

Work Choices: The High Court Challenge

In May 2006 the High Court heard argument in a challenge to the constitutional validity of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). The challenge was initiated by five States – New South Wales, Victoria, Queensland, South Australia and Western Australia – and by a number of unions and peak union bodies, including Unions NSW and the Australian Workers Union. Tasmania, the Northern Territory and the ACT intervened in support of the challenge.

The proceedings attracted a record 39 barristers and argument was heard over the course of six sitting days. Transcripts are available online at www.austlii.edu.au/au/other/HCATrans/. A decision is expected some time in late 2006, or perhaps early in 2007.

Scope of the corporations power

The principal issue in the challenge is the scope of the Commonwealth's power under s 51(20) of the Constitution to make laws with respect to "foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth".

According to the challengers, those parts of the amended *Workplace Relations Act 1996* (WR Act) that operate by reference to employers who are constitutional corporations are not validly supported by s 51(20). This would in turn bring down the rest of the Work Choices amendments, even those supported by other constitutional powers (such as the Territories power in s 122), it being accepted that the provisions effectively stand or fall together.

Indeed if the challengers are correct, it is not just the Work Choices legislation that would be invalid, but many provisions that have been in the WR Act since 1996, including Division 2 of Part VIB – the part of the Act under which most current federal agreements have been certified.

The Commonwealth's broadest contention at the hearing was that any law that makes constitutional corporations an "object of command" – that is, any law that says "a corporation shall ..." or "a corporation shall not ..." – can necessarily be regarded as a law with respect to such corporations. The Commonwealth also argued that the power extends to the regulation of a corporation's "business functions, activities or relationships", and that this necessarily includes the relations between a corporation, its employees and those who represent such employees.

The challengers, by contrast, while accepting that the Commonwealth may regulate the trading or financial activities of corporations (as under the

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Trade Practices Act 1974), contended that the power does not as a general principle extend to the regulation of employment relationships.

This argument was put in various forms. One variant, advanced by New South Wales, was that the corporations power does not extend to regulating matters *internal* to a corporation's operations, including employment relations. This contention, it is fair to say, met with considerable scepticism from the bench.

More plausibly, it was argued that a law can only be characterised as one with respect to trading, financial or foreign corporations if it operates by reference to whatever it is that *distinguishes* such corporations from other corporations, or indeed other entities. A law regulating employment relations, it was claimed, does not meet that test.

This argument does find support in observations by certain judges in cases such as *Actors & Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, *Commonwealth v Tasmania* (1983) 158 CLR 1 and *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323. The problem for the challengers is that so too do the Commonwealth's arguments for a broader reading.

A fallback argument put by South Australia, and described by that State's Solicitor-General as the States' "last stand", is that even if the corporations power extends to regulating the employment conditions of most employees who work for corporations, it cannot cover those whose jobs have absolutely nothing to do with trading or financial activities: for example a health inspector who works for a local council.

A further string to the challengers' bow concerns the relationship between s 51(20) and the industrial arbitration power in s 51(35), which has hitherto provided the principal underpinning for federal industrial legislation. The argument here was put in at least two ways.

According to Victoria, the restricted nature of the power in s 51(35) should be taken to limit the operation of the corporations power. The power under s 51(31) to make laws for the acquisition of property "on just terms" has long been construed to limit the use of other legislative powers in the Constitution, on the basis that it would defeat the very point of s 51(31) to permit the use of other powers to acquire property *without* providing just terms. So similarly, Victoria argued, the corporations power may not be used to make laws about the resolution of industrial disputes without adhering to the s 51(35) requirements that only interstate disputes be regulated, and then only by means of conciliation and arbitration (but cf *Re Pacific Coal Pty Ltd; Ex parte CFMEU* (2000) 203 CLR 346 at 360).

A more subtle (and again perhaps more plausible) argument put by some of the other States was that in choosing between a broader and narrower construction of s 51(20), the High Court should prefer a narrower interpretation so as to minimise the extent of any overlap between the two

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powers. The States also highlighted the fact that attempts to amend the Constitution to confer a broad power over employment and industrial relations have repeatedly been defeated at referenda, though the Commonwealth strongly contested the relevance of that history in interpreting the Constitution as it stands.

It was conceded by all parties that the questions at issue in this case have not been definitively addressed before by the Court. There is thus no precedent that binds the Court one way or another. Nevertheless, the view of most commentators prior to the hearing was that both the general trend in constitutional interpretation, and the preponderance of earlier judicial opinion (especially in *Dingjan*), favoured the Commonwealth's argument for a broad reading of the corporations power.

At the hearing it became clear that at least two judges, Justices Kirby and Callinan, were concerned at the implications a broad reading would have for the "federal balance" often said to be implicit in the Constitution. Justice Kirby in particular repeatedly observed that if the Commonwealth were correct, this would effectively render s 51(35) redundant, including its requirement of the use of an "independent umpire". He also noted that given the prominent role played by corporations today in virtually every sphere of society, there would be few if any topics that would fall outside the Commonwealth's reach.

The fact though that these sentiments were not echoed by other members of the bench, combined with the tenor of some of the questions posed by Chief Justice Gleeson and Justices Gummow and Hayne, has led many observers to conclude that the Commonwealth still appears likely to secure a majority finding in favour of validity.

The one specific area in which the challengers might have more success involves the provisions in Sch 1 to the WR Act. These provide not only for the registration of unions and employers' associations, but for extensive regulation of their internal affairs (including rules, elections and finances).

The Commonwealth's main argument was that control of such matters is validly incidental to the regulation of employment relations with corporations, just as the equivalent provisions used to be regarded as validly incidental to the establishment of a system for the resolution of interstate industrial disputes (see eg *Jumbunna Coal Mine, No Liability v Victorian Coal Miners Association* (1908) 6 CLR 309). The promotion of more "democratic" and "accountable" organisations was said to be a matter of significance to the relations between corporations and their employees.

At the hearing, however, the union parties mounted a strong attack both on the sufficiency of the suggested connection to corporations, and more particularly on the structure of some of the key provisions in Sch 1 – memorably described by counsel for Unions NSW as not merely "irrational",

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but “frankly, weird”. It is by no means out of the question that some of those arguments will ultimately be accepted.

Definition of a “trading corporation”

In framing their arguments as to the scope of the corporations power, all parties accepted that a trading corporation is an incorporated body that engages to a significant extent in trading activities, regardless of whether it was formed for the purpose of trading. This has been the accepted approach since the High Court’s decision in *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190.

At the hearing, however, Justice Hayne seemed to want to question whether this and later decisions had taken the definition of a “trading corporation” too far away from its original conception. It was also notable that in the course of his submissions, the Commonwealth Solicitor-General suggested that it was doubtful whether bodies such as the Red Cross or local councils would satisfy the trading activities test. Yet these are bodies that *have* been found to be trading corporations by lower courts: see eg *E v Australian Red Cross Society* (1991) 27 FCR 310; *Burrows v Shire of Esperance* (1998) 86 IR 75.

If the Work Choices legislation is upheld, it will be interesting to see whether there is anything in the judgments to suggest either an abandonment of the trading activities test, or at least a stricter application of that test. Either approach might effectively exclude a large number of incorporated non-profit organisations (including councils, public universities, hospitals and various community-based service providers) from the reach of the WR Act.

Other issues

A range of other aspects of the Work Choices legislation are being challenged in the case. These include:

- s 16 of the amended WR Act, on the basis that it purports to exclude the operation of State laws even on subjects that are not otherwise regulated by the federal statute (cf *Wenn v A-G (Vic)* (1948) 77 CLR 84);
- the breadth of some of the regulation-making powers conferred on the Commonwealth, which were claimed to be so broad as to go beyond any head of legislative power (see *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 101, 119); and
- the transitional provisions in Sch 6 to the amended WR Act, on the basis that they so fetter the discretion of the Australian Industrial

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Relations Commission to resolve disputes that they cannot fairly answer to the description of a law with respect to the arbitration of industrial disputes under s 51(35) (see *R v Commonwealth Conciliation and Arbitration Commission; Ex p Amalgamated Engineering Union (Australian Section)* (1967) 118 CLR 219 at 269).

Once again, each of these arguments were strongly contested by the Commonwealth. However a finding of invalidity on one or more of these issues cannot be discounted.