

The validity of the substantive amendments to the *Workplace Relations Act 1996* (Cth) introduced by the 2005 legislation was considered in *New South Wales v Commonwealth (WorkChoices Case)* (2006) 231 ALR 1. The amendments were held to be valid with no need for reliance on s 7A (now renumbered s 14). Similarly, the registration provisions (now renumbered as Schedule 1), and in particular ss 18A and 18B (not renumbered), were held to be valid with no need for reliance on s 18D. Accordingly, the operation of the reading-down provisions did not need to be considered. Kirby J, who held in dissent that the substantive provisions were *not* within power, also found it unnecessary to consider the validity of s 14, noting simply that its reading-down formula, “[160] even if valid, cannot rescue isolated parts of the residue ... after the invalidation of the provisions wholly reliant on s 51(xx)”. Callinan J also expressed no final view, though he found “[169] some force” in the submission that s 14 “purports to require the Court to do the impermissible, to legislate”. As for the more traditional methods of reading down and severance, including those prescribed by s 15A of the *Acts Interpretation Act 1901* (Cth), neither of these judges was prepared to hold that such methods could avail to preserve the validity of any remnants of this legislation.

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

**Kirby J:** [160] So far as s 15A of the *Acts Interpretation Act* is concerned, there are limits upon the power of the Parliament to direct the courts, in effect, to make a new law or to choose what a remade law should be. The limit is reached where, faced with a conclusion of apparent constitutional invalidity of particular provisions, a court “cannot separate the woof from the warp and manufacture a new web” [*Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 386]. From time to time, this Court has invoked other metaphors to explain when the Court has arrived at that limit. Thus, it has indicated a willingness to undertake amputation and excision, where necessary, but not to perform judicial “plastic surgery” upon the challenged law [*Bank of NSW v Commonwealth (Bank Nationalisation Case)* (1948) 76 CLR 1 at 372]. By inference, this is a reference to judicial excisions that would substantially alter the appearance of the law, presenting a law that looks quite different from that which was made by the Parliament.

[161] The reason why this Court will not undertake such a task is ultimately based on the proper function of the Judicature established by the Constitution and on the principle of the separation of the judicial from other governmental powers. Thus, in the guise of construing a challenged federal law, the Court cannot be required to perform a feat that is, in essence, legislative and not judicial.

As to s 15A of the *Acts Interpretation Act*, the provision can save the validity of a federal law generally where the law itself indicates a standard or test that may be applied for the purpose of limiting its operation and preserving the validity of the law thus limited, so long as the outcome has not been changed so as to make it something different from the law enacted by the Parliament. If the Court concludes that the challenged law “was intended to operate fully and completely according to its terms, or not at all” [*Pidoto v Victoria* (1943) 68 CLR 87 at 108], the Court will not, under the guise of interpretation and severance, uphold what would effectively be a new and different law.

If the invalidated portions are relatively few and specific, surgery involving particular invalidation and reading down will be available and appropriate, as it was in the *Industrial Relations Act Case* [(1996) 187 CLR 416]. Where, however, the resulting invalidation is substantial and would strike down key provisions of a comprehensive and integrated legislative measure, the invocation of statutory or constitutional principles of severance will be inappropriate. They will be unavailing to save the parts of the new law that are not specifically struck down as invalid for constitutional reasons.