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Federal Labour Law and New Uses for the Corporations Power

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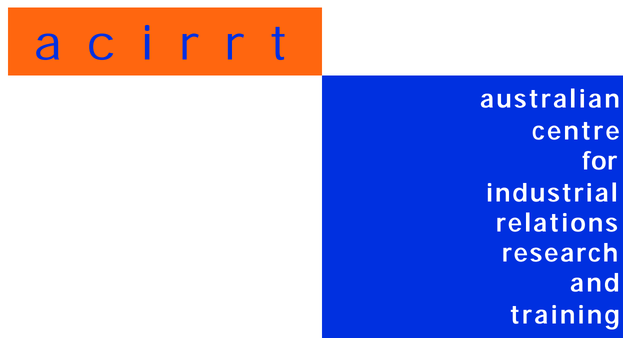

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Introduction: The Use and Limitations of the Arbitration Power

From the outset, federal regulation of industrial relations in Australia has been based predominantly on the arbitration power in section 51(35) of the Constitution. That section permits legislation "with respect to .. . conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".[1]

Outside the federal public sector, where the Commonwealth has been able to exert direct legislative control over employment conditions,[2] federal regulation has involved the establishment of a tribunal (currently the Australian Industrial Relations Commission or AIRC) to help resolve disputes that have an interstate dimension. In resolving those disputes, the tribunal has over time created a system of federal awards regulating wages and some (though not all) other employment conditions for a significant proportion of the Australian workforce.[3] The expansion of this system has been facilitated by the willingness of unions to manufacture "paper disputes" with employers in more than one State in order to attract the jurisdiction of the federal tribunal and ensure that its awards apply as widely as possible throughout particular industries or occupations.[4]

Thanks to a fairly liberal approach by the High Court over the years, the Commonwealth has also been able to use the arbitration power to make provision for the following matters, on the basis that they are "reasonably incidental" to the conciliation and arbitration of interstate industrial disputes:

- certification by the AIRC of agreements (including enterprise-level agreements) made in partial or complete settlement of interstate disputes which would, but for that certification, be subject to the AIRC's powers of conciliation and arbitration;[5]
- enforcement of awards and registered agreements made in settlement of industrial disputes;
- registration of unions and employer associations, and regulation of their internal affairs;[6]

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1 See generally B Creighton and A Stewart, *Labour Law: An Introduction*, 3rd ed, Federation Press, Sydney, 2000, pp 65–82; G Williams, *Labour Law and the Constitution*, Federation Press, Sydney, 1998, ch 2; W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials*, 2nd ed, Law Book Co, Sydney, 1993, chs 14–20.

2 Principally through the "public service" power in s 52(2), though also under whatever power allows the creation of a public instrumentality — for example, the power in s51(5) over "postal, telegraphic, telephonic and other like services" would permit regulation of employment conditions at bodies such as Australia Post and Telstra.

3 The proportion of the paid workforce that is presently covered by awards, and the balance between federal and State award coverage, are matters on which no up to date statistics are available. It seems likely that total award coverage is now somewhere between 70 and 80%, with perhaps just under half of those workers being subject to federal awards (see Creighton and Stewart, p 17, n 85); but it is certainly possible that this estimate overstates the reach of the award system.

4 For acceptance by the High Court of the constitutionality of this tactic, see eg *Attorney-General (Qld) v Riordan* (1997) 192 CLR 1.

5 See *Victoria v Commonwealth* (1996) 187 CLR 416.

- determination of the legality of industrial action taken by registered bodies or their members, or indeed by anyone if in connection with an interstate dispute or a federal award or agreement;[7] and
- prohibition of victimisation or discriminatory conduct by or against registered bodies, or relating to the membership of such bodies, or concerning the enforcement of entitlements established under the federal legislation.[8]

However there are a number of significant limitations or problems associated with use of the arbitration power as the principal source of federal regulation. At the most obvious level, the Commonwealth cannot use the power to regulate industrial relationships in any direct fashion, for instance by requiring certain employment conditions to be observed. Nor (according to the High Court) can it authorise a tribunal otherwise exercising powers of conciliation and arbitration to make "common rule" awards that bind persons who have no connection to the dispute originally before the tribunal.[9]

Hence, while the federal award system has assumed a much greater coverage than might have been expected by the framers of the arbitration power, its reach will always be limited if based only on that power. Since interstate disputes rarely occur spontaneously, federal award coverage is constantly dependent on unions manufacturing appropriate paper disputes. With some unions content to have State awards for some or all of the occupations or industries they cover, the result is a patchwork of regulation which causes particular inconvenience for employers who have workers covered by both federal and State instruments.

The potential exposure of employers to dual federal/State regulation has been exacerbated by the fact that some matters, such as workers compensation and various forms of leave, have typically been left to State legislation.[10] Nevertheless, where a federal award deals with a matter such as long service leave that is otherwise regulated by State legislation, the federal law prevails by virtue of s 109 of the Constitution.[11] Again, this can leave employers having to apply two different standards to different parts of their workforce.

There are also inconveniences associated with the paper dispute mechanism itself. For unions, these include the need to be constantly alert to "rope in" what may be dozens or even hundreds of new employers each year: for unless those employers join an employer

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6 See *Jumbunna Coal Mine, No Liability v Victorian Coal Miners Association* (1908) 6 CLR 309.

7 See *Victoria v Commonwealth* (1996) 187 CLR 416.

8 See *R v Bowen; Ex parte Amalgamated Metal Workers & Shipwrights' Union* (1980) 144 CLR 462; *R v Sweeney; Ex parte Northwest Exports Pty Ltd* (1981) 147 CLR 259.

9 *Australian Boot Trade Employees' Federation v Whybrow & Co* (1910) 11 CLR 311; *R v Kelly; Ex parte Victoria* (1950) 81 CLR 64.

10 The States have legislative powers which are not confined to particular subjects, but are regarded as "plenary" in nature: see eg *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.

11 See Creighton and Stewart, pp 95–7; Williams, ch 6.

association covered by a federal award, or take over the business of an employer already bound by that award, they will not automatically be subject to it.[12] For smaller businesses, on the other hand, it can be a shock to receive from a union a set of ambit claims which are designed to create an appropriate dispute. As Workplace Relations Minister Peter Reith skilfully demonstrated in his address to the National Press Club in Melbourne on 24 March 1999 (of which more later),[13] it is not hard to exploit community ignorance of the technicalities of, and indeed the need for, this very odd system. The Minister recounted an example of a "classic" small family business that had received a log of claims from the Australian Liquor Hospitality and Miscellaneous Workers Union demanding, among other things, a huge wage increase, a 30 hour working week, eight weeks' annual; leave, and so on. In response to the owner's question as to how such "standover" tactics could be used against "battlers like us trying to stay afloat", the Minister directed all blame to "the constitutional conciliation and arbitration power, as judicially interpreted by the courts, legislated by the parliament and supported by the Labor Party".[14]

Furthermore, the requirement that a federal award or agreement be made in settlement of an actual or threatened interstate dispute means that it is constantly necessary to be concerned with "ambit" issues — that is, whether, a provision in an award or agreement has some "rational" connection with an element of the dispute used to provide a legal foundation for the instrument in question.[15] Not only does this complicate the process of negotiating or finalising a dispute settlement, it may also provide ample opportunity for legal challenges by disgruntled parties.

Alternative Powers

There are, on the other hand, a range of other legislative powers in the Constitution to which the Commonwealth may turn if it wishes to regulate industrial relations or employment conditions without regard to the constraints imposed by the very particular wording of the arbitration power.[16] For example, it would seemingly be possible for a federal statute to impose obligations or confer rights on an employer or worker, provided:

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12 See *Workplace Relations Act* 1996 s 149(1).

13 The address is reproduced in "Getting the Outsiders Inside — Towards a Rational Workplace Relations System in Australia", Ministerial Discussion Paper, Department of Employment, Workplace Relations and Small Business, Canberra, April 1999.

14 Ibid, p 5.

15 See Creighton and Stewart, pp 72–4; and see eg *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Kirsch* (1938) 60 CLR 507 at 538.

16 See A Stewart, "Federal Regulation and the Use of Powers Other than the Industrial Power" in P Ronfeldt and RMcCallum (eds), *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations*, Monograph No 9, Australian Centre for Industrial Relations Research and Teaching, University of Sydney, 1993. Cf Committee of Review into Australian Industrial Relations Law and Systems (Hancock Committee), *Report*, Vol 2, AGPS, Canberra, paras 5.59, 6.62–6.66, recommending against the use of "exotic" powers.

- the employer or the worker were engaged in, or in close connection with, interstate or overseas trade or commerce (trade and commerce power — section 51(1));[17]
- the employer or the worker were engaged in a defence-related project, or Australia was at war at the time (defence power — section 51(6);[18]
- the employer was a financial, trading or foreign corporation (corporations power — section 51(20));[19]
- the obligations in question were mandated by a treaty which Australia had ratified, or otherwise represented a matter of significant international concern (external affairs power — section 51(29));[20]
- the employer or the worker were located in a State which had referred legislative authority to the Commonwealth over the obligations in question (section 51(37));[21] or
- the employer or the worker were located in a Territory (territories power — section 122).

(It is also possible to impose employment obligations indirectly through the taxation power in section 51(2), by imposing a tax penalty on any employer who does not act in a desired fashion. However while this method has been used to require minimum superannuation contributions,[22] and (formerly) to require a minimum level of spending on training,[23] more widespread use would almost certainly attract political controversy, not to mention High Court challenges. Accordingly it is not considered further in this paper.)

The downside of most of these powers is that they do not authorise *comprehensive* national regulation. The one that comes closest, if we exclude the unlikely possibility of all the States referring power to the Commonwealth under section 51(37), is the external affairs power. Provided an appropriate treaty can be identified, this at least permits legislation of universal application (subject to the limitations of Commonwealth power in relation to the State public

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17 See *R v Wright; Ex parte Waterside Workers Federation of Australia* (1955) 93 CLR 528; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120.

18 See *Pidoto v Victoria* (1943) 68 CLR 87.

19 The scope of the corporations power is discussed in the section that follows.

20 See *Victoria v Commonwealth* (1996) 187 CLR 416.

21 As Victoria, most notably, did in 1996: see *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic); *Workplace Relations and Other Legislation Amendment Act (No 2)* 1996 (Cth); S Kollmorgen, "Towards a Unitary National System of Industrial Relations?" (1997) 10 *Australian Journal of Labour Law* 158; and see also *Dempster v Comrie* [2000] FCA 253 (15 March 2000).

22 *Superannuation Guarantee Charge Act* 1992 (Cth); *Superannuation Guarantee (Administration) Act* 1992 (Cth).

23 *Training Guarantee Act* 1990 (Cth); *Training Guarantee (Assessment) Act* 1990 (Cth). The validity of these statutes, which were repealed in 1996, was upheld in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555.

sectors).[24] The problem is that while International Labour Organisation (ILO) Conventions deal with a wide range of employment issues, they are far from complete in their coverage. There is some possibility that one or two of the key Conventions dealing with freedom of association and promotion of collective bargaining[25] could be used as the basis for a complete system of agreement-making. However the risk of the High Court declaring such legislation unconstitutional would be very real, notwithstanding the broad view it has taken of the external affairs power.

In practice, the "alternative" powers listed above have for the most part been invoked by the Commonwealth to extend the reach of rules or processes of a kind already enacted under the arbitration power. Examples that may presently be found in the *Workplace Relations Act* 1996 include:

- authorising the AIRC to deal with disputes that occur in Victoria or a Territory, or that involve waterside workers, maritime employees or flight crew officers, even if an interstate dimension is lacking;[26]
- permitting the registration of agreements (Division 2 certified agreements and Australian Workplace Agreements) that are not necessarily made in settlement of an interstate dispute, so long as the employer is, for example, a trading, financial or foreign corporation, or located in Victoria or a Territory;[27] and
- empowering the AIRC to make common rule awards in the Territories.[28]

There are exceptions to this pattern, such as the use of the external affairs power by the Keating Government to establish "stand alone" laws on termination of employment and parental leave of a kind that did not formerly exist and were unlikely to have been possible under the arbitral power.[29] Also noteworthy under the Howard Government has been the use of State-referred powers to enact minimum standards on certain core employment conditions for Victorian workers.[30]

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24 Those limitations, which hinge on implications derived by the High Court from the federal nature of the Constitution, preclude federal regulation of employment conditions for "high-level" State employees, and also bar any attempt by the Commonwealth to determine the composition of a State's workforce: see *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; Creighton and Stewart, pp 89–92; Williams, pp 7–16.

25 For example, the Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87) and the Right to Organise and Collective Bargaining Convention 1949 (No 98).

26 *Workplace Relations Act* 1996 ss 5, 493; *Northern Territory (Self Government) Act* 1978 (Cth) s 53(1).

27 *Workplace Relations Act* 1996 ss 170LH, 170VC, 5AA, 494–495.

28 *Workplace Relations Act* 1996 ss 141–142.

29 *Industrial Relations Act* 1988 Pt VIA Divs 3, 5, as introduced by the *Industrial Relations Reform Act* 1993: see M Pittard, "International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment" (1994) 7 *Australian Journal of Labour Law* 170.

30 *Workplace Relations Act* 1996 Pt XV Div 3.

Normally, however, the alternative powers have been used only to supplement the arbitration power. This has added dramatically to the complexity of federal regulation, the most extreme example at present being the freedom of association provisions in Part XA of the *Workplace Relations Act* 1996. To determine whether these provisions apply to victimising or discriminatory conduct outside Victoria,[31] it is necessary first to ascertain if the conduct is caught by one of the prohibitions in Divisions 3, 4 or 5. It must then be determined whether one of a number of further criteria set out in Division 2 (each supported by a variety of different powers) also apply. For example, if an employer dismisses an employee for being a member of a trade union, this is on the face of it a breach of s 298K. But s298K will in fact only apply if the union in question is federally registered (s 298D), or the employer is a "constitutional corporation" (s 298G),[32] or the conduct takes place in a Territory (s 298H).[33]

The Reith Proposal

It is against this background that it is necessary to assess Peter Reith's proposal for a very different use of the corporations power, one that would substitute for the arbitration power rather than supplementing it.

The idea was first floated by the Minister in correspondence with the Prime Minister in December 1998 about labour market reform options,[34] and was then expanded in his aforementioned address to the National Press Club in March 1999. At this stage it does not in a formal sense represent government policy. Nevertheless, it is significant that the Coalition's efforts to make incremental adjustments to the reforms introduced in 1996 have stalled. Both the "second wave" amendments of 1999 and the more recent package of changes centred on the outlawing of "pattern bargaining" have fallen foul of Democrat opposition in the Senate.[35] There is also speculation that the High Court may be about to deal a further blow to the government, in ruling on a constitutional challenge by the CFMEU to key provisions in the 1996 legislation concerning award simplification.[36] Against that background, it has become common in industrial relations circles to speak of the Minister's proposal as foreshadowing a possible "third wave" of legislation — and one that might act as a circuit-breaker to the government's inability to pursue its preferred agenda on labour market regulation. Significantly, Democrats industrial relations spokesman Senator Andrew

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31 By reason of the reference of powers from Victoria, Part XA applies to *all* conduct in that State.

32 A "constitutional corporation" is defined in s 4(1) of the Act to mean a trading, financial or overseas corporation, a corporation formed in a Territory or a Commonwealth authority.

33 See eg *Rowe v Transport Workers Union of Australia* (1998) 160 ALR 66; and see further Creighton and Stewart, pp 284–8.

34 The correspondence was leaked to the media in February 1999, an outcome which seems to have perturbed the Minister not at all: see "Getting the Outsiders Inside", p 2.

35 See Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 (Cth); Workplace Relations Amendment Bill 2000 (Cth).

36 For earlier proceedings in this matter, see *Re Boulton; Ex parte Construction, Forestry, Mining and Energy Union* (1998) 85 IR 468; and see generally Creighton and Stewart, pp 133–9.

Murray has repeatedly expressed interest in the idea of making greater use of the corporations power,[37] at the same time that he has been helping to block the government's other reforms.

As presented in March 1999, the Minister's proposal would seek to dispense with some of the complex and technical processes demanded by the arbitration power, notably the artificial creation of interstate disputes so as to confer jurisdiction on the AIRC. Using the corporations power as the basis for federal regulation, it is said to be possible for "a coherent national framework of minimum standards to be established for the conduct of workplace relations in corporations", thus ending (at least in those workplaces) dual federal/State regulation.[38] Federal awards would be able to "operate on a common rule basis (applicable to all corporations) rather than the current respondency basis". They could also provide "a more secure safety net of conditions to be specified across the workforce (where employed by corporations) and into award-free areas, rather than simply be orders made within the ambit of prescribed disputes".[39]

The idea of using the corporations power as the basis for a radically different approach by the Commonwealth to labour regulation is hardly a new one.[40] But this is perhaps the first time that the notion has been seriously entertained by a party in government. It remains to be seen just how committed the Minister is in terms of following through on his suggestion — especially in light of the political obstacles that are sketched out later in this paper. One thing seems clear, however: the Minister would not have been allowed to float the idea, and to keep it alive in speeches and other public comments over a period of more than a year,[41] if he did not have at least tentative support from the Prime Minister and a majority of his Cabinet colleagues.

Scope of the Corporations Power

Before analysing both the Reith proposal and other possible options for using the corporations power, it is useful to review what the power does and does not cover. Section 51(20) authorises the Commonwealth Parliament to enact legislation "with respect to . . . foreign corporations, and trading and financial corporations formed within the limit of the

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37 See eg "Democrats see merit in Reith plan" *Daily Telegraph*, 26 March 1999, p 26; "Murray hints at Bill agreement, talks up unitary system" *Workforce*, Issue 1258, 26 May 2000, p 2.

38 "Getting the Outsiders Inside", p 2.

39 Ibid, p 8.

40 See eg J O'Donovan, "Can the Contract of Employment Be Regulated Through the Corporations Power?" (1977) 51 *Australian Law Journal* 234; G F Smith and R C McCallum, "A Legal Framework for the Establishment of Institutional Collective Bargaining in Australia" (1984) 26 *Journal of Industrial Relations* 3; I F C Spry, "Constitutional Aspects of Deregulating the Labour Market" in *Arbitration in Contempt*, H R Nicholls Society, Melbourne, 1986; S E K Hulme, "A Constitutional Basis for the Federal Coalition's Industrial Relations Policy — and Related Matters" (1993) 4 *Economic and Labour Relations Review* 62.

41 For a recent example, see "Ongoing Reform in the New Workplace", Address to the Industrial Relations Society of NSW, Bowral, 19 May 2000.

Commonwealth". The two key issues here are the scope of the terms "trading" and "financial", and the breadth of the power to make laws "with respect to" such corporations.

As to the former question, the High Court has come to take a very broad view of what constitutes a "trading" or "financial" corporation. It is sufficient that trading or financial activities represent a substantial part of what the corporation does, irrespective of the purpose for which it was established.[42] On this test, it would seem that besides the many companies operating for profit, a wide range of "non-commercial" bodies may come within the reach of the power, such as local councils,[43] public universities[44] and providers of medical or emergency services.[45] Only a relatively small number of incorporated bodies would be excluded: some charities and community service organisations,[46] and perhaps also (ironically) registered trade unions.[47] On the other hand, it is worth emphasising that many smaller employers in Australia are not incorporated at all, but rather operate as sole traders or partnerships. In 1997, for example, the ABS estimated that around 26% of all employees in the private sector were working in such businesses.[48]

As to what kind of laws the Commonwealth can pass under the corporations power, there has never really been a definitive High Court decision on its scope.[49] Since the 1971 case of *Strickland v Rocla Concrete Pipes Ltd*,[50] it has been clear that the Commonwealth may at the very least regulate the trading activities of the kinds of corporations mentioned in s 51(20). It is also possible for a law to impose duties on a person or body that is not a

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42 *R v Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190 (football clubs and football league "trading" corporations); *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 (superannuation board a "financial" corporation); *Commonwealth v Tasmania* (1983) 158 CLR 1 (public utility a "trading" corporation).

43 *Todd v City of Armadale* (1998) 44 AILR para 3-812; *Burrows v Shire of Esperance* (1998) 86 IR 75. Cf *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533.

44 *Quickenden v O'Connor* (1999) 166 ALR 385; *National Tertiary Education Industry Union v University of Wollongong* [1997] AIRC 574 (4 June 1997); *University of Western Australia v National Tertiary Education Industry Union* [1997] AIRC 681 (20 June 1997).

45 *Jones v Aboriginal Medical Service* [1997] AIRC 557 (25 September 1997); *United Firefighters Union v Metropolitan Fire and Emergency Services Board* (1998) 44 AILR para 3-842.

46 See eg *Fowler v Syd-West Personnel Ltd* (1998) 44 AILR para 3-836 (company funded by government grants to establish employment programmes for people with disabilities not a trading corporation); but cf *Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane* [1997] AIRC 1038 (27 April 1997); *Belcher v Aboriginal Rights League Inc* (1999) 45 AILR para 4-045 (services found to be trading corporations, since although government funded they received fees for services from some clients).

47 This point was raised but not decided in *Rowe v Transport Workers Union of Australia* (1998) 160 ALR 66.

48 "1.2 million workers in the cold" *Workforce*, Issue 1114, 9 May 1997, p 1.

49 As to what follows, see further W J Ford, "Reconstructing Australian Labour Law: A Constitutional Perspective" (1997) 10 *Australian Journal of Labour Law* 1 at 20–30; Williams, pp 112–20.

50 (1971) 124 CLR 468.

constitutional corporation and still be valid under the power, provided the law has a sufficient connection to such corporations — as with the "secondary boycotts" provisions in s 45D of the *Trade Practices Act* 1974, which seek to protect corporations from damage to their trading activities.[51]

Beyond that, it has sometimes been suggested by members of the Court (especially Murphy J) that the power would justify virtually any kind of law directed to corporations, and would certainly allow regulation of the employment conditions and industrial relations at a corporate employer.[52] That there are limits to the reach of the power, however, clearly emerges from *Re Dingjan; Ex parte Wagner*,[53] the Court's most recent opportunity to review the scope of s 51(20). It was stressed by a number of judges in that case that a law could not be said to be valid *merely* because it was directed at or concerned a corporation of the relevant kind: the Commonwealth may not, in other words, simply use a reference to a corporation as a "peg" on which to hang any kind of law.[54]

Nevertheless, a majority in *Dingjan* adopted what on any basis was a broad view of the power. For Mason CJ, Deane and Gaudron JJ, a law would be valid so long as it was "expressed to operate on or by reference to the business functions, activities or relationships" of corporations.[55] McHugh J adopted a slightly narrower approach, in that he would require a law to have "*some significance* for the activities, functions, relationships or business of the corporation".[56] On the facts of the case, he joined with the remaining three judges in striking down s 127C(1)(b) of what was then the *Industrial Relations Act* 1988, which permitted an independent contractor to challenge the fairness of their contract, provided it was one "relating to the business" of a corporation. Since the contract need not be with the corporation, nor have any particular significance for the corporation, the connection was regarded as too remote. Nevertheless, the test used by McHugh J is plainly more akin to that of the dissentients (who would have upheld s127C(1)(b)) than to the approaches taken by the other majority judges. Of the latter, Brennan J spoke of the need for a law to affect a corporation in a different manner to other persons in order for that law to be valid (the "discrimination" test);[57] Toohey J required a relationship between the law and a corporation's "rights, duties, powers or privileges" that must be more than tenuous;[58] and most narrowly of all, Dawson J demanded that the law relate to the "trading" or "financial" character of a corporation.[59]

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51 See *Actors & Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, upholding the validity of such provisions; and see also *Rowe v TWU* (1998) 160 ALR 66.

52 See eg *Actors & Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 207–8, 212; *Commonwealth v Tasmania* (1983) 158 CLR 1 at 148–53, 179, 269–71.

53 (1995) 183 CLR 323.

54 Ibid at 339, 344–5, 353, 369–70.

55 Ibid at 364; and see also 333–4, 342.

56 Ibid at 369.

57 Ibid at 336–7..

58 Ibid at 352–3.

59 Ibid at 346.

If we assume then that the Commonwealth may legitimately use s 51(20) to pass laws which have some significance for its "activities, functions, relationships or business", where does that leave the possibility for regulation of employment conditions and workplace relations? The term "relationships" would plainly encompass a corporation's relations with its workforce and with any unions representing that workforce, matters which are also intimately connected with its "activities", "functions" or "business". It is likely therefore that the power would support legislation which provided for any or all of the following:

- the conciliation and arbitration of industrial disputes involving corporations;
- the applicability to corporations of employment conditions stipulated by tribunals or indeed by the legislation itself;
- the certification of individual or collective agreements to which a corporation was party;
- the regulation of matters incidental to any of the above, such as bargaining tactics (including industrial action), victimisation of various kinds and (possibly) registration of unions and employer associations.

This surmise is supported by the High Court's decision in *Victoria v Commonwealth*[60] to accept without question a concession by the applicants as to the validity of the provisions in Division 3 of Part VIB of the *Industrial Relations Act* 1988 permitting constitutional corporations to enter into non-union "enterprise flexibility agreements" with their workers. It is also reinforced by subsequent decisions of the Federal Court upholding the use of the corporations power to underpin the provisions in Part XA of the *Workplace Relations Act* 1996 concerning freedom of association and victimisation, and also those permitting certification of agreements under Division 2 of Part VIB.[61] In each instance, the court applied the "activities, functions, relationships or business" test, on the basis that this represented the view of a majority of judges in *Dingjan*.

Options for Using the Corporations Power

On the face of it then, the option floated by Peter Reith of underpinning federal industrial regulation with the corporations power rather than the arbitration power would seem to be soundly based, at least in terms of constitutionality — though it must always be recognised that a differently constituted High Court in the future may yet adopt one of the narrower views expressed in *Dingjan*. There are in any event other options too which might be considered, each involving a greater use of the corporations power than at present. The various options are outlined in the sections that follow, together with an assessment of some of their respective advantages and disadvantages.

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60 (1996) 187 CLR 416 at 539.

61 *Rowe v TWU* (1998) 160 ALR 66; *Quickenden v O'Connor* (1999) 166 ALR 385.

Option A — Substitute the Corporations Power for the Arbitration Power

What it entails: Dispensing with the arbitration power in favour of the corporations power would provide the Commonwealth with a greater range of options as to the kind of regulatory system it could adopt. For example it might (as the Minister was at pains to point out in his March 1999 address) choose to retain a system which involved the conciliation and arbitration of disputes and the making of awards for corporations and their workers, but remove many of the technicalities and limitations of the current model — for example by authorising the AIRC to make common rule awards and by dispensing with the need to identify and name individual respondents.

How much of an impact such a system would have on the operation of State laws would depend on how the power to set common rules was exercised. To take one extreme, if the federal tribunal were directed to make awards applying to every conceivable kind of employment, or took it upon itself to do so, the entire corporate sector could become the preserve of the federal system, leaving State awards to apply only to non-corporate employers. If on the other hand the tribunal were directed not to intrude without good reason into industries or occupations traditionally regulated by State awards, as the present legislation effectively provides,[62] the impact of the new system would be much more modest.

It would also be possible for the Commonwealth to supplement the operation of the arbitration system by directly regulating certain employment conditions. This might mean, for corporate workplaces at least, supplanting State legislation on matters such as annual leave, sick leave, long service leave and employment termination — though probably not workers compensation and occupational health and safety, which require attendant bureaucracies that the Commonwealth would probably prefer to leave to the States. (If there is to be national and universal regulation of those matters, as many believe should be the case, it is better done under the external affairs power in any event.[63])

Equally, however, the Commonwealth could abolish any system of conciliation and arbitration and choose to regulate industrial relations and employment conditions at corporations in a very different manner. The Minister's March 1999 address is peppered with attacks on the role of third parties in workplace relations, and on the "industrial relations club and its intelligentsia in the Labor Party" who persist in defending a system that treats employers and employees as "outsiders".[64] These suggest that his real target is the role that unions and the AIRC currently play under the current system in regulating wages and conditions, not merely the need for the creation of artificial disputes as part of that system. Given the tenor of the address as a whole, not to mention the Coalition's decade-long interest in radical reform,[65] one might reasonably expect he and his colleagues to be

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62 *Workplace Relations Act* 1996 s 111AAA: see Creighton and Stewart, pp 114–16.

63 See Creighton and Stewart, pp 447–8.

64 "Getting the Outsiders Inside", p 6.

65 See especially Liberal and National Parties, *Jobsback*, 1992; though cf the compromises evident after the 1993 election defeat in *Better Pay for Better Work* (1996) and *More Jobs, Better Pay* (1998).

committed (at least in the longer term) to instituting a system of individual agreements backed by a small number of legislated minimum standards, with no formal role for either unions or tribunals.

Advantages: A conciliation and arbitration system based on the corporations power would not need to involve the hassle and complexity of manufacturing paper disputes, pursuing roping-in awards, or arguing about ambit. The availability of common rules would mean that federal awards could have wider and more consistent coverage, extending throughout an industry or occupation and automatically applying to greenfield sites. Aside from (potentially) simplifying the operation of the federal system, many corporate employers could also benefit from not having to cope with the operation of both federal and State regulation on most issues, depending (as discussed above) on the extent to which the new federal awards were allowed to intrude into areas traditionally left to the States.

Disadvantages: Switching the basis of federal arbitration to the corporations power would obviously mean that a sizeable group of workers would "drop out" of the federal award system — those working in non-corporate organisations, or in corporations which cannot be categorised as trading, financial or foreign. Moreover they would not necessarily become subject to State awards, since in many instances there would simply be no applicable instrument. Such a consequence might well be regarded as unpalatable by sections of the labour movement.

Looking at it from another perspective, there might also be objections from many of the employers who would cease to be covered by the federal system, especially if they felt that they were being exposed to State regulation in jurisdictions with governments and/or tribunals less inclined to favour business interests. Since most of these employers would tend to be small businesses, the "natural" constituency of the conservative parties, this point may have particular significance for the Coalition.

A further source of discontent and opposition would in all likelihood be the States — especially the more parochial ones such as Queensland, Western Australia and Tasmania — which might well mount both political and constitutional challenges in order to preserve the operation of their own systems. One can imagine many State politicians bridling at the suggestion (very much apparent in the Minister's March 1999 address) that they choose between being "relegated" to deal with the non-corporate sector and handing over power to the Commonwealth to do so.

There is a further disadvantage of switching to the corporations power, at least for those philosophically committed to the traditional system of conciliation and arbitration. While that system might for a time survive, severance of the link to the arbitration power might well be seen as a symbolic move which would legitimate the replacement of the system by other, quite different forms of regulation. In other words — and this has surely occurred to the present Minister! — the transformation of the arbitration system into one capable of operating without the need for a dispute as such, and of being overridden by direct statutory regulation of conditions, might simply lay the groundwork for the abandonment of compulsory conciliation and arbitration altogether.

Trade unions might also object to the fact that their role in a new corporations-based system would be less central than it has tended to be under the present system, even if some form of arbitration mechanism were retained. Without the requirement for interstate disputes to be created, and indeed with the federal tribunal presumably able to act of its motion to make or vary awards, the scope of the award system would no longer hinge so much on the strategic decisions taken by unions. This is not to say, of course, that unions would not play an important part in such a system: in practice, they would in all probability remain significant agents for change.

On the subject of unions, there might also be some question as to whether the Commonwealth could validly provide under the corporations power for the registration and incorporation of unions and for control of their internal affairs. Should the thrust of legislation under that power still be to facilitate collective bargaining and/or the resolution of disputes affecting corporations, regulation of unions and their affairs would arguably still be reasonably incidental to the attainment of those objectives. But it might be otherwise if the federal statute did no more than deal with individual agreements and minimum employment conditions.

Option B — Use the Corporations Power and Plug Gaps with Other Powers

What it entails: There are certain obvious strategies for extending the reach of a regulatory system otherwise based on the corporations power. Aside from including the federal public sector, the Commonwealth could extend such a system with relatively little difficulty to employment relationships that involved work in a Territory, or in a State (such as Victoria) which had referred appropriate powers to the Commonwealth, or in connection with interstate or overseas trade or commerce.

The Commonwealth could in addition use the external affairs power to impose national regulation on certain matters covered by ILO Conventions and other international treaties, so as to protect workers even if they fell outside the new federal system. Aside from existing regulation on discrimination and parental leave,[66] this might extend to matters such as termination of employment, minimum wages and collective bargaining.[67]

It would also be possible, presumably, to use the arbitration power to make transitional arrangements for workers with non-corporate employers who were no longer covered by a new federal arbitration system. For example, it might be provided that federal awards

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66 See *Racial Discrimination Act* 1975; *Sex Discrimination Act* 1984; *Human Rights and Equal Opportunity Commission Act* 1986; *Disability Discrimination Act* 1992; *Workplace Relations Act* 1996 Pt VIA Div 5. This legislation gives effect to a variety of international instruments, including the ILO's Discrimination (Employment and Occupation) Convention 1958 (No 111) and Workers with Family Responsibilities Convention 1981 (No 156).

67 Relevant instruments for this purpose might include the ILO's Termination of Employment Convention 1982 (No 158), Minimum Wage-Fixing Convention 1970 (No 131) and Right to Organise and Collective Bargaining Convention 1949 (No 98).

and/or agreements made under the old system would remain binding until superseded by a new award/agreement, or until revoked by the federal tribunal on the basis that appropriate provision had subsequently been made under State law. This would ensure at least some protection of existing conditions for those excluded from the new system. Subject to what the High Court may be about to say in the *CFMEU* case,[68] this would seem a valid exercise of the arbitration power, since it would simply involve continuing in force instruments properly made in settlement of an interstate dispute that had existed at some point in the past.

Advantages: The obvious gain (in addition to those articulated in relation to Option A) would be a reduction in the number of workers disadvantaged by a switch to a corporations-based system. Indeed if more States were prepared to follow Victoria's lead in referring some or all of their powers, something they might be more inclined to contemplate if already faced with the prospect of "losing" most if not all corporate employers to federal coverage, momentum could quickly develop for a genuinely national system.

Disadvantages: But the more likely scenario is that most of the States would continue to find reasons to maintain their own systems, meaning that even if all available powers were used by the Commonwealth, gaps in coverage would remain. Furthermore, any transitional protection provided by the continuation in force of "old" awards or agreements would decline in value over time, particularly where wage rates were concerned.

Option C — Use Both Corporation and Arbitration Powers in Parallel

What it entails: Rather than substitute the corporations power for the arbitration power, or use the corporations power merely to extend the operation of a system otherwise based on the arbitration power (see Option D), it is possible to envisage a dual system of regulation which would in effect involve a new corporations-based regime (as per Options A or B) operating alongside the existing regime.

There is a clear precedent for this in the present *Workplace Relations Act* 1996, in the form of the provision made in Part VIB for the certification of agreements under either Division 2 or Division 3. The former generally requires that the employer concerned be a constitutional corporation or be located in Victoria or a Territory. The latter can be accessed by any type of employer, but generally requires that each agreement be made in settlement of an interstate dispute. Thanks also to a quirk of the arbitration power, as interpreted by the High Court, Division 3 agreements may not validly impose obligations on non-union employees, while Division 2 is unaffected by that limitation.[69] Some employers may only be able to have an agreement certified if they proceed under Division 2; with

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68 As noted earlier, this is the challenge to the constitutional validity of some of the award simplification provisions introduced as part of the 1996 reforms.

69 See *Re National Tertiary Education Industry Union; Ex parte Quickenden* (1996) 71 ALJR 75; *Quickenden v O'Connor* (1999) 166 ALR 385.

others it may be the reverse. Others still effectively have a choice — and generally opt for Division 2 because it is simpler and does not have the problem with binding non-unionists.

Similarly, it would be possible to confer jurisdiction on the AIRC to make and vary awards that would be binding on corporations (and employers in Victoria or a Territory, etc) regardless of the existence or scope of any particular dispute. Unions would still, however, be able to manufacture paper disputes so as to obtain or update awards binding on identified non-corporate employers in States which had not referred power to the Commonwealth. As with certified agreements at present, the federal statute would have separate provisions dealing with the two types of award, while for many purposes imposing common requirements and indeed often dealing with them in an undifferentiated fashion.

There could also be direct federal regulation of some employment conditions for corporate employers, while leaving other employers to be subject (as is generally the case at present) to a mixture of State legislation and federal award provisions.

Advantages: This approach would obviously overcome the problem of having a significant percentage of the workforce drop out of the federal system and (in many instances) join the ranks of the award-free. It would also involve less radical change to the present system.

Disadvantages: Much of the advantages of Options A and B in terms of simplification would be lost, except to the extent that corporate employers at least might be freed from the complexities of the present award system and of much dual federal/State regulation. The technicalities and peculiarities of the paper dispute-driven award system would remain, even though (just as with certified agreements) it might be expected that the "corporations stream" would quickly assume much greater importance in terms of coverage of the workforce. Unions would still, therefore, have to worry about roping-in and the like. Moreover even if concomitant action were taken (as it ought to be in any event) to simplify the existing provisions in the federal statute, a reform of this kind would further add to the overall complexity of the legislation.

It would also seem likely that most States would object to this model as much as to Options A or B — in fact even more so, perhaps, since any loss of coverage of corporate employers would not on this scenario be balanced or compensated by non-corporate employers dropping out of the federal system.

Option D — Extend the Supplementary Use of the Corporations Power

What it entails: There are various ways in which the corporations power could be used to extend the reach of the federal arbitration system, just as the trade and commerce and territories powers have been, without altering the central character of that system as being one based on the arbitration power. Most obviously, the AIRC could be empowered to deal with any dispute that involved a corporation, regardless of the lack of any interstate dimension. It could also be empowered to extend awards made in settlement of a particular dispute to apply by way of common rule to any corporation operating in the relevant

industry or employing workers in the relevant type of job. The more these sort of options are pursued, of course, the more that the outcome begins to look like Option C.

Advantages: See Option C.

Disadvantages: The more "supplementation" that occurred, the higher the resulting degree of complexity, and the more strenuous the opposition from the States: see Option C.

Conclusion

This paper has sketched out in a fairly general fashion what some of the options might be for making greater use of the corporations power in particular. In terms both of improving the simplicity and efficiency of federal regulation, and of hastening the abandonment of State regulation in favour of a single, national system, there is much to be said for Option B — especially if it involved extensive use of the external affairs power to impose national standards in key areas such as wages and job security, and the "freezing" of federal awards to offer protection over a transitional period to those workers excluded from the new federal system.

In reality, however, it may be that the short-term political pain associated with that option will force both major parties to look at Options C or D — if they are prepared to go down the corporations power track at all.