

Work Choices: The High Court Challenge

In May 2006 the High Court heard argument in a challenge to the constitutional validity of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). The challenge was initiated by five States — New South Wales, Victoria, Queensland, South Australia and Western Australia — and by a number of unions and peak union bodies, including Unions NSW and the Australian Workers Union. Tasmania, the Northern Territory and the ACT intervened in support of the challenge.

The proceedings attracted a record 39 barristers and argument was heard over the course of six sitting days.

On 14 November 2006 the Court handed down its decision: see *NSW v Commonwealth* [2006] HCA 52. As widely predicted, the majority of the Court held that the Commonwealth could validly use the corporations power to underpin workplace laws.

What was perhaps less expected was that the ruling would be so decisive. The majority judgment, given by Gleeson CJ and Gummow, Hayne, Heydon and Crennan JJ, rejected every single one of the various challenges to provisions in the amended *Workplace Relations Act 1996* (the WR Act).

The decision thus removes the cloud of uncertainty that has (no matter how faintly) hovered over the new legislation since the constitutional challenge was announced.

Scope of the corporations power

The principal issue in the challenge was the scope of the Commonwealth's power under s 51(20) of the Constitution to make laws with respect to “foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth”.

According to the challengers, those parts of the amended WR Act that operate by reference to employers who are constitutional corporations were not validly supported by s 51(20). Indeed if the challengers were correct, it was not just the Work Choices amendments that would have been invalid, but many provisions that had been in the federal statute since 1996 (or in some cases 1993).

However their arguments on this point were rejected by the majority. They adopted (at [178]) what Gaudron J had said about the corporations power in *Re Pacific Coal Pty Ltd; Ex p CFMEU* (2000) 203 CLR 346 at 375, that it:

“extends to the regulation of the activities, functions, relationships and the business of a [constitutional corporation], 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”.

As the majority noted, and again in the words of Gaudron J (ibid), that broad view of the power clearly permits the Commonwealth to pass laws “prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations”.

The majority rejected any suggestion that the scope of the corporations power should be limited in order to avoid any conflict with the industrial arbitration power in s 51(35) of the Constitution, or to disturb a suggested “balance” in the Constitution between the Commonwealth and the States.

On its broad reading of the corporations power, the majority upheld the provisions of the amended WR Act that regulate minimum employment conditions, workplace agreements, industrial action and so on.

It also, perhaps more surprisingly, rejected a strongly mounted challenge to the validity of the provisions in Schedule 1 for the registration and control of trade unions and employer associations. As the majority observed (at [322]):

“If [it is] within the corporations power for the Parliament to regulate employer-employee relationships and to set up a framework for this to be achieved, then it also is within power to authorise registered bodies to perform certain functions within that scheme of regulation. It also is within power to require, as a condition of registration, that these organisations meet requirements of efficient and democratic conduct of their affairs.”

Who is a constitutional corporation?

The majority made it clear (at [55]) that the issue of the type of body that qualifies as a trading or financial corporation had not been addressed by the parties. This was not an appropriate case to reconsider the established “activities test” for identifying such a corporation, a test based on a string of High Court decisions since *R v Federal Court of Australia; ex parte WA National Football League* (1979) 143 CLR 190.

Accordingly whether not-for-profit bodies such as local councils, private schools, sporting clubs, community services organisations and the like qualify as trading corporations (and hence as federal system employers) will continue to be determined by reference to that test.

Exclusion of State laws

Section 16 of the WR Act purports to exclude the operation of State industrial laws even on subjects that are not otherwise regulated by the federal statute. While the challengers accepted that a valid federal law will prevail over a State law on the same subject, by virtue of s 109 of the Constitution, they argued that s 16 took this principle

too far. It was nothing more than a “bare attempt to limit or exclude State legislative power”.

The majority of the Court, however, confirmed that s 16 should properly be interpreted as excluding State laws only in so far as they relate to federal system employers and employees, and then subject to the various exceptions for “non-excluded matters”. Read in that way, the provision was a valid exercise of power.

As the majority noted (at [370]), it is open to the Commonwealth to define a “field” of regulation, pass laws that relate to that field, then exclude the States from trespassing on it. And this can be done regardless of whether the federal regime is more detailed than the State regimes, less detailed or — as in this case — more detailed in certain respects and less detailed in others.

The finding as to the validity and broad operation of s 16 will have important implications for those States which have been looking to pass laws that fill gaps left by Work Choices — though the potentially broad scope of some of the “non-excluded matters” (such as OHS or child labour) may still leave them some room to manoeuvre.

Regulation-making powers

One of the more striking features of the amended WR Act is the large number of matters that are now left to regulations, rather than being contained in the main body of the statute. Under these provisions, the executive government can change the law without specific parliamentary sanction, though the regulations may be retrospectively disallowed by the Senate if a majority oppose them.

A challenge was made to a number of the regulation-making provisions in the Act, including s 356 which leaves it entirely to regulations to prescribe what constitutes “prohibited content” for workplace agreements.

The majority commented (at [399]) that “the technique employed in s 356 is an undesirable one which ought to be discouraged”. They noted that “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”. Furthermore, it “creates difficulty in assessing whether particular regulations made under the legislation are *intra vires*”.

Nonetheless, despite these criticisms they found that s 356 and other similar provisions were constitutionally valid. Whether a particular regulation is or is not within power will depend on the terms of that regulation, and whether it bears a “rational connection” to the regime established by the statute (at [416]). But if that regime is otherwise within the Commonwealth’s power to establish, then a general authority to make regulations in support of it, no matter how imprecisely worded, must also be considered to be valid.

Transitional provisions in Schedule 6

Schedule 6 of the WR Act establishes transitional provisions for employers who do not qualify as federal system employers, but who were covered by federal awards as at the commencement of the Work Choices amendments. Schedule 6, unlike the rest of the Act, is still underpinned by the industrial arbitration power.

During the challenge, it was argued that certain provisions in Schedule 6 could not fairly answer to the description of a law with respect to the arbitration of industrial disputes, on the basis that they unduly fettered the discretion of the AIRC to resolve disputes affecting employers covered by the Schedule.

But this too was rejected by the majority, concluding (at [307]) that the arbitration power does not bind Parliament “to maintain any particular system of regulation of industrial disputes”. If Parliament can make laws for the conciliation or arbitration of industrial disputes, it can also unmake them. In so far as Schedule 6 provided a “staged withdrawal” from the old arbitration system, it was a valid exercise of the Commonwealth’s power.

The dissenting judgments

Kirby and Callinan JJ wrote separate dissenting judgments. Each would have found the Work Choices legislation invalid in its entirety, on the basis that the corporations power could not validly support such legislation. Neither could accept that the corporations power was intended to deal with industrial affairs, given the presence of the more restrictively worded arbitration power. Each stressed the need to read the Constitution as a whole and to be mindful of preserving a balance between the Commonwealth and the States.

By contrast with the dry and technical tone of the majority judgment, the dissents positively crackle with passion — and with dismay for the majority view. For Kirby J (at [611]), it would permit “a destabilising intrusion of direct federal lawmaking into areas of legislation which, since federation, have been the subjects of State laws”. Callinan J went even further, suggesting (at [779]) that it might reduce the Parliament of each State to “an impotent debating society”.

The implications

What the Court’s decision confirms is that the Commonwealth can make use of the corporations power, in combination with other legislative powers, to regulate employment conditions and labour relations for a majority of the workforce — and in ways that simply could not have been possible under the industrial arbitration power.

The immediate effect of the decision is to uphold the Work Choices reforms. But the decision also sets a clear precedent for a future Labor government that may wish to use these powers to rather different ends.