what additional State and Territory laws are excluded by s 16 (s 16(4)). The majority rejected arguments that these provisions involved an impermissible delegation of legislative power to the executive and thus were not 'laws': [375]–[376], [414]–[418], [420]. The majority did, however, state that the technique employed at least by s 356 was 'undesirable' (at [399]), and led to the ambit of the relevant regulation-making power being 'imprecise': [417].

— ***Transitional arrangements for employees/employers leaving the federal system:*** Schedule 6 of the WRA provides transitional arrangements for non-federal system employers and employees, who were bound by federal awards made under the pre-reform WRA, but who are not within the new system established by the Work Choices Act. During a five-year transitional period those employers and employees remain bound by the relevant awards, which are continued in operation as 'transitional awards' and are maintained by the AIRC, but within the limits specified in Schedule 6. The majority held Schedule 6 to be valid, including because it was part of the Commonwealth's staged dismantling of the previous system established pursuant to s 51(xxxv) of the Constitution: [307]–[308]. The majority similarly upheld transitional arrangements in Schedule 1 for organisations which may no longer be eligible for registration: [327].

— ***Rights of entry under State law:*** The plaintiffs attacked various provisions in Part 15 which prohibit certain persons from exercising a right under State law to enter premises for OH&S purposes, unless amongst other things the person also holds a permit under the WRA. Part 15 relevantly applies to a right to enter premises occupied or controlled by a constitutional corporation, or where the right relates to conduct of a constitutional corporation, or where the right relates to a contractor insofar as the contractor provides services to a constitutional corporation. In so applying, Part 15 is supported by the corporations power: [284]–[286].

— ***Freedom of association:*** Part 16 proscribes certain conduct to ensure that employers, employees and independent contractors are free to become, or not become, members of industrial associations and are not victimised because they are, or are not, such

members (s 778(1)). Part 16 is supported by the corporations power because it only applies to conduct by or against constitutional corporations, conduct whose ultimate purpose or effect is to cause harm to a constitutional corporation, and conduct affecting a person *in his or her capacity* as employee of, or contractor to, a constitutional corporation: [291]–[294].

— ***Restraining State industrial authorities:*** Section 117 confers power on the AIRC to make an order restraining a State industrial authority from dealing with a matter that is also the subject of proceedings before the AIRC. The majority rejected the plaintiffs' arguments that s 117 is contrary to s 106 of the Constitution (which provides for the continuation of the 'Constitution of each State'), or otherwise infringes what is known as the *Melbourne Corporation* doctrine, and held that s 117 is supported by the corporations power: [390]–[393]. The interference with the functioning of a State which s 117 permitted is 'relatively minor'.

Dissenting judgments

Justices Kirby and Callinan each delivered strongly worded dissenting judgments, drawing attention to the wide-ranging consequences of a broad view of the corporations power, given the role that corporations now play in modern life. For example, Kirby J stated:

> The States, correctly in my view, pointed to the potential of the Commonwealth's argument, if upheld, radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of the States' principal governmental activities. Such fields include education, where universities, tertiary colleges and a lately expanding cohort of private schools and colleges are already, or may easily become, incorporated. Likewise, in healthcare, where hospitals (public and private), clinics, hospices, pathology providers and medical practices are, or may readily become, incorporated. Similarly, with the privatisation and out-sourcing of activities formerly conducted by State governments, departments or statutory authorities, through corporatised bodies now providing services in town planning, security and protective activities, local transport, energy, environmental protection, aged and disability services, land and water conservation, agricultural activities, corrective services, gaming and racing, sport and recreation services, fisheries and many Aboriginal activities. All of the foregoing fields of regulation might potentially be changed, in whole or in part, from their traditional place as subjects of State law and regulation, to federal legal regulation, through the propounded ambit of the corporations power. [539]

In light of this the dissenting judges considered that s 51(xx) had to be read down in order to preserve the 'federal balance' in the Constitution.[9] Thus Callinan J stated:

> There is nothing in the text or the structure of the Constitution to suggest that the Commonwealth's powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society. This Court too is a creature of the Constitution. Its powers are defined in Ch III, and legislation made under it. The Court goes beyond power if it reshape[s] the federation. By doing that it also subverts the sacred and exclusive role of the people to do so under s 128. [779]

The dissenting judges then held that s 51(xx)[10] should be read down or restricted in its operation by reference to s 51(xxxv), with the result that Parliament has, in effect, no power to legislate with respect to the employment relationship between a constitutional corporation and its employees except pursuant to s 51(xxxv): [583], [913].

In reaching this conclusion, the dissenting judges also referred to:

— the history of failed referenda to amend the Constitution to confer power on the Commonwealth with respect to industrial matters more generally (Kirby J at [437], Callinan J at [707]–[735])

— s 51(xxxv) as protecting industrial fairness (Kirby J at [519]–[531])

— the assumption, by successive governments and courts, that s 51(xxxv) was the Commonwealth's only source of power to legislate with respect to industrial matters (Kirby J at [428]–[447]).

According to the dissenting judges, the core provisions of the WRA as amended were laws with respect to industrial disputes or industrial relations and were invalid for failing to comply with the limitations in s 51(xxxv) concerning conciliation and arbitration. Furthermore, as those core provisions could not be severed from the balance of the amendments, the entire Work Choices Act was invalid: [599], [912]. Kirby J also held that Schedule 6 and various 'opaque' regulation-making powers were invalid in their own right: [460].

Issues for the future?

Since the Work Choices Act several lower courts have had to address whether various employers are constitutional corporations and thus covered by the WRA. In the present case, the majority emphasised that the question of what is a constitutional corporation was not in issue in this case, and that any debate about that question 'must await a case in which [it] properly arise[s]' (see e.g. [55], [58], [86], [158], [185]). Similarly, the majority noted that no party had sought to reopen the *Incorporation case*[11] and thus that there was no occasion to consider further what it decided (namely that s 51(xx) does not confer a general power to incorporate trading or financial corporations): [137].

Text of the decision is available at:
http://www.austlii.edu.au/au/cases/cth/high_ct/2006/52.html

AGS lawyers advised on the constitutional basis of the Work Choices Act and acted for the Commonwealth in the High Court litigation. The Commonwealth's counsel in the litigation included the Commonwealth Solicitor-General David Bennett QC and AGS Chief General Counsel Henry Burmester QC.

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Notes

1 Parts of the WRA are also supported by other heads of power. Most notably, the operation of the WRA in Victoria is supported by a reference of power from that State pursuant to s 51(xxxvii) of the Constitution.

2 In relation to which the majority expressed some caution, stating that 'the answer to [the] question [whether a law is within power] is not to be found in attempting to attribute some collective subjective intention to all or any of those who participated in the Convention Debates': [120].

3 The majority concluded that 'There are insuperable difficulties in arguing from the failure of a proposal for constitutional amendment to any conclusion about the Constitution's meaning.': [131]–[135].

4 *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375 [83].

5 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

6 Part VIAAA has since been replaced by the more general exclusion of State laws effected by s 16 of the WRA.

7 According to the majority the kinds of laws that can be prescribed under s 16(4) are, however, limited by its statutory context: [361].

8 Section 356 provides: 'The regulations may specify matters that are prohibited content for the purposes of this Act'.

9 At [532]–[559] per Kirby J, and [774]-[797] per Callinan J.

10 And other heads of power, except for the defence power (s 51(vi), [569], [797]), probably the external affairs power (s 51(xxix), [573], [797]) and perhaps the Territories power (s 122, [573], [910]).

11 *NSW v The Commonwealth (The Incorporation Case)* (1990) 169 CLR 482.
