

In *New South Wales v Commonwealth (WorkChoices Case)* (2006) 231 ALR 1, the High Court held by a 5:2 majority (Kirby and Callinan JJ dissenting) that the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), substantially reshaping the *Workplace Relations Act 1996* (Cth), was valid. The repeal of the older provisions based on s 51(xxxv) was a valid exercise of power under s 51(xxxv); their replacement by new provisions based on s 51(xx) was a valid exercise of the latter power. The result entailed a clear rejection of the “narrow” view of s 51(xx), and to that extent appeared to vindicate the “wide” alternative view. However, the joint judgment did little to clarify the principles involved.

The case generated enormous media interest in dealing with a matter of national political controversy. This was reflected in the parties that brought the case. The challenge was initiated by five States – New South Wales, Victoria, Queensland, South Australia and Western Australia – and a number of unions and peak union bodies. Tasmania, the Northern Territory and the Australian Capital Territory intervened in support. All up, the hearing before the High Court took six days and involved 39 barristers.

The Court’s decision rested simply on adoption of the reasoning of Gaudron J in *Re Dingjan* (1995) 183 CLR 323, which the joint judgment now paraphrased as follows.

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

**Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ:** [54] Her Honour’s reasoning proceeded by the following steps [183 CLR at 365]. First, the business activities of corporations formed within Australia signify whether they are trading or financial corporations, and the main purpose of the power to legislate with respect to foreign corporations must be directed to their business activities in Australia. Second, it follows that the power conferred by s 51(xx) extends “at the very least” to the business functions and activities of constitutional corporations and to their business relationships. Third, once the second step is accepted, it follows that the power “also extends to the persons by and through whom they carry out those functions and activities and with whom they enter into those relationships”.

This understanding of s 51(xx) was subsequently amplified by Gaudron J in her reasons in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* [(2000) 203 CLR 346 at 375] where her Honour said:

“I have no doubt that the power conferred by s 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that subsection, 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.”

[55] This understanding of the power should be adopted. It follows, as Gaudron J said [203 CLR at 375], that the legislative power conferred by s 51(xx) “extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations”.

Of course, both in *Dingjan* and in *Pacific Coal* (as to which see Chapter 22, §4), Gaudron J was in dissent, as Kirby J now pointed out. He added that in any event the passage from *Pacific Coal* had been taken out of context:

**Kirby J:** [132] The joint reasons attach great significance to the remarks of Gaudron J in her reasons in *Pacific Coal*. Her Honour is there quoted as expressing her belief as to the amplitude of the “power conferred by s 51(xx) of the Constitution”, including with respect to the “regulation of the conduct of those through whom [the corporation] acts, its employees and shareholders”. Three observations can be made on this passage, which the joint reasons say should be adopted by the Court as a correct “understanding of the power”.

First, in *Pacific Coal*, Gaudron J (along with McHugh J and myself) was in dissent. Her reasoning therefore forms no part of the *ratio decidendi* of that case. Secondly, the quotation from Gaudron J in the joint reasons omits the sentence that introduces the passage which the majority has now approved. That sentence makes it clear that Gaudron J was confining her remarks to the issue in hand, namely the constitutional validity under s 51(xx) of s 7A(1) of the *Workplace Relations Act 1996* (Cth). In the omitted sentence, Gaudron J said [203 CLR at 375]:

“Even if s 7A(1) did apply in this case, item 50 in Pt 2 of Sch 5 could not, in my view, be characterised as a law with respect to constitutional corporations.”

The fact that the approved passage was not intended by Gaudron J to be as unqualified as the words quoted in isolation might suggest is confirmed by the conclusion which her Honour reached, based on the invocation by the employer in that case of s 51(xx) to sustain the validity of the contested provision. Gaudron J actually rejected the conclusion that the provision could rely for its validity on s 51(xx). Thus, her Honour went on to explain why the paragraph was not available [203 CLR at 375]:

“The only connection between item 50 in Pt 2 of Sch 5 to the [*Workplace Relations and Other Legislation Amendment Act 1996* (Cth)] and s 51(xx) of the Constitution is that it may have some effect on the rights and obligations of corporations and their employees. That is not sufficient to give s 3 of [that] Act, to the extent that it purports to give effect to item 50, the character of a law with respect to corporations.”

This is therefore yet another instance of the oft-expressed danger of taking words (whether in a constitutional grant of power or in judicial elaborations of it) out of context.

Thirdly, no argument was addressed in *Pacific Coal* to the reconciliation of the powers granted by pars (xx) and (xxxv) of s 51 of the Constitution. In these proceedings, that argument is at the very centre of the matters for decision. Remarks made by a judge without regard to that argument are of limited utility in the present proceedings. They should not be inflated into a general principle to be endorsed by this Court.

Similarly, Callinan J now pointed out that what Gaudron J had said in *Re Dingjan* was “[259] directed to dealings between contractors and ‘constitutional corporations’, and not relations between them and their employees. This appears from the emphasis that her Honour placed upon a [260] connexion between the contractors and the *business* functions and activities of corporations, and their business relationships with others.” As to *Pacific Coal* he said:

**Callinan J: [261]** There was little or no discussion of the corporations power in argument. Gaudron J, in the minority, taking a step beyond her position in *Re Dingjan*, stated, unnecessarily for the decision, that in her view the corporations power “extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations” [203 CLR at 375]. I respectfully agree with Kirby J that it is not right to seize, and to rely conclusively, upon a pronouncement made by a dissenting judge on a point not even argued, and, as Kirby J points out, also greatly qualified by other passages from her Honour’s reasons in that case.

Leaving particular dicta aside, the majority’s references to *Re Dingjan* might appear to imply an acceptance of the main point of consensus in that case: namely, that rather than trying to determine the precise metes and bounds of the power conferred by s 51(xx), the Court, in any particular case, should simply focus on the question whether the impugned law has a “sufficient connection” with s 51(xx). This, of course, would be in accord with the current generally agreed approach to issues of characterisation (see Chapter 16, §3), and indeed the joint judgment in *WorkChoices* took care to reaffirm that approach:

**Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ: [45]** The general principles to be applied in determining whether a law is with respect to a head of legislative power are well settled. It is necessary, always, to construe the constitutional text and to do that “with all the generality which the words used admit” [*R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-6]. The character of the law must then be determined by reference to the rights, powers, liabilities, duties and privileges which it creates [*Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 352-3]. The practical as well as the legal

operation of the law must be examined [*Re Dingjan* (1995) 183 CLR 323 at 369]. If a law fairly answers the description of being a law with respect to two subject-matters, one a subject-matter within s 51 and the other not, it is valid notwithstanding there is no independent connection between the two [46] subject-matters [*Re F; ex parte F* (1986) 161 CLR 376 at 388]. Finally, as remarked in *Grain Pool of Western Australia v Commonwealth* [(2000) 202 CLR 479 at 492], “if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice”.

Inevitably, however, the case had been argued as turning on the choice between a “narrow” and a “wide” view of s 51(xx), now reformulated respectively as a “distinctive character” test and an “object of command” test. In those terms, while not perhaps fully endorsing the “object of command” test, the joint judgment decisively rejected the “distinctive character” test, and with it one possible reading of *Dingjan*.

**Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ:** [45] The “distinctive character test” was said to be: “the fact that the corporation is a foreign, trading or financial corporation should be significant in the way in which the law relates to it” if the law is to be valid [cf Dawson J in *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 316]. The “object of command test” was said to be: that a constitutional corporation is “an ‘object of command’ [of a law], permitting or prohibiting a trading or financial corporation from engaging in conduct or forming relationships” [cf Murphy J in *Fontana Films* (1982) 150 CLR 169 at 212 and Griffith CJ in *Huddart Parker v Moorehead* (1909) 8 CLR 330 at 348] ...

At once it should be said that the plaintiffs’ argument against the object of command test and in favour of the distinctive character test has several difficulties. It seeks to build upon some statements made in judgments of the Court which, read in their context, constitute no more than an explicit limitation upon what was being decided in the particular case. In so far as it seeks to build upon suggestions that s 51(xx) could be interpreted as having an unduly broad reach, such as would disturb a proper or intended “federal balance”, it invites the closest attention to what assumptions underpin the suggestions. Finally, the assertion of a specific test for characterisation of a law as being a law with respect to constitutional corporations either runs serious risk of inverting the proper order of inquiry or posits a test that again invokes notions of federal balance.

The first of these points referred to comments like those of Barwick CJ in the *Concrete Pipes Case* (1971) 124 CLR 468, to the effect that the result in that case did not necessarily or logically mean “[489] that any law which in the range of its command or prohibition includes foreign corporations or trading or financial corporations formed within the limits of the Commonwealth is necessarily a law with respect to the subject matter of s 51 (xx)”. The point was simply that judicial abstention from affirming such a consequence was not to be read as denying the possibility of such a consequence. The concern to maintain “the proper order of inquiry” was partly a concern that “[46] consideration of the legal or practical operation of the law in question” should precede the consideration of arguments *against* a sufficient connection, and partly a concern that presuppositions about “federal balance” should *not* take priority over the process of construing the constitutional text.

The argument was complicated by reference to two other conceptions to be drawn from the decided cases. The first was the attempt to confine the scope of s 51(xx) by limiting it to the regulation of activities and relationships “external” to a corporation, as distinct from its “internal” arrangements – a distinction derived from the judgment of Isaacs J in *Huddart Parker v Moorehead* (1909) 8 CLR 330. Isaacs J had treated such matters as “[396] wages and hours” for employees as questions of “purely internal management”, and hence beyond the scope of the power. The joint judgment rejected the whole distinction, and in any event suggested that its application was not clear-cut.

**Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ:** [31] [B]y dealing thus with questions of employment, Isaacs J gave a very particular meaning to events and circumstances that were *not*

external to a corporation. It was a meaning which would evidently present great difficulty in distinguishing between what is external or “extraneous” to a corporation and what is not ...

In any event, there seems little reason to assign relationships between the corporation and its employees to the class of “internal” relationships. If, as Isaacs J suggested, the touchstone is whether the corporation is “a completely equipped body ready to exercise its faculties and capacities” [8 CLR at 396], that seems to embrace the initial employment of employees but not any subsequent solicitation for, or engagement of, employees. Moreover, the inherent instability of the distinction can be illustrated further by considering three ways in which a corporation could raise capital – by borrowing from a bank or raising debt finance from the public, or by issuing shares (either by private placement or by public issue). There seems little reason to distinguish between the three. Yet it seems that borrowing from a bank would be an “external” matter and issuing shares to existing shareholders would be an “internal” matter.

The joint judgment also argued that the idea of excluding legislative interference in a corporation’s “internal” affairs was derived from the “[32] choice of law rule” enjoining comity in the treatment of foreign companies, as laid down in cases like *Bateman v Service* (1881) 6 App Cas 386; but that whatever utility such conceptions might have in that context, it was inappropriate to import them into a constitutional context.

The second complicating factor was the test of “discriminatory operation”, originally advanced by Brennan J in the *Actors Equity* case (see §3 above). Although Brennan J there declined to choose between the “wide” and the “narrow” view of s 51(xx), his approach had seemed to lean towards the “object of command” test, since it treated s 51(xx) as extending to any law which focused on corporate involvement as the *discrimen* triggering its application. Accordingly, the joint judgment in the *WorkChoices* case initially assumed that “[55] on its face”, the test of “discriminatory operation” “would ... be satisfied by any law which singled out constitutional corporations as the object of statutory command” (and hence by any law in the form: “A corporation shall ...” or “A corporation shall not ...”).

In *Dingjan*, however, Brennan J had seemed to assimilate his test to that of “significance”. Accordingly, the plaintiffs in the *WorkChoices* case adopted “discriminatory operation” as an alternative but equivalent version of their own preferred “distinctive character” test.

The majority judgment did not accept this equivalence. Instead, it proposed a new interpretation, treating the test as one of “discriminatory operation” – that is, as “[55] intended to apply chiefly, perhaps only” to cases where the law applies on its face “to constitutional corporations and to other persons indifferently”, but its practical operation has a particular impact on its corporate subjects. The majority reasoned that if a law of this kind was brought within power under s 51(xx) by reason of its practical impact on constitutional corporations, a law applicable *only* to such corporations must be valid *a fortiori*: that is, the “object of command” test was merely “[56] the logical extension” of the test proposed by Brennan J.

Neither of these new explanations of what Brennan J meant by “discrimination” seems very convincing; but the issue can be put to one side. The practical effect of the explanation adopted by the plaintiffs was that “distinctive character” and “discriminatory operation” became, in effect, alternative versions of the limit which they sought to impose on s 51(xx) – and, however it was expressed, the majority judges declined to impose any such limit.

**Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ:** [46] What is described as the “distinctive character test” builds largely upon statements made in cases where the laws in question have concerned the *trading* activities of *trading* corporations. The argument that the distinctive character test has been, or should be, adopted takes what has been said about what is distinctive of a trading corporation and treats that as indicating that the adjectives “foreign”, “trading”, and “financial” are the considerations on which the power turns. “Trading” and “financial” are said to refer to a corporation’s activities; “foreign” refers to a corporation’s status or origin. Yet it is acknowledged that the power is to make laws with respect to particular juristic persons. It is what was described in argument as “a persons power” – it is not “a power with respect to a function of government, a field of activity or a

class of relationships” [*New South Wales v Commonwealth (Incorporation Case)* (1990) 169 CLR 482 at 497].

Treating the character of the corporations mentioned in s 51(xx) (as foreign, trading or financial) as the consideration on which the power turns produces awkward results. Why should the federal Parliament’s power with respect to Australian corporations focus upon their *activities*, but the power with respect to foreign corporations focus only upon their *status*? More fundamentally, however, examination will reveal that the “distinctive character test” is put forward by the plaintiffs, not just as a convenient description of the result of considering the sufficiency of connection between a law and the relevant head of power, but as an additional filter through which it is said the law must pass if it is to be regarded as having a sufficient connection with s 51(xx). This is a contention that, again, necessarily invokes notions of federal balance.

In short, the joint judgment refused to treat the “distinctive character” test as a mere explanation or elaboration of what is required to establish a “sufficient connection” with s 51(xx), and treated it instead as “[46] an additional filter” interposed cumulatively upon the process of ascertaining “sufficient connection”. This insistence that the plaintiffs’ argument must be “[60] understood as inserting a new or different filter into the process of characterisation” was a recurring theme of the majority judgment. In any event, these judges rejected the suggested test as inherently unsatisfactory.

**Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ:** [52] The plaintiffs ... submitted that the analysis made by Dawson J in *The Tasmanian Dam Case*, and subsequently amplified in *Re Dingjan*, embodied the distinctive character test and is the preferable approach to determining whether a law is supported by s 51(xx). It is an approach which would read the power as confined to making laws with respect to the trading activities of Australian trading corporations and the financial activities of Australian financial corporations. But that, of course, is not what s 51(xx) says.

It is an approach that presents a particular difficulty with foreign corporations. The character of a foreign corporation is fixed by its status, not by its activities. The power to legislate with respect to foreign corporations would be very narrow if the law must focus upon the status of the corporation. There is no immediately evident reason for there to be such disconformity between the ambit of legislative power with respect to Australian corporations and the ambit of legislative power with respect to foreign corporations ...

[56] An important element underpinning this argument, and indeed all of the plaintiffs’ arguments about s 51(xx), was that it is necessary to limit the reach of the power. The step of taking “a different approach” to s 51(xx) was said by Dawson J [*Re Dingjan* (1995) 183 CLR 323 at 345] to be required because s 51(xx) is a power with respect to persons. But what necessarily underpins the proposition that a different approach is required to the task of determining whether a law is supported by s 51(xx) is an implicit assertion about federal balance and, in particular, an implicit assertion that to give the ordinary scope to the legislative power with respect to the particular persons mentioned in s 51(xx) could or would distort that balance. So much was made explicit by Gibbs CJ in *Fontana Films* – “extraordinary consequences would result if the Parliament had power to make any kind of law on any subject affecting such corporations” [150 CLR at 182]. And if there is no underlying assertion about federal balance, there could be no reason to adopt a different approach to determining the sufficiency of connection between an impugned law and the relevant head of power. The bare fact that s 51(xx) is a power to legislate with respect to particular persons rather than functions, activities or relationships, requires no such conclusion ...

[57] Reference has often been made in the cases to what are said to be the possible consequences of concluding that a law whose object of command is only constitutional corporations is a valid law. In *Huddart Parker* [8 CLR at 409], Higgins J spoke of possibilities that he saw as distorting constitutional arrangements. Reference was made to the possibility of the federal Parliament framing a new system of libel laws applicable to newspapers owned by corporations, and to licensing Acts creating a new scheme of administration and of offences applicable only to hotels belonging to corporations.

In part, reference to such consequences seeks to present possible *social* consequences that it is said could flow if further legislation is enacted, and which it is said are to be seen as absurd or inconvenient, as a reason to confine the reach of the legislative power. Section 51(xx), like other powers, should not be given a meaning narrowed by an apprehension of extreme examples and

distorting possibilities of its application to future laws. While there may be room for debate about whether the particular examples proffered by Higgins J are properly to be characterised as extreme examples or distorting possibilities, what is plain is that, as Professor Zines has written:

“It is clear that any power of the Commonwealth, on the most restricted or the widest interpretation, might, if the federal Parliament were so inclined, produce results which, when viewed together with State laws, are inefficient, socially bad or downright ridiculous. ... *That does not mean that the powers concerned should be construed restrictively so as to prevent those results.* The object of the power, as an aid in its interpretation, is not to be seen as an accumulation of desirable laws.” (emphasis added)

The plaintiffs’ arguments proffering limits to the reach of s 51(xx) were not confined, however, to arguments about the social or political utility of parallel systems of laws dealing in the one case with constitutional corporations and in the other with all other persons. Rather, the arguments about consequences went further than postulating absurd or inconvenient social consequences and explicitly or implicitly invoked notions of federal balance.

In response to this appeal to “federal balance”, the joint judgment reaffirmed the *Engineers Case* as rejecting any such presupposition, since both of the doctrines overturned in that case – implied immunity of instrumentalities and reserved State powers – had arisen out of a failure to start from “[58] the constitutional text, rather than a view of the place of the States that is formed independently of that text”:

**Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ:** [58] What was discarded in the *Engineers’ Case* was an approach to constitutional construction that started in a view of the place to be accorded to the States formed independently of the text of the Constitution. The *Engineers’ Case* did not establish that no implications are to be drawn from the Constitution. So much is evident from *Melbourne Corporation* and from *R v Kirby; Ex parte [59] Boilermakers’ Society of Australia* (“the *Boilermakers’ Case*”) [(1956) 94 CLR 254]. Nor did the *Engineers’ Case* establish that no regard may be had to the general nature and structure of the constitutional framework which the Constitution erects. As was held in *Melbourne Corporation* [74 CLR at 82]:

“The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities.”

And because the entities, whose continued existence is predicated by the Constitution, are polities, they are to continue as separate bodies politic each having legislative, executive and judicial functions. But this last observation does not identify the content of any of those functions. It does not say what those legislative functions are to be.

In the present matters, the appeals made to notions of federal balance, no matter whether the appeal was explicit or only implicit, were propositions about a “balance” of legislative power between the Commonwealth and the States. Two points must be made about those propositions. First, as Dixon J said in *Melbourne Corporation* [74 CLR at 82-83]:

“The position of the federal government is necessarily stronger than that of the States. The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation. Then supremacy is given to the legislative powers of the Commonwealth.”

Secondly, again as Dixon J pointed out in *Melbourne Corporation* [74 CLR at 82], the framers “appear ... to have conceived the States as bodies politic *whose existence and nature are independent of the powers allocated to them*” (emphasis added). Thus when it is said that there is a point at which the legislative powers of the federal Parliament and the legislative powers of the States are to be divided lest the federal balance be disturbed, how is that point to be identified? It cannot be identified from any of the considerations mentioned thus far in these reasons, and no other basis for its identification was advanced in argument.

Whether a basis for choosing a point of balance is identified or not, the fundamental question which lies behind the plaintiffs’ submissions is: what exactly is the content of the proposition that a particular construction of s 51(xx) would, or would not, impermissibly alter the federal balance? It is a proposition that stops well short of asserting that the favoured construction must be adopted lest the States could no longer operate as separate governments exercising independent functions. Instead it is

advanced by proposing particular limitations to the connection which must be established to demonstrate that a law is a law with respect to constitutional corporations and is advanced in that form on the basis that the result is said to be evidently desirable, even necessary. It may be suggested that the proposition should be criticised as being more a political proposition than a legal proposition. But “[t]he Constitution is a political instrument. It deals with government and governmental powers.” [74 CLR at 82] To state that the proposition is political rather than legal may, therefore, have a specious [60] plausibility but really be meaningless and the suggested criticism would be ill-founded. But to be valuable, the proposition, that a particular construction of s 51(xx) would or would not impermissibly alter the federal balance, must have content, and the plaintiffs made no attempt to define that content.

#### *General conclusions*

It is convenient to summarise at this point the conclusions that follow from the preceding discussion of the arguments about s 51(xx), before dealing with the arguments advanced by the parties concerning the relationship between s 51(xxxv) and s 51(xx). The distinction between external and internal relationships of corporations proffered by the plaintiffs as a limit to the legislative power conferred by s 51(xx) should be rejected as an inappropriate and unhelpful distinction. As explained earlier, transposing a distinction originating in choice of law rules into the present context is inappropriate. The distinction finds no reflection in the Convention Debates or the drafting history of s 51(xx) and, in any event, is unstable. Adopting it would distract attention from the tasks of construing the constitutional text, identifying the legal and practical operation of the impugned law, and then assessing the sufficiency of the connection between the impugned law and the head of power.

In so far as the plaintiffs contended that a test of distinctive character or discriminatory operation is to be adopted it is enough to say that, as these reasons will explain, the impugned provisions of the Amending Act which depend upon s 51(xx) either single out constitutional corporations as the object of statutory command (and in that sense have a discriminatory operation) or, like the legislation considered in *Fontana Films*, are directed to protecting constitutional corporations from conduct intended and likely to cause loss or damage to the corporation. In so far as the plaintiffs’ contentions required tests of distinctive character or discriminatory operation to be understood as inserting a new or different filter into the process of characterisation those contentions should be rejected. A law which prescribes norms regulating the relationship between constitutional corporations and their employees, or affecting constitutional corporations in the manner considered and upheld in *Fontana Films* or, as Gaudron J said in *Re Pacific Coal* [203 CLR at 375], “laws prescribing the industrial rights and obligations of [constitutional] corporations and their employees and the means by which they are to conduct their industrial relations” are laws with respect to constitutional corporations.

The joint judgment went on to apply this reasoning to various aspects of the legislation which had been singled out by the plaintiffs for more specific attack. For example, as part of the statutory protection against the possibility that a workplace agreement might contain “prohibited content”, s 365 made it an offence to seek to include such content in an agreement, and s 366 made it an offence to represent falsely (and recklessly) “that a particular term does not contain prohibited content”. The plaintiffs had argued that these provisions had no sufficient connection with power; but the argument failed.

**Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ:** [78] It was submitted that neither section required that the person to whom the prohibition was directed be a party or proposed party to a workplace agreement or a proposed agreement. Moreover, the submission contended, the provisions of s 366(1) “are even more abstract”, in as much as the conduct enjoined does not have to be in the course of, or in relation to, negotiations for a workplace agreement or a variation to it.

It is critically important, however, to recognise that both provisions relate to existing or proposed workplace agreements. By definition a workplace agreement is an agreement to which an employer, as defined in s 6(1), is a party (or in the case of a multiple-business agreement, one or more such employers is a party). For present purposes, then, ss 365 and 366 have operation in relation to existing or proposed workplace agreements with constitutional corporations.

A law which forbids any person from making a misrepresentation in relation to an existing or proposed workplace agreement, that a particular term does not contain prohibited content, is connected with the subject-matter of s 51(xx) - constitutional corporations. It is connected in a way that is not “insubstantial, tenuous or distant” [*Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at

79]. The connection is not insubstantial, tenuous or distant because the provisions now impugned form an integral part of a set of provisions directed to forbidding employers and employees from making or seeking to make workplace agreements with prohibited content. Section 365 prevents any person from seeking the inclusion of such a term; s 366 is evidently intended to prevent reckless misrepresentations about the effect of existing or proposed agreements. In their operation with respect to those employers which are constitutional corporations, both ss 365 and 366 are supported by s 51(xx).

Again, there was a specific challenge to restrictions on the right of trade union officials to enter a workplace to investigate issues of occupational health and safety arising under State legislation. By s 755(1)(a) the restrictions were made applicable to any premises “occupied or otherwise controlled by” a constitutional corporation.

**Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ: [80]** The chief contention was that s 755(1)(a)(i) should be held to be invalid on the ground that, like the law considered in *Re Dingjan*, it “does no more than make the activity of a s 51(xx) corporation the condition for regulating the conduct of an outsider”. To describe the operation of s 755(1)(a)(i) in this way gives insufficient significance to the fact that the particular operation of the new Act that is in question is the regulation of a right of entry to premises, and that the premises to which the right of entry is controlled are premises “occupied or otherwise controlled by” a constitutional corporation. This is a sufficient connection with s 51(xx), whether or not the entry that is thus regulated concerns a business being conducted on the premises by that corporation. The connection lies in the controlling of entry to a constitutional corporation’s premises. The law controlling entry is a law with respect to constitutional corporations.

Perhaps most controversially, the new statutory regime based on s 51(xx), like the old regime based on s 51(xxxv), provided for the registration of trade unions and employers’ associations with the Industrial Relations Commission, and also for the incorporation of organisations so registered. The original provisions had been upheld as reasonably incidental to legislation under s 51(xxxv) as early as *Jumbunna Coal Mine, NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309 (see Chapter 7, §6); but the trade unions now argued strongly that the new provisions could not be upheld as reasonably incidental to legislation under s 51(xx). The five majority judges disagreed – relying upon *Jumbunna Coal*, and also upon *Cunliffe v Commonwealth* (1994) 182 CLR 272, to illustrate “[86] the extent of the power to register persons and organisations, and to incorporate the latter, if there be the sufficient connection with one or more paragraphs in s 51 of the Constitution”.

**Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ: [80]** *Cunliffe v The Commonwealth* upheld the validity of a system requiring registration of persons giving assistance and advice to aliens seeking entry permits, visas and determination of refugee status. It made no difference for its validity that the law operated upon those providing the services in question rather than upon those to whom they were provided; the law was concerned with the protection of aliens in relation to matters affecting their status.

If it be accepted, as it should be for the argument on this branch of the plaintiffs’ case, that 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.

In short, the 2005 legislation was upheld in its entirety, and any attempt to set limits to the use of the corporations power in this context were dismissed.

Whether the emphatic rejection of the “distinctive character” test entails an endorsement of the “object of command” test is less clear. Such a conclusion would follow only if the dichotomy between the two tests is understood as a stark opposition exhausting all possibilities. For his part, Callinan J discerned an “[268] apparent acceptance of the ‘object of

command' test" to such an extent that the *Incorporation Case* (see Chapter 17, §4) "may well now be effectively overruled".