

Despite continuing uncertainties about the extent to which limitations derived from other parts of the Constitution may apply to the Commonwealth's power under s 122 to legislate for the Territories, there is no doubt that the "plenary" nature of the power allows it to extend to a very wide range of subject-matters. In *New South Wales v Commonwealth (WorkChoices Case)* (2006) 231 ALR 1, its width was reaffirmed by a five-judge majority (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

The new industrial relations regime introduced by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) is applicable to those employed by the classes of "employers" enumerated in the amended s 6 of the *Workplace Relations Act 1996* (Cth). Primarily these "employers" include the "constitutional corporations" specified by s 51(xx) of the Constitution; thus the principal issue to be determined was whether, in its application to those employers, the legislation was valid as an exercise of power under s 51(xx). But the specified "employers" also include "(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual"; and "(f) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs, or usually, employs, an individual in connection with the activity carried on in the Territory". The five-judge majority held that both these devices for extending the application of the new regime were valid.

The issue relating to paragraph (e) was initially complicated by a question of construction. Fastening on the fact that the word "incorporated" is a past participle, the plaintiffs argued that the new regime would extend to any case "[89] where the employer is a body whose sole connexion with a Territory is that it *had been* incorporated in a territory – irrespective of whether the employees or body have any other connexion with a territory whatsoever". Though apparently inspired by the reasoning in *New South Wales v Commonwealth (Incorporation Case)* (1990) 169 CLR 482, this interpretation was emphatically rejected.

New South Wales v Commonwealth (WorkChoices Case)
(2006) 231 ALR 1

Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ: [89] The Commonwealth responded to this submission by pointing out that the words "had been" do not appear in par (e) and that par (e) could not be construed as if it contained them. The Commonwealth contended that par (e) referred only to a body corporate, the ongoing status of which as a body corporate depended on a Territory law or a Commonwealth law made under s 122. The [90] Commonwealth contended that there is a sufficient nexus or connection between laws made under s 122 and bodies corporate incorporated in a Territory, because the law of the place of incorporation generally determines the powers of corporations established under that law. The Commonwealth contended further that s 122 supported the relevant provisions even though they affected employees of the body corporate incorporated in the Territory who were outside the Territory ...

[The] challenge must be rejected. The Commonwealth's construction of par (e) of the definition of "employer" is plainly correct. On that construction, its submissions as to the sufficiency of connection between s 122 and a law directed to bodies corporate incorporated in a Territory ... are also correct.

The joint judgment then turned to the arguments relating to paragraph (f), as formulated most fully in the written submissions tendered on behalf of Queensland.

Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ: [90] The first submission ... was that par (f) of the definition created no sufficient nexus with a Territory, because its effect was that the challenged provisions could apply to employees who conducted an activity in a Territory no matter how small a part of the employer's overall activities it was, no matter how insignificant it was, no matter whether the employer employed anyone in connection with the activity, no matter whether the

employer or the employee had ever been present in the Territory, and no matter whether the employee might be engaged predominantly in activities unconnected in any way with the Territory. It was submitted that this state of affairs would produce an absurd outcome: an employee would be subject to the challenged legislation so far as an employee undertook Territory-connected activities, but subject to State laws so far as the employee's activities did not have that connection.

The second submission ... rested on the fact that in *Re Dingjan* [(1995) 183 CLR 323] it was held that a law giving power "in relation to a contract relating to the business of a constitutional corporation" was not a law with respect to a constitutional corporation. It was said to follow that "a law with respect to the employment of employees in connexion with activities conducted by such persons in a territory" could not be a law for the government of the Territory.

[91] [The first submission] ... turned on a particular construction of the legislation. The better construction is that for a person or entity to be an employer, two elements have to be found. First, the person or entity has to carry on an activity in a Territory. Secondly, the person or entity has to employ, or usually employ, an individual in connection with that activity. The word "usually" excludes unpredictable, infrequent or unusual acts carried out by the employee at the employer's request. It suggests the need for attention to what the employee normally does, and that in turn suggests that attention must be given to the employee's core or routine duties – considered as a whole, not separately.

It is true, as the Commonwealth accepted, that in particular cases it might be difficult to assess whether the connection between the employee's duties and the employer's activities in a Territory existed. It is also true that changes in an individual's duties might cause that individual to cease to be an employee as defined in s 5(1), and later changes may cause that individual to become one again, with consequential changes in the application of the legislation to the employer. However, if a person or entity is an "employer" because an individual is employed in connection with an activity carried on by the person or entity in a Territory, the employee is subject to the new Act in respect of all that employee's duties. The supposed absurdity of an employee falling under one body of law as to one part of his or her duties, and a different body of law as to another, would not arise.

On the better construction, the points made by Queensland can be seen to lack force. An employee engaged predominantly in activities unconnected in any way with a Territory would not be employed or usually employed in connection with the activity carried on by the employer in the Territory. If no employee were employed in connection with the activity, the employer would not be an employer in the sense defined in par (f). The fact that neither the employer nor the employee had ever been present in the Territory might point against the definition applying, but would not be fatal: an employer can carry on an activity in a Territory quite intensively through agents without ever going there, and an employee who directs the conduct of others in a Territory can be employed in connection with an employer's activity in that Territory without ever going there. The laws supported by s 122 are not limited to those applying to persons or activities in a Territory, but extend to laws applying to conduct taking place outside the Territory, for example, journeys that begin or end in a Territory [*Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29]. Neither the insignificance of the activity carried on by the employer as compared to the employer's other activities, nor the insignificance of the activity considered by itself, are factors which can prevent the definition in par (f) from applying, and they are not factors revealing any remoteness of connection between the impugned provisions and the Territory. Nor is remoteness of connection demonstrated by the application of the challenged legislation to the employer in relation to only a small proportion of its employees rather than more of them.

The second submission ... must also be rejected. *Re Dingjan* is distinguishable. It dealt with the power conferred by s 51(xx) to make laws for the peace, order and good government of the Commonwealth with respect to a particular class of persons, namely certain types of "corporations". It did not deal with s 122, which is not a power limited to persons, but which [92] extends to making "laws for the government of any territory". The connection established by par (f) of the definition of "employer" between the impugned provisions and a Territory is in any event closer than the connection between the legislation held invalid in *Re Dingjan* and corporations ...

The challenges to validity so far as they are based on a lack of support from s 122 fail.

Kirby and Callinan JJ held that the legislation could not validly operate even in its application to corporations under s 51(xx). They therefore did not need to determine the validity of its

operation in relation to Territories, which was clearly not capable of standing alone. Nevertheless Kirby J expressed his tentative agreement with the above reasoning.

Kirby J: [122] The extent to which limitations upon the powers specifically granted to the Parliament by s 51 of the Constitution fetter the legislative power to make laws for the government of any territory, has been a matter of controversy upon which, in the past, this Court has divided. In *Newcrest Mining (WA) Ltd v Commonwealth* [(1997) 190 CLR 513], Gaudron and Gummow JJ and I concluded, contrary to some earlier authority, that the grant of power in s 122 was subject, in that case, to the restriction on the making of federal laws expressed in s 51(xxxi). I accept that the issue is not settled by *Newcrest*. Nor is this the case to settle it. Apart from anything else, there are differences between the restriction, relevant to laws for the federal acquisition of property contained in s 51(xxxi) of the Constitution, and the suggested restriction on federal laws with respect to industrial relations contained in s 51(xxxv). The reference in the latter to the consideration of interstateness suggests that, in this respect, the power of the Parliament to make laws for the government of any territory stands apart, is relevantly plenary and is not, in the case of the [123] territories, subject to any express or implied restriction or limitation imported from the industrial disputes power contained in s 51(xxxv).

Whilst, therefore, I am inclined to agree with the conclusion and reasoning of the majority concerning those provisions of the new Act that rely on the constitutional power to make laws by reference to the connection between the “employer” and “employee” and a territory, it is unnecessary for me to reach a final opinion on the issue.