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Nationalisation of the industrial relations system

There are four major heads of power used by the Commonwealth to legislate in industrial relations. Each of these has constitutional limitations in establishing a national industrial relations system.

This article concentrates on one of these powers, the corporations power, and its use in industrial relations in the light of the WorkChoices legislation.1

The legislation

The federal government has attempted to establish a national industrial relations system by the passing of the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) in December 2005. This voluminous piece of legislation has not repealed the Workplace Relations Act 1996 (Cth) (the Act). However, it has rewritten the Act so that almost no section number after the amendment remains the same.

In essence, the reforms attempt to move employees away from awards at state and federal level and place them onto individual workplace agreements. Five minimum conditions will be protected in legislation. They are:

- maximum ordinary hours a week may be averaged over 12 months;
- annual leave of four weeks per year, plus an additional week's leave for shift workers;
- parental leave of 52 weeks unpaid leave;
- personal leave of 10 days a year of which all 10 days can be used for carer's leave; two additional days for unpaid carer's leave and two day compassionate leave per occasion; and
- minimum wage rates to be set by the Australian Fair Pay Commission.

Generally any other conditions are to be negotiated between the parties.

The WorkChoices legislation also attempts to establish a national industrial relations system. This has never occurred before in Australia's history. The Constitution does not have an industrial relations power that enables the Commonwealth...
The federal government’s use of the corporations power in the Constitution to establish its national industrial relations system is under challenge from the states. By Victoria Lambropoulos

...
The corporations power has never been used this comprehensively in the field of industrial relations.

Victoria v Commonwealth. The High Court upheld most of the provisions. However, by the time the decision was handed down, the Coalition government had been voted in and repealed the Industrial Relations Act 1996 (Cth).

Victoria v Commonwealth shows that the Commonwealth does have power to legislate on industrial matters directly that can potentially cover all employees so long as the legislation is implementing international treaties.

The Coalition government has not chosen this route, perhaps because of the "anti-pitily towards the ILO and to standards emanating from that body." The ILO conventions are the major source of international labour law. These are the treaties that would likely be the most relevant and would serve the basis for the exercise of commonwealth power in this area. The federal government would not be able, for example, to legislate to exclude unfair dismissal for most employees as it has done through WorkChoices.

Trade and commerce power: s51(x)

Section s51(x) of the Constitution empowers the Commonwealth to legislate with respect to "trade and commerce with other countries, and among States".

Under the current interpretation of the power, the Commonwealth could not legislate to implement a national industrial system as it cannot regulate interstate commercial activity. To establish a national industrial system, regulation of interstate activity is essential.

The case law has narrowly confined the scope of the power to maintain a separation between interstate and intrastate commerce. The last time the High Court examined the power to a significant extent was in 1976 in Attorney-General (WA) v Australian National Airlines Commission (the third airlines case).

Some commentators have argued for a broad view of the power based on the US commerce power as it is similar to the Australian power in its wording. An expanded commerce clause would be able to provide the foundation for a national industrial system as it has for the US. In the US, Congress has introduced legislation that directly provides for minimum conditions of employment nationally.

The trade and commerce power has been used to legislate in this area; however, it has always been used in conjunction with other powers. If the Commonwealth was permitted to regulate intrastate activity, then a national system could be established for minimum employment conditions on the basis that it was essential to our national economy. Further dispute resolution mechanisms and regulation of unions could be upheld by an expanded commerce power.

There has not been a case since 1976 which has examined the commerce power. It is uncertain what a modern court would do. Given this uncertainty, the federal government would not use this power.

Corporations power: s51(zz)

The corporations power has been used by the federal government to establish a national industrial relations system in an attempt to cover the field, to the exclusion of the states' industrial powers. The corporations power has never been used this comprehensively in the field of industrial relations. It remains to be seen whether the use of the power in this way will withstand constitutional challenge.

This power can only cover corporations and therefore partnerships and sole traders are not affected by the reforms, unless they are in Victoria. Therefore, a truly national system is impossible under this power. The case law is examined below.

Section s51(zz) authorises the federal Parliament to enact legislation with respect to "...foreign corporations, and trading and financial corporations, formed within the limit of the Commonwealth".

The jurisprudence has centred around the scope of the terms "trading" and "financial", and the breadth of the power to make laws with respect to corporations. It is the second issue which has greater relevance in the industrial relations area.

The High Court has given a broad meaning to the words "trading" and "financial". It is sufficient that the trading or financial activities represent a substantial part of what the corporation does. The activities need not be predominant.

Furthermore, the purpose for which the corporation was established is irrelevant. Therefore the Australian Red Cross and the Prince Alfred Hospital were trading corporations, as they derived substantial income from trading activities. Many not-for-profit organisations would come within the reach of the corporations power, such as local councils, public universities, and providers of medical or emergency services.

"Only a small number of incorporated bodies would be excluded, some charities and community service organisations and, perhaps also ironically, registered trade unions."

The precise scope of the corporations power in the area of industrial relations has not been accurately defined by the High Court. However, it can be assumed from the decisions of Re Dingjan; Ex Parte Wagner and Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union that the power does extend specifically to employment conditions or industrial relationships of these corporations. The law will not, however, be valid if it "merely refers to or operates upon the existence of a corporate function or relationship or category of corporate behaviour."

The Commonwealth cannot use the word "corporations" as a mere reference in enacting a law. Thus, in Dingjan the law was not held as a valid exercise of the corporations power. The relevant sections permitted an independent contractor to challenge the fairness of their contract, as long as the contract related to the business of the corporation. In essence, as there was no essence for the contract to be with the corporation or have a significant connection with the corporation, the nexus with the corporations was too remote.

In Victoria v Commonwealth, the High Court upheld the provisions passed in reliance on the corporations power by the then Keating Labor government. Some of the provisions that were upheld have already been discussed in the section on the external affairs power (above). Part of the new provisions based on the corporations power empowered the AIRC to approve enterprise flexibility agreements that were made between
employees and employers which were defined as constitutional corporations.

The specific argument that the Commonwealth had the power to legislate as to the industrial rights and obligations of constitutional corporations and their employees was, however, conceded in argument and therefore the validity of the legislation in this regard was not in issue. It remains to be seen whether this argument would be upheld. This is where the uncertainty regarding the use of the power lies.  

"If the concession from Victoria v Commonwealth is upheld the Corporations power may serve the basis for the following:

• the conciliation and arbitration of industrial disputes involving corporations;
• the applicability to corporations of employment conditions stipulated by tribunals (commission) or directly by legislation;
• the certification of individual or collective agreements between employees and employers who are constitutional corporations;
• the regulation of matters incidental to any of these matters." These are all matters covered by the WorkChoices legislation. It is important to note that the previous cases were not decided in the context of such an expansive use of the power. "It is new territory, however, whether the Corporations power allows the Commonwealth to set five guaranteed working conditions, and to take away most of the powers of State tribunals, by vastly reducing the number of State awards." As noted, the federal government reforms will only cover corporations. The government's figures estimate only 10-15 per cent of the workforce is outside its reach under this power. It is unclear whether this figure takes into account incorporations that would not satisfy the threshold for trading or financial corporations mentioned above. Queensland government statistics state the federal system will cover no more than 75 per cent of employees nationally, and less than 60 per cent in Queensland, South Australia and Western Australia. What is clear is that this portion would predominantly be made up of small businesses operating as sole traders or partnerships. This portion presumably would be taken up by the states' systems. If a constitutional challenge is upheld, the federal government contends that state governments would then have little choice but to abandon their industrial relations systems, as their existence would not be justified to service such a small portion of the labour market. A further argument against the use of the corporations power has been put forward by Ron McCallum. He argues that the real fear is that "instead of our labour laws focusing upon the relations between employees and employers they would eventually become a subset of corporation law whereby the function of employees would be to enhance and bolster the economic activities of corporations".

This, he says, would be detrimental to employees long term and perhaps the workplace culture throughout Australia. Labour laws cannot merely be categorised as a function of trade and commerce. There are considerations of equity between employees and employers which have far more reaching effects on society. If the High Court finds in favour of the Commonwealth and allows the corporations power to be used in the way that it has been through the WorkChoices legislation, there are also implications for other areas of law. It will expand the Commonwealth's reach into other areas of law which have traditionally been the province of the states.  

Conclusion  
The passing of the WorkChoices legislation signifies an historical change in our labour laws. It remains to be seen whether it will survive a constitutional challenge by the states. If the legislation does survive a challenge, a national system is still not achievable through the corporations power. It may simply add a further layer of complication in this already complex area.

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2. Workplace Relations and Other Legislation Amendment Act (No 2) 1996 (Cth).  

3. State of NSW v Ch (S552) 2003; State of WA v Ch (P661) 2003; State of SA v Ch (H8) 2006; State of Qld v Ch (BY) 2006; Australian Workers Union & Amor v Ch (BS) 2006; Unions NSW & O's v Ch (S53) 2006; State of Victoria v Ch (MR2) 2006 – argument was heard before the High Court in May. It is uncertain at the time of writing this article when a decision will be handed down.

4. Australian Boat Trade Employees' Federation v Whydrow & Co (1991) 21 CLR 311; Ex parte Victoria (1951) 81 CLR 64.


8. Note 6 above, at 487 (CLR).

9. Note 6 above, at 488 (CLR).

10. Note 6 above, at 489 (CLR).

11. For a list of the IIL conventions relied on, see note 6 above, at 425, 542 and 543 (CLR).


15. David McCann, note 12 above, at 91.

16. The Act (as prior to reforms) uses the trade and commerce power to cover employment of flight crew officers, maritime employees or waterside workers, see also ss60 of the Act. See also G Williams, Labour Law and the Constitution, 1996, Federation Press, 2140.


18. See Stewart, note 5 above, at 955.

19. See Stewart, note 5 above, at 955.


22. Re Dingjan; Ex parte Wagner, note 20 above, McHugh J at 368-369.


24. Note 23 above, at 539 and 553.

25. Stewart, note 5 above, at 160.


27. The Hon Kevin Andrews MP, Minister for Employment and Workplace Relations, "Where do we want workplace relations to be in five years time?", speech to the Committee for Economic Development of Australia, Melbourne, 25 February 2005.

28. Queensland Department of Industrial Relations, Elaborating the Coverage of a New Industrial Relations System, Department of Industrial Relations, Brisbane, 2005.

29. Michelle Grattan and Megahan Shaw, "Canberra steps up push to take control of industrial relations", The Age, 25 February 2005.


31. Note 30 above.

32. Note 30 above.


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