This speech was delivered at *Industrial Relations Reform: Fair Go or Anything Goes?*
On 13 July 2005 by **George Williams** – author of ***Labour Law and The Constitution***

The Constitution and a National IR Regime

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The main impediment to achieving a national scheme has been a political one. While this may disappear when the government gains control of the Senate from 1 July, a key problem remains.

It is whether the Commonwealth has the power under the Australian Constitution to enact such a law. The federal Parliament can pass laws in the 40 different areas listed in s 51 of the Constitution, however, it does not have a general power over "workplace relations". The closest the section comes is the power in s 51(35) over "[C]onciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

To pass a national law the Commonwealth will need to be creative and to compromise on coverage. It is likely to turn to its power in s 51(20) to make laws with respect to '[F]oreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. The Commonwealth might rely on this power to set out the conditions of employees working for every constitutional corporation in Australia.

In combination with its other powers, such as its power over the territories and interstate trade and commerce, as well as the referral of power over industrial matters by Victoria, this could allow the Commonwealth to enact a scheme that might extend to 85% or more of the workforce.

Where a state law also sought to cover these employees, it would be overridden. Section 109 of the Constitution states that "[W]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid". This can be done expressly.

A potential problem for the Commonwealth is that the extent of the corporations' power is unclear. There are two important limitations on the scope of the power.

First, it is addressed only to corporations (and thus not to partnerships, sole traders and the like), and even then it is addressed only to certain types of corporations (that is, foreign, trading and financial corporations). High Court decisions mean that most corporations will fall into these categories (*R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282). On the other hand, some corporations clearly will not, such as Australian corporations that do not have substantial trading or financial activities.

People who might escape the federal net and thus remain under state law would be those working for partnerships, sole traderships and other unincorporated associations that operate within the limits of one state. In addition, the constitutional immunity of each of the states from some Commonwealth laws would also mean that the federal scheme would not apply to some, especially senior, members of the state's public service.

Second, there is an unresolved division of opinion in the High Court as to which activities of the listed corporations can be regulated. Two possible views, a narrow and a broad view, border the possible scope of the power:

- Narrow View: The clue is in the categories of corporations specified as being within power: "foreign corporations", and Australian-based "trading" or "financial" corporations. Thus the aspects or activities that the Commonwealth can regulate must have something to do with the characteristic that brings corporations within Commonwealth power. This would mean, for example, that only the trading activities of a trading corporation could be regulated and not any of the other activities of the corporation (such as the relationship between the corporation and its employees where this lies outside of its trading activities).

- Broad View: There are no limits at all. Provided a corporation has the characteristics that bring it within s 51(20), any aspect or activity of that corporation can be regulated by the Commonwealth (including the relationship of a constitutional corporation with its employees).

A majority of the High Court has gone beyond the narrow view but has yet to accept the broad view of the power. In *Commonwealth v Tasmania* (*Tasmanian Dam Case*) (1983) 158 CLR 1, a majority of the Court held that s 51(20) at least enables the Commonwealth to regulate the

activities of trading corporations undertaken *for the purposes* of the trading activities of that corporation.

Under this approach, it is likely that the Commonwealth can regulate some aspects of employment within a constitutional corporation (the degree is unclear) on the basis that such employment is for the purpose of the trading activities of the corporation. While the reasoning might extend to the regulation of all actions of all of the employees of a constitutional corporation (each employee being taken on for the purpose of the trading activities of the corporation), it is unclear whether the High Court would interpret the power to extend that far. The answer will depend on the detail of the new law.

A more recent High Court decision on the power, *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, also falls short of the broad view. The lowest common position of Chief Justice Mason and Justices Deane, Gaudron, and McHugh was that "the power conferred by s 51(20) extends, at the very least, to the business functions and activities of constitutional corporations and to their business relationships".

This issue was again raised in the High Court in *Victoria v Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416, a challenge to changes brought about to the *Industrial Relations Act 1988* (Cth) by the *Industrial Relations Reform Act 1993* (Cth) and the *Industrial Relations Amendment Act (No 2) 1994* (Cth). Although three States instituted proceedings to challenge the validity of the new legislation, only Western Australia challenged those provisions that primarily relied on s 51(xx); and at the hearing that challenge was abandoned. As was stated in that case at 188: 'Subject to one possible exception [as to 'secondary boycotts'], it was conceded in argument by Western Australia . . . that the Parliament has power to legislate as to the industrial rights and obligations of constitutional corporations . . . and their employees'. Accordingly, the validity of such legislation was 'not in issue'.

Uncertainty about the scope of the corporations power means that it cannot be said with confidence that a law that sought to regulate the full range of industrial matters that can arise between employers and employees would be a valid enactment under the power.

This uncertainty is magnified by the fact that any determination would be made by a High Court composed entirely of judges who did not sit on the decision in *Re Dingjan; Ex parte Wagner*

(Justice McHugh retires on 1 November 2005). Moreover, most of the current members of the Court have not even delivered judgments that enable an assessment of their likely approach to the power. Resolution of the scope of the power remains very much open.

There are significant limitations upon the scope of the Commonwealth's corporations power, as well as continuing uncertainty as to its ambit. In these circumstances, it would be brave assessment to state with any confidence that a national industrial relations scheme passed under this power would be held valid by a majority of the High Court.

My view is that the power, including in combination with other powers (such as its powers over territories and interstate trade and commerce), is not sufficient to enact a comprehensive national industrial relations scheme. At the very least, such a power will not be able to extend to industrial matters arising out of some businesses, such as partnerships, that trade within the confines of one State.

Of course, if the federal law were carefully drafted to fall within the narrowest accepted scope of the power, it would likely be valid. However, if the law were drafted in this way it would not extend to many of the matters that would be expected to fall within a comprehensive national law on the subject.

A salutary example is the attempt by the Commonwealth to enact a single national corporations law (the *Corporations Act* 1989 (Cth)) under its corporations power. At the time, it was widely believed that the law would be held valid by the High Court, and the Commonwealth passed the Act without support from the States in the form of a co-operative scheme or a referral of power.

In 1990, the issue was resolved in a way that reasserted limits on Commonwealth power. In *New South Wales v Commonwealth* (*Incorporation Case*) (1990) 169 CLR 482, the High Court held by 6 to 1 that the corporations power does not enable the Commonwealth to regulate the incorporation of companies. The decision meant that the Commonwealth could not, by itself, establish a national corporations regime, but could only do so in co-operation with the States. Today, such co-operation provides the foundation for Australia's national corporations law. It provides a better model for moving forward in this area.

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