

The terms of ss 16–18 of the *Workplace Relations Act 1996* (Cth), as amended in 2005, were substantially set out on pages 398-9 of the fourth edition of Blackshield & Williams, though wrongly identified there (in an attempt to anticipate the final numbering) as ss 14–16. The possibility of a challenge to those sections on grounds of “manufactured” inconsistency was also there canvassed. The challenge as subsequently mounted was formulated in a variety of ways; but, predictably, all formulations failed.

The principal arguments were, first, that s 16 was not supported by any head of power; and, second, that s 16 constituted “[93] a bare attempt to limit or exclude State legislative power, including future State laws which may be excluded by regulations made under the [new] Act, rather than to comprehensively regulate a particular field of activity to the exclusion of any State law which also regulates that field of activity”.

The first argument was treated as depending largely on a question of construction: namely, on the width of meaning and application to be ascribed to the expressions “employer” and “employee” in s 16. The joint majority judgment held that the meanings of those expressions were confined to the meanings assigned to them by ss 5 and 6 of the Act, which operated by invoking particular heads of Commonwealth legislative power. (In particular, “employer” was defined to mean (*inter alia*) a “constitutional corporation” within the meaning of s 51(xx).) On this reading, s 16 would be valid, since the various heads of power invoked by s 6 would suffice to support it, just as they did for the substantive provisions of the new legislation.

The joint judgment did advert briefly to a further submission that, even on that basis, s 16 “[96] could not be characterised as a law with respect to corporations”, but said simply: “The submission must be rejected.” No reasons were given. Nor was any reference made to *CFMEU v Newcrest Mining Ltd* (2005) 139 IR 50, which had appeared to support such a submission. In short, the disposition of this issue is a further example of the Court relying on a process of statutory construction to avoid the need for any attempt at constitutional analysis at all.

The second argument was that, as a bare attempt to exclude State laws, s 16 did not in fact exercise the powers thus held to be available. The joint judgment rejected that argument also.

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

**Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ:** [96] It follows from the conclusion just reached that the Parliament had available to it the heads of power referred to in the definition of “employer” in s 6(1). But Western Australia submitted that in s 16 the Parliament had failed to use its power to deal with the subject-matter of the new Act. Section 16 was not a law dealing with a subject-matter assigned to the Parliament; it was a law merely aimed at preventing State legislative action. That was because it sought to exclude the operation of State laws on matters in relation to which the Commonwealth had not attempted to legislate.

Western Australia accepted that it is open to the Parliament to identify a field to be “covered” by federal laws in the sense that federal laws are to operate exclusively of State laws, making those State laws inconsistent with the federal laws and invalid to that extent under s 109 of the Constitution. But Western Australia contended that the Commonwealth had attempted, in a sense, to manufacture inconsistency ... in attempting to take the “covering the field” test beyond what s 109 permits.

Western Australia submitted that in contrast to s 17, s 16 was not expressed in terms requiring there to be an inconsistency between the new Act and a State law. Both ss 17 and 18 would be unnecessary if s 16 were a genuine attempt to identify the extent to which the new Act was intended to operate exclusively, and they reveal that s 16 is concerned with the operation of State laws, not with preserving the operation of particular provisions of the new Act which might be inconsistent with State laws.

[97] Western Australia also contended that in numerous respects s 16 attempts to invalidate State laws despite having failed to enact any corresponding federal law. Western Australia said, for example, that s 16(1)(d) provides that the new Act is intended to apply to the exclusion of a State or Territory law providing for the variation or setting aside of rights and obligations arising under a contract of, or arrangement for, employment that a court or tribunal finds to be unfair. The only provisions in the new Act dealing with unfair contracts are ss 832-834, and they only deal with contracts binding on independent contractors, not employees. Hence s 16(1)(d) applies to the exclusion of Pt 9 of Ch 2 of the *Industrial Relations Act 1996* (NSW), dealing with unfair contracts of employment. The State law is excluded, but no federal law applies. Western Australia contended that there were various other examples of this. One was said to relate to s 16(1)(e) which, read with s 16(3)(c), indicates an intention to apply the new Act to the exclusion of State laws dealing with the exercise of rights by a representative of any trade union to enter premises for any purpose other than occupational health and safety; yet the new Act only deals with the exercise of rights of entry pursuant to Divs 4, 5 and 6 of Pt 15 by officials of organisations registered under the new Act for certain purposes ... [Other examples] related to the making of regulations under s 16(4) in relation to discrimination legislation, matters listed in s 16(3), redundancy provisions, and the enforcement of contractual entitlements.

Thus Western Australia submitted that s 16, since it is aimed at preventing the exercise of State legislative power on various matters rather than preserving the operation of Commonwealth legislation on those matters, is not “a law of the Commonwealth” within the meaning of s 109, and cannot prevail over State legislation passed in exercise of its concurrent power. It is true that on the construction of s 16(1) which was accepted above, provisions like s 16(1)(d) and (e) only apply to circumstances involving employees and employers as defined in ss 5(1) and 6(1), and hence to circumstances where, subject to the present controversy, Commonwealth power exists. But even on that construction, Western Australia contended that there was an area – relatively narrow, perhaps, but still an area – where the Commonwealth had refused to legislate positively and had used s 16 to prevent the States from doing so. That is, the Commonwealth had effectuated a bare exclusion of State law.

*The Commonwealth’s arguments.* The Commonwealth specifically declined to contend that if a Commonwealth law simply sought to exclude State law in a field and made no provision whatever on the same subject-matter it was within power. The Commonwealth contended rather that it was open to the Commonwealth Parliament to indicate the relevant field it intended to cover to [98] the exclusion of State law, that s 109 would then operate even though the Commonwealth had not made its own detailed provisions about every matter within that field which State law dealt with, and that it sufficed for the Commonwealth to have some provisions dealing with aspects of the field, leaving others unregulated. The Commonwealth submitted that the relevant field was to be identified, not by reference to the areas regulated by State law, but by reference to the terms of the Commonwealth law ... The Commonwealth submitted that it was open to the Parliament to identify the rights and obligations arising out of [the relevant] relationships of employees and employers as a field, and to indicate an intention to cover that field (or, as here, part of it, because of the limitations to s 16(1) and the operation of s 16(2) and (3)). On the construction of s 16(1) accepted above, the Commonwealth chose to exclude State law only in respect of ... employees and employers as defined in ss 5(1) and 6(1).

*No bare attempt to limit or exclude State legislative power.* The Commonwealth’s submissions are to be preferred. Western Australia pointed to nothing in s 109 itself or in the case law on s 109 suggesting that s 109 will not cause Commonwealth law to prevail over an inconsistent State law and render it invalid to the extent of the inconsistency unless the Commonwealth law provides some regime for regulating each particular aspect of the topics dealt with by the State law. Rather, as Dixon CJ put it in *Lamshed v Lake* [(1958) 99 CLR 132 at 147], the distinction is between a law which lays down a positive rule and a law “seeking rather to limit State power”. Section 109 may operate where the Commonwealth chooses to enact a scheme involving a more detailed form of regulation than State law provides. Equally, s 109 may operate where the Commonwealth creates a scheme involving less detailed regulation than State law provides. And s 109 may operate where the Parliament has done what it has in the new Act – to provide a more detailed scheme than State law in some respects and a less detailed scheme in other respects. The Commonwealth has legislated to provide a detailed set of rules for particular agreements; it has not dealt, for example, with unfair contracts except in relation to independent contractors, but that does not preclude it from defining a

SUPPLEMENT TO CHAPTER 9, §4

field of relationships between s 5(1) employees and s 6(1) employers, and occupying parts of that field, like unfair contracts, to the exclusion of State law.

The joint judgment added that since s 16 “[98] strongly resembles” the provision considered in *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84, that case was “[100] directly applicable”. Kirby and Callinan JJ, who held the new provisions wholly invalid, did not consider this issue.