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WorkChoices – the implications

Part 1 (John Cain)

On 14 November 2006 the High Court of Australia by a majority of 5-2 ruled that the *Workplace Relations Act 1996* as amended by the *Workplace Relations Amendment (WorkChoices) Act 2005* was valid in all respects. Whilst the decision did not surprise many commentators, as it had been widely anticipated that the Court would uphold the legislation, what surprised some commentators was that it was a clear and decisive ruling in relation to s 51(xx) of the *Constitution*. The full implications of the decision will take some time to become clear, but what we hope to do today is to provide you with some insight into the issues and implications arising from this decision.

According to at least two academics commenting on ABC radio on the morning of the decision the implications are significant. According to Professor Greg Craven:

If the High Court chooses to greatly widen that power, and to really say that the Commonwealth can regulate anything done to, by or around a trading corporation, then the Commonwealth will be able to control vast slabs of policy, simply by utilising that power.

The Dean of Law at Sydney University, Professor Ron McCallum, also commented

It's important because it will decide the extent of federal power, not only over labour relations, but over other ancillary areas, even areas of health and local government.

James Stephens, Natalie Blok and I will take you through various aspects of the decision. I will provide some background to the case and the implications of the decision insofar as they relate to industrial relations matters with particular reference to s 51(xxxv). James Stephens will talk in some detail about the corporations power – s 51(xx) and trading corporations, and Natalie Blok will talk to you about the regulation making power and s 109 of the *Constitution* implications. As you will no doubt appreciate it would be impossible to cover all aspects of a 400 page judgment in this presentation. There are, however, some general observations that can be made following this decision.

1. It may be wrong to suggest that WorkChoices is a ground breaking decision, as it only confirms a pattern of decisions of the court spanning many decades. According to Professor George Williams of Sydney University, writing in the Age newspaper on 15 November 'In one sense, the WorkChoices case is

exactly what was expected and is far from radical. It fits neatly into a long line of decisions'. The court has over the last 80 years incrementally eroded the power of the States and the WorkChoices decision is entirely consistent with this trend.

2. It is suggested that it is open to a Commonwealth Government to move into areas of traditional State activity, for example water, energy, gaming, health and education. Some States may attempt to limit this interference and re-establish agencies of government departments to operate some of these activities. This however would involve a significant shift in the pattern of government activity. Increasingly the public sector 'contracts out', 'privatises', 'engages in' 'public private partnerships', and generally seeks out structures other than government departments to do its business. The fact is that the activities of government have been increasingly contracted to the private sector, and public sector has a role to manage these contracts. Almost without exception these contracts are with a trading corporation. This pattern is well entrenched and will be difficult to change. The corporations power s 51(xx) gives the Commonwealth the power to legislate to control the activities of these trading corporations. The privatisation process means that the reach of Commonwealth laws is greater than it would have been otherwise. The related point is that a trading corporation is the entity of choice to engage in commercial activities in the private sector. The Commonwealth has largely unrestricted power to pass laws affecting the activities of trading corporations.

3. The States will have little or no role in industrial relations, the Commonwealth will set and manage the agenda. Even in those States that have a State-based industrial relations structures for non corporation employers and employees, they may come under pressure to dismantle these.

Background

In December 2005 the Commonwealth Parliament passed the *Workplace Relations Amendment (WorkChoices) Act 2005*. The legislation significantly amends the *Workplace Relations Act 1994* (WRA). The critical parts of the legislation came into operation on 27 March 2006. What made this Act substantially different from other industrial relations and workplace relations legislation was the constitutional basis underpinning the legislation. In this Act s 51(xx) the corporations power was relied upon as the source of legislative power. Previously workplace relations legislation had usually relied upon s 51(xxxv) as the source of power. There are some exceptions to this, for example, the Keating Government in 1993 used the External Affairs power to introduce entitlements to unpaid parental leave, and unfair dismissal and unlawful termination of employment protections, and the corporations power had been used for some aspects of workplace relations but not generally.

The challenge to the WorkChoices law was brought by five States – New South Wales, Victorian, Queensland, South Australia and Western Australia, and in addition Tasmania, the Northern Territory and the Australian Capital Territory intervened in support. In addition to the States and Territories, Unions New South Wales, the

equivalent of the Victorian Trades Hall Council, lodged a challenge as did the Australian Workers Union, Australia's oldest unions. There were in all seven separate proceedings which challenged the validity of the *Workplace Relations Amendment (WorkChoices) Act 2005* Chief Justice Gleeson, Justices Gummow, Heydon, Hayne and Crennan formed the majority with Justices Kirby and Callinan each delivering dissenting judgments. All seven proceedings were dismissed and the Act has been upheld.

Victorian Industrial Relations landscape

The position in Victoria is slightly different to other States. Victoria has for some time not had a State-based industrial relation system. Prior to 1992, Victoria had the Industrial Relations Commission and a series of State awards with other industries subject to Federal awards. Between 1992 and 1996, the Victorian Government abolished the Industrial Relations Commission replacing it with the Employee Relations Commissioner Victoria and individual contracts with five minimum conditions for employees with no compulsory arbitration.

With the introduction of these changes a significant number of employees moved from the Victorian system to the Commonwealth system. Many unions whose members had been employed under State awards sought coverage under Federal Awards.

Between 1996 and 2004 Victoria referred its industrial relations powers to the Commonwealth Government. These referrals were not, however, complete referrals as Victoria preserved legislative power in particular areas, including occupational health and safety, workers compensation, trading hours, public holidays and long service leave

(see *Commonwealth Powers (Industrial Relation) Act 1996 (Vic)*).

As a consequence of this history, the impact of the WorkChoices decision in Victoria is different to that in other States.

What does the decision mean for employers and employees in Victoria

1. The *WorkChoices Act* will bind the vast majority of employers and employees in Victoria.
2. All employers in Victoria who are trading or financial corporations and all employees who are employed by them, including public sector employees employed by statutory authorities or bodies corporate that are trading and financial corporations, are subject to the Act. To this extent the Act will have an identical operation in Victoria on those employers and employees as it will in other States.
3. Where Victoria will differ from other States as a result of its referral to the Commonwealth is the operation of the Act on all non-corporate employers and their employees, including public sector employees. With a small number of exceptions non-corporates will be bound by the Act. This includes partnerships, trusts and individuals. This places Victoria in a different position in that the Act will apply to non-corporate employers and employees. In other States these employers and employees are subject to the State based industrial relations systems.
4. It should, however, be remembered as discussed above that there are a

number of matters that relate to the non-corporate employers and employees where the Commonwealth cannot legislate as they were not part of the referral to the Commonwealth. These include workers compensation, superannuation and equal opportunity.

Conciliation and Arbitration Power, s 51(xxxv)

The area that I now wish to turn to is that aspect of the challenge that relates to the operation of s 51(xxxv). This relates to the challenge to Part 8 (Workplace agreements) Part 9 (Industrial action) and Part 13 (Dispute resolution). Victoria argued that even if these parts were capable of being supported by s 51(xx) or s 51(1) they were nevertheless invalid as these parts related to the prevention and settlement of industrial disputes but did not satisfy the restrictions imposed by s 51(xxxv).

It was said that it was not possible to view the powers conferred by s 51 in a vacuum. They needed to be considered taking into account each of the provisions in that section. Some of the powers contained in s 51 contained express exception. For example, s 51(xiii) - the banking power and s 51(xiv) – the insurance power. Where there is such an express exception other heads of power need to be constrained or restricted to take account of that express exception to give full effect to the powers within s 51. Another example given was s 51(xxxi) – the acquisition of property power that acts as a limitation over a head of power in s 51. In the Victorian submission, it was said that some heads of power incorporate ‘a clear reservation from the subject-matter from the power conferred (see Victorian submissions at p 74). It was suggested that this principle should be taken into account when considering the interaction between s 51(xxxv) and s 51(xx) so as to limit the Commonwealth’s power of industrial

relations to the issues dealt with in s 51(xxxv) and that the balance of industrial relations issues were matters preserved for the States.

This argument received no support from the majority. They were not prepared to apply any restriction to the operation of s 51(xx) by virtue of s 51(xxxv). At par 221 the majority express it as follows:

Paragraph (xxxv) is to be read as a whole, it does not contain any element which answers the description in *Bourke* of a positive prohibition or restriction upon what otherwise would be the ambit of the power conferred by that paragraph. Accordingly, there does not arise the further question addressed in *Bourke* namely whether other paragraphs of s 51 in particular para (xx) are to be construed subject to the positive prohibition or restriction found elsewhere and in particular in s 51(xxxv).

At paragraph 226 the majority observed:

As already remarked each head of power expresses a compound and distinct concept; that a law with respect to para 1 of s 51 also bears upon industrial relations does not deny to the law that character whether or not it might fall outside para (xxxv).

The argument of the States did however find favour with Justices Kirby and Callinan. Some of the passages of the judgement of Justice Kirby are of particular interest as they provide an historical context that questions the majority view. Of particular interest are par 436, 438 and 441.

Why did generations of Justices of this Court struggle in so many cases over the jurisdiction of s 51(xxxv) of the Constitution doing so for decades without in their impatience occasionally

appealing to the legislature to be rid of the needless limitations of par (xxxv) of s 51 and urging the substitution of the fructuous source of par 51(xx).

The answer to these questions is not that the earlier Justices or other lawyers of the Commonwealth and the well-resourced parties lacked intelligence, insight and imagination of those of the present generation. Their work on s 51(xxxv) is proof enough of legal imagination demonstrated most clearly in the invention of the paper disputes to give rise to the necessary interstate net as Callinan J explained. Nor can the answer be that the Justices focused their attention solely on the terms of the statute they have rather than a much simpler statute that would make life easier for so many including themselves.

The unlikely hypothesis of oversight: The question now presented by these proceedings and the Amending Act with which they are concerned is whether all that effort and the hundreds of decisions of the Justices were really a futile waste of time, because the ever ready availability of s 51(xx) to come to the rescue of federal lawmakers and to provide a new, and much larger and more direct, source of constitutional power to enact a comprehensive federal law on what the Amending Act still calls ‘workplace relations’.

Referral of power

Before concluding this part of the presentation, there is one final matter that I wish to raise and that relates to the challenge by Victoria to s 898. In a case where from the States perspective wins were hard to find this did represent a minor victory. Victoria challenged the validity of s 898 in that it purported to go beyond the power that have been referred to the Commonwealth and therefore interfered with and limited the

State’s power to legislate in the areas it had preserved to itself.

It was not necessary for Victoria to pursue this argument as the Commonwealth undertook to amend regulations to avoid the interference with the Victorian laws. The Commonwealth has honoured its undertaking and amended the regulation (see Regulation 2.2A of Chapter 7 of the *Workplace Relations Regulations 2006*).

Part 2 (James Stephens)

In this section I am going to briefly describe the interpretation of the power that supported the laws that were challenged in the case and the significance of that interpretation, and then turn to the question of what is a constitutional corporation, focussing on the example of statutory corporations and corporations with a public or governmental nature.

The challenge relating to the use of the corporations power

Part of the challenge brought by Victoria targeted particular provisions of the Act as being invalid on the grounds they were not supported by the corporations power. Generally those laws were challenged so far as they purported to apply to employers and employees as defined in s 6(1)(a) with s 5(1) of the Act. Those definitions are central to the operation of the Act, and paragraph (a) includes in those definitions employers that are constitutional corporations and following from that their employees.

Provisions of the Act targeted in this way included:

- Part 7 - The Australian Fair Pay and Conditions Standard
- Part 9 – Industrial action
- Part 10 – Awards
- Divisions 1 and 2 of Part 12, and s 637(1) - Minimum entitlements of employees
- Division 5 of Part 15 – Right of Entry for OHS purposes
- Part 16 - Freedom of association
- Part 23 – School-based apprentices and trainees

Significance of the majority's interpretation of the corporations power

The case is significant for how the majority treated what it saw as arguments based on a 'federal balance', and for holding that it is sufficient for a law to be with respect to constitutional corporations if it treats constitutional corporations as the object of a statutory command.¹ The majority approved Gaudron J's understanding of s 51(xx) in *Re Pacific Coal; Ex parte CFMEU*:²

I have no doubt that the power conferred by s 51(xx) of the Constitution 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.

However, the majority did not define any new test as such as being the test for validity under s 51(xx).³ Rather they rejected the plaintiffs' 'distinctive character test' for whether a law was with respect to constitutional corporations (along with the other proposed limitations) as being an additional 'filter'⁴ on the already established general principles used to characterise a law as being with respect to the subject matter of a constitutional power.⁵ (The additional filter was rejected as being derived from 'an implicit assertion about federal balance',⁶ which the majority appears to have at times equated to the 'reserved powers doctrine' that was discredited in the *Engineers case*.⁷)

The practical significance of the decision is not so much a matter of constitutional interpretation but the fact that it results in such a wide-ranging power because of the ubiquity of corporations in our society. If the case had been run 50 years ago, a much smaller proportion of the workforce would have been affected by the majority's decision due to the corporate form being far less prevalent in economic life. Only in recent times has there been real utility in using the power to regulate industrial relations, as a law under the power can capture a large enough portion of employers and employees to provide what is close to a single industrial relations system as opposed to an alternative or duplicate system specific to people who happen to use the corporate form. The practical, legal and economic drivers that attract people to use corporations for business will ensure a 'captive' population for the new industrial laws. It is because corporations can be found in so many parts of our lives, not just our working lives, that s 51(xx) appears to extend the power of the Commonwealth to directly affect us in ways it has not before.

What is a ‘constitutional corporation’?

Trading and financial corporations

The question of what is a constitutional corporation becomes very significant, as the scope of that definition will affect the practical scope of the power. The majority upheld the challenged laws as being ‘with respect to constitutional corporations’, but the majority did not deal with the question of what is a constitutional corporation.⁸ This question is likely to be the ‘next frontier’ in the development of the corporations power.

‘Constitutional corporation’ is shorthand for the corporations that fall within the description in s 51(xx). That section provides that the Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

Foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth.

Attention in the earlier cases on s 51(xx) has been focused on what is a trading or financial corporation,⁹ being two distinct but not mutually exclusive classes of person.¹⁰ The Court’s approach is likely to be the same to both.¹¹

Examples of constitutional corporations

Examples of bodies corporate that courts have held to be ‘trading and financial corporations’ extend beyond bodies incorporated under State or national companies laws,¹² to include entities incorporated under incorporated associations laws,¹³ statutory corporations¹⁴ and, although it is not fully clear, could be expected to include local councils.¹⁵ An

unincorporated association would not be a constitutional corporation.

Also a range of bodies, including a not-for-profit football league and club,¹⁶ the RSPCA,¹⁷ the Royal Prince Alfred Hospital¹⁸ have been held to be constitutional corporations even though they might not fall within the public imagination of what a ‘trading’ or ‘financial’ corporation is. The Red Cross Society was held to be a trading corporation as it earned substantial income from its shop, stalls and running courses.¹⁹

The ‘activities test’

Significantly, the mere fact of incorporation will not mean a body corporate falls within the corporations power.²⁰ The present test for whether a body corporate is a constitutional corporation is the ‘activities test’, where a court looks to the current activities of a body corporate to determine whether it falls within the definition in s 51(xx).²¹ On the other hand, there still appears room in some cases for a ‘purpose test’ – at least in the case of a ‘dormant’ body corporate, ie one with no relevant, current activities to be tested.²² It should be noted that the activities test is not without regard to the purpose of the activities, and questions of how ‘substantial’ or ‘significant’ trading activities are for a corporation might address not only the quantity but the quality of those activities.²³ It may be that in future the test for what is a constitutional corporation will be reconsidered by the High Court.

In general terms the activities test asks to what degree is a body corporate engaged in trading or financial activities. A body corporate will fall within the definition if trading or financial activities are a significant part of its overall activities.²⁴

However those trading or financial activities need not be the primary or dominant undertaking of a corporation,²⁵ though they need to be more than peripheral and not insubstantial.²⁶

The term ‘trading activities’ means trading in goods or services for reward,²⁷ and is therefore not limited to profit-making.²⁸ ‘Financial activities’ refers to activities such as making loans, entering into hire-purchase agreements or providing credit in other forms, and are those a corporation deals in for commercial purposes rather than those undertaken for the purpose of carrying on some other business.²⁹

The answer to the activities test is one of fact and degree³⁰ and depends on the time at which the activities test is applied. The majority in the *Incorporation Case* commented that:³¹

the character of a corporation may vary, so that it may be at one time a trading or financial corporation and not at another ... [the Commonwealth’s] power of regulation might fluctuate, possibly without [anyone’s] knowledge.

Statutory authorities; corporations with ‘public’ or governmental functions

It is of particular significance to State governments that statutory authorities are definitely capable of being constitutional corporation. Statutory authorities typically take the form of a body corporate with perpetual succession. In Victoria, the State Superannuation Board was held to be a financial corporation, as it was held to have ‘substantial’ financial activities which formed a ‘significant part of its overall activities.’³²

The majority in that case held it was a financial corporation even though a significant proportion of its activities were entered into for the end purpose of providing

superannuation benefits to public sector employees, and it engaged in ‘other more-extensive’ non-trading activities’.³³

Members of the High Court have considered the degree to which the public or governmental nature of a body corporate might affect its characterisation as a constitutional corporation. In the *Tasmanian Dam Case*, Mason J commented that the Tasmanian Hydro-Electric Commission had a closer connection to government than the St George County Council³⁴ which had been at the centre of a case on the scope of the corporations power nearly 10 years previously. However the former was held to be a constitutional corporation while the latter was not.³⁵ That outcome could be the result in the shift between those cases from members of the Court taking a purposive approach (which took into account that the Council was established for ‘local government purposes’³⁶) to adopting the activities test in the intervening period.³⁷ If so, this example illustrates the significance of the kind of test used. If the activities test was modified or a more purposive test were to be adopted in the future, the range of bodies corporate that fall within the definition might be narrower. However, such a shift would not necessarily remove a significant number of incorporated entities from the scope of the power, as that would depend on the precise formulation of the test, and what kinds of corporations private individuals and the government are using.

In the *Tasmanian Dam Case*, Mason J observed the Commission was more important in the structure of government than the Council. It was the State authority responsible for generating and distributing electrical power in the State. It constructed and managed the relevant dams, generating plants and other works and made policy

decisions and recommendations to the Minister. In an earlier case it had been decided the Commission was not a servant or agent of the Crown,³⁸ and it was not suggested that status had altered even though by the time of the *Tasmanian Dam Case* the Commission's Act had been amended to enable the Minister to notify the Commission of policy objectives and to direct the Commission with respect to the performance of its functions, subject to some limitations. Mason J considered that the trading activities of the Commission were a much less prominent feature of its overall activities than was the case with St George County Council. It had an important policy-making role and as the generator of electrical power for Tasmania, its operations were largely conducted in the public interest. However, this fact did not prevent it being a 'trading corporation', and trading activities that are carried on so that some other primary non-trading activity can be carried on will not preclude a body corporate from being a 'trading corporation'. The Commission's selling of electrical power in bulk and by retail on large scale designated it as a trading corporation.³⁹

Summary

For the meantime, it should be expected that the definition 'constitutional corporation' includes incorporated statutory bodies for which trading and/or financial activities are substantial and a significant, though not necessarily predominant, part of their overall activities. The development of this aspect of the corporations power could come from a test case, selected by the party or parties behind the action for its potential to prove a strategic point of law. Alternatively, it could spring from a case under the *Trade Practices Act 1974* (Cth) where a body corporate is contesting for its own reasons whether that Act applies to it. People working in

government should look out for what could be the next case, whether it is one they choose to run themselves, or one in which the government should intervene.

Examples of particular relevance to government

- Government Insurance Office NSW was held to be both a trading and financial corporation.⁴⁰
- Royal Prince Alfred Hospital, a statutory corporation, was held to be a trading corporation due to the scale of its trading activities.⁴¹
- It has been raised that the Queensland Commissioner for Railways could be a trading corporation.⁴²
- State Superannuation Board was held to be a financial corporation, as it was held to have 'substantial' financial activities which formed a 'significant part of its overall activities'.⁴³
- Tasmanian Hydro-Electric Commission was considered to have substantial trading activities.⁴⁴
- St George County Council, incorporated under the *Local Government Act 1919* (NSW) and which engaged in substantial trade in the sale of electricity and electrical appliances, was held by a majority of the High Court not to be a trading corporation. However, the two of the three majority judges' reasons were based on an assessment of the Council's purpose. This approach was disapproved of and/or distinguished by the majority in *WANFL*, who adopted the activities test.⁴⁵

Part 3 (Natalie Blok)

Introduction

In this part, I will focus on two further implications which flow from the WorkChoices decision.⁴⁶ Firstly, I will talk about the Commonwealth's greater power to make law in what have traditionally been State-based spheres of activity. Secondly, I will discuss the implications for regulation-making.

Commonwealth law in traditionally state-based spheres of activity

As we've been told, following the decision, if a body or entity can be identified as being a corporation within the meaning of the Constitution, the Commonwealth Parliament now has broad powers to regulate all aspects of that corporation. Given that corporations occupy nearly all spheres of society, the Commonwealth has acquired much greater power to directly regulate fields which have been to date beyond their grasp. Professor George Williams goes so far as to say that the decision 'brings into question whether there are real limits to the ability of the Commonwealth to regulate areas now in State control'.⁴⁷

New areas of federal control have been speculated about over the past week in the media, and they were listed by Justice Kirby in his dissenting judgment.⁴⁸ As John has mentioned, they include education⁴⁹ and health care,⁵⁰ and outsourced activities of government operated through corporatised bodies, such as local transport, energy or water conservation.

We know this will upset the federal balance, but what will it mean in practice for the Commonwealth Parliament now to make law

in subject areas that are currently State-controlled?

In practice, a broader corporations power means that, by reason of s 109 of the Constitution, there will be a greater likelihood that existing Victorian laws will be rendered inoperative. This is because s 109 states that where there is an inconsistency between a State law and a law of the Commonwealth, the Commonwealth law will prevail and the State law is invalid to the extent of the inconsistency. Where there is an inconsistency, Commonwealth law is paramount and Victorian law is invalid in the sense that it cannot operate as long as the Commonwealth law is in force. It may mean, as Justice Callinan said in his dissenting judgment, that some of our laws will be 'obliterated'.⁵¹

Broadly speaking, there are three situations where inconsistency can exist.⁵² The first two are where simultaneous obedience of the laws is impossible;⁵³ and where one law takes away a right or privilege conferred by the other.⁵⁴ These approaches are sometimes called 'direct inconsistency' and have also been described as occurring where there are 'textual collisions' between the provisions of a State and a Commonwealth law.⁵⁵ The application of the tests involves a comparative analysis of the legal operation of the both laws. For example, what are the legal rights and obligations created by each of the laws and how do they compare? Does one take away a right conferred by the other?

The third approach is where a State law invades the field or subject area which the Commonwealth law intended to cover.⁵⁶ This is sometimes called 'cover the field inconsistency' and of the three forms of inconsistency, probably has the greatest

impact on the autonomy and power of the States. This is because any State law which purports to regulate or apply to the same matter will be inoperative for inconsistency. This test is relevant here.

The question that must be asked is whether the Commonwealth law is intended to exclusively regulate a particular subject matter.⁵⁷ If there is no express statement, the court must draw inferences from the legislation or from the subject matter. Otherwise, as in the WorkChoices Act,⁵⁸ the Commonwealth law may expressly state its intention to operate to the exclusion of State laws.⁵⁹ John has already mentioned the effect.

On the other hand, a Commonwealth law may express an intention to operate against the background of general law, including State laws,⁶⁰ or that it will be supplementary to, or cumulative upon State law.⁶¹ Accordingly, absent a direct conflict between the laws,⁶² both State and federal law may be able to apply to the same subject or circumstances.

Hence it is by application of these tests that s 109 of the Constitution provides the mechanics for Commonwealth law to suppress or stifle Victorian law.

The power now given to the Commonwealth Parliament at the expense of the States is brought home in the context of energy. Given the Federal Government's recent review of nuclear power, it is not now impossible that the Commonwealth Parliament may seek to legislate for the construction and operation of a nuclear power station in Victoria for electricity-generating purposes.

Victoria currently has an Act which prohibits the construction and operation of such a plant in the State.⁶³

Whilst there are a number of powers⁶⁴ upon which the Commonwealth Parliament might have relied previously to legislate in this context, each of those powers carries its own difficulties.

Following WorkChoices, however, some difficulties thought to exist no longer pose an obstacle to the Commonwealth utilising the corporations power. Reliance on the corporations power, probably together with the power under s 52(i) (which gives the Commonwealth Parliament exclusive power to make laws with respect to all places acquired by the Commonwealth for public purposes), would give the Commonwealth Parliament the opportunity to regulate all aspects of a corporation charged with the building and operation of a nuclear power plant, thus giving it far greater control of the industry.

The Commonwealth law may express an intention to 'cover the field'. In any event, the Victorian law which prohibits the construction and operation of nuclear power stations will be in direct conflict with the Commonwealth law. Either way, the Victorian law will be, in Justice Callinan's words, 'obliterated'.

Obviously, s 109 does not foreclose an opportunity for the States and the Commonwealth to work co-operatively together. The decision in WorkChoices leaves the States with less legal resistance to the Commonwealth, and as Professor George Williams has noted, with greater dependence on the goodwill of the Prime Minister of the day.⁶⁵ The challenge for the States, independently and with other States, is to work co-operatively with the Commonwealth.

Regulation-making power

Turning to the final part of our talk, I will now discuss the Court's findings on the Commonwealth's regulation-making power. The finding is significant for Victoria not so much in terms of its precedential value, but more in terms of the criticisms made by the Court of the Commonwealth Parliament's use of that power.

Delegated legislation has always formed a major part of this country's legislative process and reliance on it has increased over time.⁶⁶

For the Commonwealth Parliament, the adoption by the Constitution of a strict separation of powers may have presented an obstacle, however, it has been held by the High Court (in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan*),⁶⁷ that the separation of powers does not preclude delegated legislation because a strict separation is not required by the Constitution between the Parliament and the Executive.

Nevertheless, in that case, Justice Dixon noted that there may be limitations to this power. His Honour said that a power giving the Executive authority to make law will not necessarily be valid if the subject matter delegated is too extensive or vague, or if it is too wide or uncertain so that it cannot be characterized as a law with respect to one of the heads of Commonwealth legislative power.⁶⁸

The High Court revisited the issue in 2003, in *Plaintiff S157 of 2002 v Commonwealth*,⁶⁹ where it reminded us that what may be 'delegated' is the power to make laws with respect to s 51 of the Constitution and the hallmark of the exercise of legislative power is that legislation determines the content of a law as a rule of conduct or a declaration as to a power, a right or a duty.⁷⁰

In the WorkChoices challenge, the Australian Workers' Union, supported by Victoria, relied upon the separation of powers to argue that the regulation-making power conferred by the WorkChoices Act upon the Executive was invalid.

The relevant section of the Act (s 356) provides for the regulations to specify matters that are 'prohibited content' for the purposes of the Act. As such, the section gives power to the Executive, (in essence, the Minister for Employment and Workplace Relations and his department), to prohibit content in workplace agreements.⁷¹ The union argued that no 'law' was enacted in the sense of a rule of conduct or a declaration as to a power, a right or a duty – 'prohibited content' was whatever the Executive Government says should not be contained in a workplace agreement.⁷² It further argued that the power delegated to the Executive was too wide and uncertain.

The majority disagreed, noting several ways in which the Executive was guided in the making of regulations.⁷³ Of the scope of the power to make regulations, their Honours said:⁷⁴

The extent of the power is marked out by inquiring whether any particular regulation about the prohibited content of workplace agreements can be said to have a rational connection with the regime established by the new Act for workplace agreements.

What does all of this mean for Victoria? Unlike the Commonwealth, Victoria's legislative power is plenary and its power to delegate this function to the Executive is not constrained by a strict, formal separation of powers, nor is it constrained in the same way by s 51 of the Constitution. Accordingly, the restrictions which operate

in the Commonwealth sphere do not apply in the same way to Victoria.

However, comments made in obiter by the majority are instructive. The majority was critical of the technique employed by s 356, which leaves the content of important matters to the regulations which means that people have to seek them out. Victoria, which also relies heavily on the Executive to alleviate Parliament's workload, should be mindful of these criticisms when conferring law-making power upon the Executive.

Their Honours said that the technique employed by the Parliament was an:⁷⁵

undesirable one which ought to be discouraged. For one thing it requires the lawyers (and the many non-lawyers) who have to work with the new Act to look outside it in order to apply it: identifying what regulations are in force is a task which many inquirers have found difficult. And it creates difficulty in assessing whether particular regulations are *intra vires*.

Associate Professor Graeme Orr recently said:⁷⁶

The majority might have added that ministerial power reduces democratic scrutiny and public debate on important questions like the limits of workplace bargaining.

Justice Kirby, in dissent, was highly disapproving of the regulation-making power in the WorkChoices legislation:⁷⁷

There comes a point when a regulation-making power becomes so vague and open-ended that the law which establishes it ceases to be a law with respect to a subject of federal law-making power ...

...

The impugned provisions border on an endeavour to enact an abdication of the Parliament's responsibilities. This Court should say so and forbid it.

These comments reflect a concern with a lack of transparency and accountability on the part of the Commonwealth Parliament. Importantly, they also reflect a concern that law must be accessible and citizens must have the capacity to know what the law is. Thus, although the Court found no strict legal obstacle to the inclusion of more substantive matters in the regulations, it did express a concern about the practice based on broader policy considerations.

The precedent value of the WorkChoices decision is that more substantive provisions which affect people's rights and liabilities need not be in a main Act but can be delegated to the Executive Government and departments. The lesson is that regulations are better suited as a repository of less substantive matters, for example, highly technical or detailed laws such as civil aviation orders, or perhaps procedural matters, all of which do not affect the rights and liabilities of people in the same way.

Conclusion

To conclude then, the decision in WorkChoices may not be surprising or a huge step in terms of the history of constitutional interpretation in a federation in which the Commonwealth has been steadily increasing its powers ever since the *Engineers Case* in the 1920s. But it has many implications. Today we have tried to unpack some of those implications, there are undoubtedly many more which will present themselves in the fullness of time.

¹ *New South Wales v Commonwealth* [2006] HCA 52 (*Work Choices Case*) [198] cf [159].

² Ibid [178]; *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 [83]. In that case Gaudron J did not consider the law in question was supported by s 51(xx). The law prescribed ‘the extent to which awards are binding on those constitutional corporations and their employees who are parties to or bound by awards’. Although it might ‘have some effect on the rights and obligations of corporations and their employees’, that was not sufficient to characterise it as a law with respect to constitutional corporations: [85].

³ *Work Choices Case* [141], [186]. The utility of a distinctive character test or discriminatory test was not altogether excluded in cases where a law applies to corporations and other persons indifferently: [181].

⁴ Ibid [145], [179].

⁵ Ibid [142], [196], [198]. See *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 [16].

⁶ *Work Choices Case* [145], [183].

⁷ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

⁸ *Work Choices Case* [185]-[186].

⁹ As for ‘foreign corporations’, see *NSW v Commonwealth* (1990) 169 CLR 482 (***Incorporation Case***), 498 (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ) and *R v Federal Court of Australia; Ex parte Western Australian Football League (Inc)* (1979) 143 CLR 190 (***WANFL***), 238 (Murphy J).

¹⁰ For example, the New South Wales Government Insurance Office was held to be both: *State Government Insurance Corporation v GIO (NSW)* (1991) 28 FCR 511.

¹¹ *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 (***State Superannuation***), 303 (Mason, Murphy and Deane JJ).
¹² Eg the corporations in *Huddart Parker & Co v Moorehead* (1909) 8 CLR 330 (***Huddart Parker***) and *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 (***Concrete Pipes***).

¹³ Eg the non-profit football club and league in ***WANFL***.

¹⁴ The Hydro-Electric Commission in *Commonwealth v Tasmania* (1983) 158 CLR 1 (***Tasmanian Dam Case***), the State Superannuation Board in *State Superannuation*, and the contrasting views of Gibbs ACJ and Murphy J regarding the Queensland Commissioner for Railways in *Bradken Consolidated Ltd v BHP Co Ltd* (1979) 145 CLR 107, 113 (Gibbs ACJ), 139 (Murphy J). Stating in obiter that the Commissioner was not a trading corporation,

Gibbs ACJ said that the Commissioner’s position seemed ‘stronger’ than that of the Council considered in *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 (***St George CC***); the Royal Prince Alfred Hospital in *E v Australian Red Cross Society* (1991) 27 FCR 310.

¹⁵ Eg see *St George CC*, 543 (Barwick CJ).

Although in the minority in that case, the ‘activities test’ used by Barwick CJ was later approved in ***WANFL***.

¹⁶ ***WANFL***.

¹⁷ *Orion Pet Products Pty Ltd v RSPCA (Vic)* (2002) 120 FCR 191. Even though the purpose of its incorporation related to non-commercial pursuits, the RSPCA’s trading activities were anything but modest and therefore it was a trading corporation.

¹⁸ *E v Australian Red Cross Society* (1991) 27 FCR 310. Although the purpose for which it was formed was not to be a trading corporation, and it was incorporated by statute and publicly owned, the scale of its trading activities during the period in question was such that it was regarded as a trading corporation.

¹⁹ Ibid. Trading activities such as the sale of goods were a major contributant to its income.

²⁰ *St George CC*, 543, 562 (Gibbs J); ***WANFL***, 219 (Stephen J), 234 (Mason J); see *Hughes v Western Australian Cricket Association* (1986) 19 FCR 10 (***Hughes***), 20 (Toohey J).

²¹ *State Superannuation*, 303-304 (Mason, Murphy and Deane JJ); In ***WANFL***, a majority of the Court either disapproved of and/or distinguished the purposive approach taken in *St George CC*. See ***WANFL***, 209 (Barwick CJ distinguishing), 233 (Mason J preferring the minority view), 237 (Jacobs J agreeing with Mason J), 239 (Murphy J overruling). See also *Tasmanian Dam Case*, 155 (Mason J), 293 (Deane J). See *Hughes*, 20 (Toohey J).

²² See *Fencott v Muller* (1983) 152 CLR 570, 596, 600-602 esp 601 (Mason, Murphy, Brennan and Deane JJ); see also *State Superannuation*, 304-305 (Mason, Murphy and Deane JJ).

²³ See PH Lane Lane’s *Commentary on the Australian Constitution* (2nd ed 1997) 235.

²⁴ In ***WANFL***, members of the Court variously considered what the ‘major’, ‘extensive’, ‘very substantial’ or ‘principal’ activities of the bodies corporate were: see 210 (Barwick CJ), 233 (Mason J), 240 (Murphy J); *State Superannuation*, 306: Mason, Murphy and Deane JJ echoed

Mason J's expression in *WANFL* when they said that the State Superannuation Board's 'substantial' financial activities were 'a significant part of its overall activities'. This expression was again reiterated by Brennan and Deane JJ in their separate reasons in *Tasmanian Dam Case*, 240 (Brennan J), 293 (Deane J). See also *Hughes*, 20 (Toohey J).

²⁵ *State Superannuation*, 304-305 (Mason, Murphy and Deane JJ); citing Murphy J in *WANFL*, 239. In *State Superannuation*, Mason, Murphy and Deane JJ noted that having 'other more extensive non-trading activities' will not preclude a corporation be characterised as a trading corporation: 304. Gibbs CJ and Wilson J accepted the activities test but dissented in that they held the trading and financial activity should be predominant.

²⁶ In *WANFL* it was variously considered that if a corporation's trading activities were 'merely peripheral', 'so slight and so incidental' or 'insubstantial', those activities would not characterise a corporation as falling within the ambit of the corporations power: 208 (Barwick CJ), 234 (Mason J), 239 (Murphy J). See also *St George CC*, 552-553 (Menzies J) and 562-563 (Gibbs J) and their discussion of examples of when trading activities might be conducted by non-constitutional corporations: see also *Huddart Parker*, 393 (Isaacs J).

²⁷ See *St George CC*, 567-570 esp 570 (Stephen J); *Concrete Pipes*, 489 (Barwick CJ); *Ku-ring-gai Cooperative Building Society (No 12) Ltd* (1978) 36 FLR 134, 138-139 (Bowen CJ); See *Hughes*, 20 (Toohey J).

²⁸ *St George CC*, 539 (Barwick CJ), 563-564 (Gibbs J), 569 (Stephen J); *WANFL*, 235 (Mason J).

²⁹ *State Superannuation*, 305 (Mason, Murphy and Deane JJ).

³⁰ *WANFL*, 233 (Mason J); quoted in *State Superannuation*, 304 (Mason, Murphy, and Deane JJ).

³¹ *Incorporation Case*, 503 (Mason CJ, Brennan, Dawson, Toohey, Gaudron, and McHugh JJ).

³² *State Superannuation*, 306 (Mason, Murphy, and Deane JJ).

³³ *Ibid*, 304, 306 (Mason, Murphy, and Deane JJ).

³⁴ *Tasmanian Dam Case*, 155-156 (Mason J); see also 293 (Deane J) where the Commission was is described as a 'public utility' corporation.

³⁵ *Ibid*, 155 (Mason J), 179-180 (Murphy J), 240 (Brennan J), 292-293 (Deane J) Deane J expressly stated the Commission was a corporation within the meaning of the statute and the Constitution.

³⁶ *St George CC*, 554 (Menzies J), 562-565 (Gibbs J).

³⁷ See *WANFL*.

³⁸ *Launceston Corporation v Hydro-Electric Commission* (1959) 100 CLR 654.

³⁹ *Tasmanian Dam Case*, 155-156 (Mason J).

⁴⁰ *State Government Insurance Corporation v GIO (NSW)* (1991) 28 FCR 511.

⁴¹ *E v Australian Red Cross Society* (1991) 27 FCR 310.

⁴² *Bradken Consolidated Ld v BHP Co Ltd* (1979) 145 CLR 107.

⁴³ *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282.

⁴⁴ *Commonwealth v Tasmania* (1983) 158 CLR 1.

⁴⁵ *R v Trade Practices Tribunal v St George CC* (1974) 130 CLR 533.

⁴⁶ *South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* [2006] HCA 52.

⁴⁷ George Williams, 'Goodbye to States' Rights', *The Age*, (15 November 2006) available at <http://www.theage.com.au/news/opinion/goodbye-to-states-rights/2006/11/14/1163266550931.html>

⁴⁸ *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* [2006] HCA 52 at [539] per Kirby J. The list includes town planning, environmental protection, aged and disability services, land, agricultural activities, corrective services, gaming and racing, sport and recreation services, fisheries and many Aboriginal activities.

⁴⁹ Although only insofar as it is carried on by corporations, hence not State-run primary and secondary schools.

⁵⁰ Also only to the extent that such services are provided by corporations.

⁵¹ Justice Callinan warned in his dissenting judgment that 'the reach of the corporations power, as validated by the majority, has the capacity to obliterate powers of the states hitherto unquestioned'. *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* [2006] HCA 52 at [794] per Callinan J.

⁵² *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466.

⁵³ *Ibid*.

⁵⁴ *Ibid* at 489 per Isaacs J.

⁵⁵ *Miller v Miller* (1978) 141 CLR 269 at 275 per Barwick CJ.

⁵⁶ *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 478 per Isaacs J.

⁵⁷ *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630 per Dixon J; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 (the Court).

⁵⁸ *Workplace Relations Act 1996* (Cth).

⁵⁹ Sections 16, 17, 18 and s 898 of the *Workplace Relations Act 1996* (Cth).

⁶⁰ *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47.

⁶¹ *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 (the Court) citing *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J.

⁶² *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545.

⁶³ *Nuclear Activities (Prohibitions) Act 1983* (Vic).

⁶⁴ For example, the external affairs power (s 51(xxix)) or the trade and commerce power (s 51(i)).

⁶⁵ George Williams, ‘Goodbye to States’ Rights’, *The Age*, (15 November 2006) available at <http://www.theage.com.au/news/opinion/goodbye-to-states-rights/2006/11/14/1163266550931.html>.

⁶⁶ See generally Pearce and Argument, *Delegated Legislation in Australia* (2005) at 1-18.

⁶⁷ (1931) 46 CLR 73.

⁶⁸ *Ibid* at 101 per Dixon J. See also similar remarks of Evatt J at 120.

⁶⁹ (2003) 211 CLR 476.

⁷⁰ *Ibid* at [102] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ citing *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82 per Latham CJ. This is in contrast to Executive authority which applies the law in particular cases.

⁷¹ See Subdiv B of Div 7 of Pt 8 of the *Workplace Relations Act 1996* (Cth).

⁷² See amended submissions of the Australian Workers Union at [177].

⁷³ The majority noted that it is not open to the Executive to say that a workplace agreement should not contain any of the matters which are stipulated by the Act to be required content because the regulations must not be inconsistent with the Act. Subdivision A of Division 7 of Part 8 of the Act stipulates the details of ‘required content’. For example, workplace agreements must include procedures for dispute settlement (s 353) and certain ‘protected award conditions’ (s 354). They further noted that it is not open to the Executive to specify matters as prohibited which have the effect of excluding the Fair Pay and Conditions Standard or any part of it because to do so

would be impermissible under s 73 of the Act. Nor is it permissible to specify in the regulations matters as prohibited content which provide a less favourable outcome of the employee than that provided by the Fair Pay and Conditions Standard. Finally, the majority noted that should the specification by the regulations of matters as prohibited content be so wide as to undermine the possibility of making a workplace agreement capable of practical operation, it would be ultra vires or beyond power. Additionally, s 846(1)(b) of the Act provides guidance in that any regulations made must be of matters “necessary or convenient to be prescribed for carrying out or giving effect to this Act”. See *New South Wales v Commonwealth of Australia*; *Western Australia v Commonwealth of Australia* [2006] HCA 52 at [408]-[414] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

⁷⁴ *Ibid* at [416].

⁷⁵ *New South Wales v Commonwealth of Australia*; *Western Australia v Commonwealth of Australia* [2006] HCA 52 at [399] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

⁷⁶ Graeme Orr, ‘The Constitution, Court gives Howard the Whip hand’, *Australian Policy Online*, http://www.apo.org.au/webboard/results.shtml?file_name_num=115703. See also Pearce and Argument, *Delegated Legislation in Australia* (2005) at 11.

⁷⁷ *New South Wales v Commonwealth of Australia*; *Western Australia v Commonwealth of Australia* [2006] HCA 52 at [460] per Kirby J.