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Workplace Relations and the Constitution:
The Development and Expansion of Federal Jurisdiction over Workplace Relations in Australia

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Toni Lucev
Federal Magistrate

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Engineers – The Critical Preliminary Argument

1. Robert Gordon Menzies stood before the Full High Court in Melbourne. He was counsel, junior counsel, age 25, briefed without senior counsel, appearing for a union, the Amalgamated Society of Engineers, in the High Court. This was the hearing of the now famous *Engineers* case.[1]

2. The question for the High Court in *Engineers* was whether a dispute between unions and Western Australian Government trading concerns was subject to the federal conciliation and arbitration power.

3. Menzies tried to argue that activities of the government trading concerns were trading, not government. Justice Starke soon said to Menzies:

> *This argument is a lot of nonsense.*

Menzies responded:

> *Sir, I quite agree.*

The new Chief Justice, Sir Adrian Knox, then said:

> *Well, why are you putting an argument which you admit is nonsense?*

Menzies, with all the brashness of youth, responded:

> *Because I am compelled by the earlier decisions of this Court. If your Honours will permit me to question all or any of those earlier decisions, I will undertake to advance a sensible argument.*

Rather than savage Menzies for what, in 1920 before the High Court might have seemed like impertinence, the Court adjourned, came back and announced that liberty would be granted to challenge any earlier decision of the High Court, and the case was adjourned to Sydney for argument.[2]

4. Manning Clark wrote this of the *Engineers* case:

> *The boy from Jeparit persuaded the judges to overthrow the doctrine of the "immunity of instrumentalities", the bulwark of the sovereign independence of the state.*[3]

5. The boy from Jeparit, speaking and writing 47 years later in the United States described "the method of interpreting Commonwealth powers" in *Engineers* as "revolutionary".[4]

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[1] *Amalgamated Society of Engineers v Adelaide Steamship Company Limited and Others* (1920) 28 CLR 129 ("*Engineers*").

[2] R. Menzies, Central Power in the Australian Commonwealth (Melbourne: Cassell & Co, 1968), pp 38-39 ("Menzies, Central Power"). *"Menzies may have been indulging his fondness for a good anecdote here. In 1995, on the 75th anniversary of the Engineers' Case, research by Sir Gerard Brennan into the original notebooks kept by the members of the Engineers bench disclosed that the argument against any reciprocal immunity had already been clearly stated by Menzies during his initial argument at the Melbourne hearings, and that at the Sydney hearings the fuller version of the argument was put by Leverrier KC, not by Menzies ("Three Cheers for Engineers", in M Coper and G Williams (eds), How Many Cheers for Engineers? (Federation Press, 1997), 145 at 146-8). In any event, the argument was accepted and the doctrine was overruled."*: T. Blackshield & G. Williams, Australian Constitutional Law and Theory. Commentary and Materials (4th Edn). (Leichhardt: The Federation Press, 2006) page 303 ("Blackshield & Williams, Australian Constitutional Law").

[3] CMH Clark, A History of Australia, Vol. VI (Carlton: Melbourne University Press, 1987) page 153. Menzies was born in Jeparit, in the Wimmera district of Victoria, in 1894: AW Martin, Robert Menzies. A Life. Vol. 1 (Carlton: Melbourne University Press, 1993), page 1.

[4] Menzies, Central Power, p. 48.

6. Menzies was thus, in part, responsible for a High Court decision which forever altered the federal-state balance of power, in favour of federal power.

7. *Engineers* is a strainer post in Australian legal history, taking a broad view of Commonwealth power, and specifically under section 51(xxxv) of the Constitution, the conciliation and arbitration power.

8. *Engineers* has recently been joined by another legal strainer post, the High Court's decision in the *Work Choices* case,[5] which has taken a similarly broad view of Commonwealth power, but under section 51(xx) of the Constitution, the corporations power.

9. *Engineers* and *Work Choices*, are convenient strainer posts from which to examine almost a century of growth in the boundaries of federal power over what is now generally called workplace relations.

Pre-federation

10. There were three attempts to insert a conciliation and arbitration power in the Constitution during the constitutional conventions of the 1890s.

11. The first and second, in 1891 and 1897, failed. The third, at the Melbourne convention of January 1898 succeeded. It did so by a slender margin: 22-19. It was lucky to do so. A Western Australian arch conservative, Sir John Forrest, only voted for the clause because he thought Federal Parliament would "deal with [conciliation and arbitration] more moderately than the states".[6] Sir Joseph Abbott was persuaded that the proposed words of the conciliation and arbitration power were "idle" or a "mischievous proposal", and that the Commonwealth might not use the power.[7] Without Forrest and Abbott there would likely be no conciliation and arbitration power in the Constitution.

12. The Premier of South Australia, Mr Kingston, first raised the question as to whether the Commonwealth Parliament ought to have the power to deal with the settlement of industrial disputes in 1891. Premier Kingston initially suggested the establishment of a federal tribunal to settle industrial disputes.[8] Premier Kingston proposed that Commonwealth Parliament have power to legislate for the establishment of courts of conciliation and arbitration, with jurisdiction, throughout the Commonwealth, to settle industrial disputes, but added the caveat that they would "hardly be a federal court in the ordinary acceptation".[9]

13. Having been defeated in 1891 the proposal for the Commonwealth Parliament to have conciliation and arbitration powers was resurrected by Mr Higgins, of Victoria, in 1897.[10] Higgins proposed that the

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[5] *New South Wales & Ors v Commonwealth of Australia* (2006) 229 CLR 1; [2006] HCA 52 ("*Work Choices*").
[6] Official Record of the Debates of the Australasian Federal Convention,Vol. 4, page 210 ("Convention Debates").
[7] Convention Debates, Vol. 4, pp. 197-198.
[8] Convention Debates, Vol. 1, page 164.
[9] Convention Debates, Vol. 1, pages 688 and 689.
[10] N. Palmer, Henry Bournes Higgins. A Memoir. (London: George G Harrop & Co, 1931) page 148 ("Palmer, Higgins"). Higgins, an Irish-born Melbournite barrister had become the member for Geelong in the Victorian Parliament in 1984: Palmer, Higgins, ch. XIII. He went as a Victorian representative to the 1897-1898 Constitutional Conventions: Palmer, Higgins, ch. XV. In 1901 he became the Federal Parliamentary member for North Melbourne: Palmer, Higgins, page 162. He took silk in 1903: Palmer, Higgins, p.182. In 1904 he became Attorney-General in the first Federal Labour Government, appointed by the Labour Prime Minister from outside of the Labour caucus: Palmer, Higgins, pages 172-173. In 1906 he accepted an appointment to the High Court: Palmer, Higgins, page 187. He would also serve as President of the Court of Conciliation and Arbitration from 1907 to 1920: Higgins J would hand down the famous Harvestor judgment: *Ex parte HV McKay* (1907) 2 CAR ("*McKay*") – the standard of fair and reasonable remuneration is the standard appropriate to the normal needs of the average employee, regarded as a human being living in a civilized community: *McKay* at 3. In *R v Barger* (1908) 6 CLR 41 ("*Barger*") Higgins J sat in the High Court as the employer in *McKay* argued tht the excise legislation which required payment of fair and reasonable remuneration was invalid because it was not a law with respect to taxation (under section 51(ii) of the Constitution) but a law to regulate labour conditions. The employer succeeded. Higgins J dissented: *Barger* at 111-135. Significantly, so too did Isaacs J: *Barger*

power be to deal with industrial disputes extending beyond the limits of any one State. The proposal was somewhat luke-warm, the power to be exercisable only if the Federal Parliament thought fit to create courts of conciliation and arbitration to deal with interstate industrial disputes. There was discussion about whether disputes were interstate or local, and the proposal was defeated.[11]

14. Higgins returned to the issue at the 1898 Convention Debate. Delegates objected that disputes might be artificially created to attract federal power.[12] Higgins dismissed these objections, characterising them as "mere theoretical grievance"[13] Higgins characterised the issue as to whether federal parliament ought to have the power to deal with federal disputes.[14] This time the proposal passed, and the words:

> *Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State*

would enter the Constitution as section 51(xxxv).

The passage of the Conciliation and Arbitration Act 1904

15. It was an element of "labour" platform that there be a system of "compulsory arbitration". In echoes of the "idle words" which had persuaded Sir Joseph Abbott to vote in favour of the conciliation and arbitration power at the Convention Debates, Australia's first Prime Minister,[15] Sir Edmund Barton said of the Conciliation and Arbitration Bill that:

> *This was a power, the necessity for the exercise of which it is hoped will seldom arise.*

Geoffrey Sawyer, one of the nation's leading constitutional law academics, has subsequently observed that this was "a vain hope".[16]

16. The passing of the *Conciliation and Arbitration Act*, *1904* (Cth) established a Court of Conciliation and Arbitration to, in broad terms, settle industrial disputes by means of conciliation and arbitration and to make awards, but also to enforce the awards made by the Court.

The pre-Engineers context

17. To understand *Engineers* it is necessary to understand the pre-*Engineers* context.

18. In *D'Emden v Pedder*[17] the High Court held that a State Government could not tax a federal officer in respect of his federal salary (the state seeking to impose a state payroll tax on that salary) because it operated as an interference with the free exercise of the powers of the Commonwealth. The Commonwealth Government, in the exercise of its legislative and executive power, was immune from the exercise of State Government power, unless authorised by the Constitution.

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at 81-111. He also wrote his seminal article "A New Province for Law and Order" for the Harvard Law Review: (1916) Harv. L. Rev. 13 during his Presidency of the Court of Conciliation and Arbitration. It was Higgins J, in his capacity as President of the Court of Conciliation and Arbitration, who referred *Engineers* to the High Court. He died in 1929, while still a Justice of the High Court, aged 78. See, generally, Palmer, Higgins, passim; T. Blackshield, et al (Eds), The Oxford Companion to the High Court of Australia (South Melbourne: Oxford University Press, 2001) pages 321-322 ("Blackshield, High Court").

[11] Convention Debates, Vol. 3, pages 782 and 792-793.

[12] Convention Debates, Vol. 4, pages 184-187 and 208; Palmer, Higgins, page 149.

[13] Convention Debates, Vol. 4, page 211.

[14] Convention Debates, Vol. 4, page 210.

[15] And also one of the first three Justices appointed to the High Court: Blackshield, High Court, page 54.

[16] D. Solomon, The Political High Court. How the High Court shapes politics (Sydney: Allen & Unwin, 1999) page 134 ("*Solomon, the Political High Court*").

[17] (1904) 1 CLR 91.

19. In *Federated Amalgamated Government Railway and Tramways Service Association v NSW Railway Traffic Employees Association*[18] the High Court held that the conciliation and arbitration power did not extend to enable federal industrial awards to be made against the state in the right of their railways employees. That is, state instrumentalities were immune from the exercise of Commonwealth Government power.

20. The so-called doctrine of the immunity of the instrumentalities was based on implication: that is, it was not express but implied into the Constitution by the early High Court, as was the notion that by reason of section 107 of the Constitution, there were "reserved state powers", the scope for expansion of Federal power was limited.

21. In *Amalgamated Workers Union v The Adelaide Milling Company*,[19] decided in 1919 just a year before *Engineers*, Justice Barton said:

> *The case of D'Emden v Pedder has become a settled authority, and this Court only in September last year intimated in Full Bench that the majority of Justices were of the opinion that it would be a waste of time to attack the decision of this Court in the Railway Servants Case.*[20]

22. By the time *Engineers* was argued, Justice Barton was dead, and the former Chief Justice, Sir Samuel Griffith had retired.[21] Justices Isaacs and Higgins were now the ascendant figures on the High Court.[22]

Engineers – Decision and impact

23. Historically, at the time *Engineers* was decided, Australia had a sense of national unity and identity resulting from its involvement in the First World War, "which made it appropriate for the High Court to contemplate an expansion in the exercise of Commonwealth powers."[23]

24. *Engineers* is not an impressive judgment. Delivered just 29 days after 6 days of argument closed,[24] it is "poorly constructed and composed", but of undeniable significance.[25] Sir Garfield Barwick observed on his retirement more than 60 years later that later generations of judges and citizens need to be very wary that the triumph of *Engineers* is never tarnished.[26]

25. *Engineers* may be summarised this way. A power to legislate with regard to a given subject matter (in *Engineers*, conciliation and arbitration) enables the Commonwealth Parliament to make laws which, upon that subject, affect the operations of the states and their agencies.[27]

26. *Engineers* repudiated the doctrines of implied prohibitions and state reserve powers, and asserted the paramountcy of Commonwealth laws over inconsistent laws, based on section 109 of the Constitution.

27. *Engineers'* primary legacy is that it was a victory of the express over the implied. Greater literalism in constitutional interpretation prevailed, with the primacy of the text of the Constitution being asserted by the majority.[28]

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[18] (1906) 4 CLR 488 ("*Railway Servants*").
[19] (1919) 26 CLR 460 ("*Adelaide Milling*").
[20] *Adelaide Milling* at 465 per Barton J.
[21] Blackshield, High Court, 56 and 311.
[22] Hon. Justice M. Kirby, "Sir Isaac Isaacs – A Sesquicentenary Reflection" (2005) Melbourne University Law Review 880 at 889-891 ("Kirby, Sir Isaac Isaacs").
[23] Hon. Sir A Mason, "The High Court of Australia: A Personal Impression of Its First 100 Years" (2003) Melbourne University Law Review 864 at 873 ("Mason, The High Court").
[24] *Engineers* at 129: the margin note shows the case was argued before the High Court on July 26-30 and August 2, 1920 and decided on August 31, 1920.
[25] Mason, The High Court at 873.
[26] (1981) 148 CLR v at x.
[27] *Engineers* at 150 and 153-154 per Knox CJ, Isaacs, Starke and Rich JJ; *The Lord Mayor, Councillors and Citizens of the City of Melbourne v The Commonwealth & Anor* (1947) 74 CLR 31 at 78-79 per Dixon J ("*Melbourne Corporation*").

28. Its second legacy was its practical impact. Rejection of implied intergovernmental immunities and reserve state powers doctrines, expanded the powers of the Federal Parliament.[29] This was a fundamental shift in the Court's attitude towards the distribution of powers between federal and state legislatures. Combining literal interpretation and broad construction of Commonwealth powers *Engineers* allowed the Commonwealth to assume a dominant position in the Australian federation vis-à-vis the states.[30] The balance was tilted decisively in favour of federal powers.[31]

Broadening approaches to workplace relations

29. Both in relation to the elements of the conciliation and arbitration power and the use of powers in relation to workplace relations matters the High Court has gradually broadened its approach to encompass and facilitate a far broader conception of matters susceptible to federal regulation than that envisaged at the Convention Debates.[32]

Industry

30. The definition of "industry" under the conciliation and arbitration is an example. In 1925 in the High Court held that State educational activities were not industrial. Why? Because they were not connected directly with, or attendant upon, the production or distribution of wealth.[33] This approach prevailed until the 1980s.[34]

31. In *R v Coldham; ex parte Australian Social Welfare Union*[35] the High Court said:

> *"It is, we think, beyond dispute that the popular meaning of "industrial disputes" includes disputes between employees and employers about the terms of employment and the conditions of work. Experience shows that disputes of this kind may lead to industrial action involving disruption or reduction in the supply of goods or services to the community. We reject any notion that the adjective "industrial" imports some restriction which confines the constitutional conception of "industrial disputes" to disputes in productive industry and organised business carried on for the purpose of making profits."*[36]

32. In *Re Australian Education Union; ex parte Victoria*[37] the High Court held that disputes between a State and its employees were capable of being industrial disputes under the Constitution, but that there was an implied limitation on the exercise of Commonwealth legislative power, derived from the general structure of the Constitution as well as the language of particular powers, protecting the States from an exercise of power that would threaten their existence or their capacity to govern or imposing a particular disability of burden upon operational activity of a State or the exercise of the State's constitutional powers.[38] The High Court did however exclude from federal industrial regulation:

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[28] Kirby, Sir Isaac Isaacs at 891.
[29] Kirby, Sir Isaac Isaacs at 891.
[30] Mason, The High Court at 873.
[31] Kirby, Sir Isaac Isaacs at 891-892, who described a tilting "entirely in keeping with the nationalist and centralist tendencies that characterised the approach of Justice Isaacs [who wrote the majority decision in *Engineers*] to the nature of the federation created in the Australian Commonwealth."
[32] As to the use of heads of power, other than the conciliation and arbitration power, in relation to workplace relations, see generally N. Williams & A. Gotting "The interrelationship between the industrial power and other heads of power in Australian industrial law" (2001) 20 Australian Bar Review 264 ("Williams & Gotting, Other Heads of Power").
[33] *Federated State School Teachers Association of Australia v Victoria* (1929) 41 CLR 569 at 575-576 per Knox CJ, Gavan Duffy and Starke JJ.
[34] *Pitfield v Franki* (1970) 123 CLR 448; *R v Holmes; ex parte Public Service Association of New South Wales* (1977) 140 CLR 63.
[35] (1983) 153 CLR 297 at 312 per Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ ("*Social Welfare*").
[36] *Social Welfare* at 313 per Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ.
[37] (1995) 184 CLR 188 ("*Australian Education Union*").
[38] *Australian Education Union* at 230 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

(a) a State Government's right to determine the number and identity of persons to be employed, the term of appointment of its employees, and the number and identity of persons the State wishes to dismiss with or without notice from its employment on redundancy grounds; and

(b) persons to be engaged at the higher levels of government, and their terms and conditions, thus excluding Ministers, ministerial assistants and advisors, heads of departments and high level statutory office holders, parliamentary officers and judges.[39]

33. Thus, the Commonwealth conciliation and arbitration power has extended to:

(a) include coverage of State employees, with the exception of those State employees vital to the integrity of the maintenance of a State's government and constitutional functions; and

(b) any employee, including professional employees.

Organisations

34. Representative organisations, and particularly unions of employees, were, in the early years of federation, subject to contradiction by their members.[40]

35. The "fully representative role [of unions] in making industrial demands"[41] arises from the judgment of the High Court in *Burwood Cinema Limited v Australian Theatrical and Amusement Employees Association.*[42] There, the High Court held that representative organisations were not mere agents of their members, but stood in their place, acted on their account and represented the class associated together in the organisation.[43] This was a judgment of the most profound practical importance: allowing unions to fully participate in and run disputes, and in conjunction with the development of the "paper dispute" was a central feature of the workplace relations system until its "de-regulation" from 1996 onwards.[44]

Dispute

36. The creation of artificial disputes feared by some convention delegates, but dismissed by Higgins as "mere theoretical grievance", soon came to pass. It had two manifestations:

(a) logs of claims, widely served upon employers, in more than one state, thereby creating an interstate industrial dispute, at least on paper;[45] and

(b) ambit claims, involving inflated demands in the logs of claims, thereby investing in a federal industrial tribunal wide power to make orders settling disputes, both present and future disputes, within the inflated ambit of the claims.[46]

37. Practically, unions large and small, were able to serve multiple employers (sometimes hundreds or even thousands of them) in multiple states, with ambit claims, which upon a refusal or failure to answer by the employers created an interstate industrial "paper dispute". The demand, genuinely

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[39] *Australian Education Union* at 232-233 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
[40] *R v President of the Court of Conciliation and Arbitration; ex parte William Holyman & Sons Limited* (1914) 18 CLR 273.
[41] R J Buchanan QC and IM Neil, "Industrial Law and the Constitution in the New Century: An Historical Review of the Industrial Power" (2001) 20 Australian Bar Review 256 at 259 ("Buchanan & Neil, Industrial Law*")*.
[42] (1925) 35 CLR 528 ("*Burwood Cinema*").
[43] *Burwood Cinema* at 551 per Starke J. See also *Federated Iron Workers of Australia v Commonwealth* (1951) 84 CLR 265 at 280 per Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ.
[44] Buchanan & Neil, Industrial Law at 259; Blackshield & Williams, Australian Constitutional Law at 1041-1042.
[45] *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387 at 428 per Dixon J; *Attorney-General (Queensland) v Riordan* (1997) 192 CLR 1 at 16-18 per Brennan CJ and McHugh J ("*Riordan*").
[46] *Riordan* at 16-18 per Brennan CJ and McHugh J; *R v Ludeke; ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 183 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ.

made, became a dispute constituted by disagreement.[47] Massive paper disputes were far removed from the interstate industrial dispute created by a waterfront dispute in Sydney affecting Melbourne, and the inability to deal with a local dispute spread to a larger area, envisaged during the Convention Debates.[48]

External Affairs

38. In 1993 the Keating Labour Government used the external affairs power to supplement the conciliation and arbitration power to include legislative provisions in the then *Industrial Relations Act, 1993* (Cth) relating to:

    (a) minimum conditions of employment (including wages and equal pay provisions);

    (b) termination of employment;

    (c) discrimination; and

    (d) parental leave.

39. The High Court held most of the relevant provisions to be valid, and in most cases because they were laws reasonably capable of being considered appropriate and adapted to implementing international treaty obligations or an ILO Convention or Recommendation, and were therefore laws with sufficient connection between the law and the Treaty, Convention or Recommendation to be with respect to external affairs under s.51(xxix) of the Constitution.[49]

Trade and Commerce

40. The trade and commerce power extends to the regulation of acts and processes identifiably done for interstate trade or export.[50] Historically, "the major alternative or additional source of power to s.51(xxxv) for regulating industrial relations"[51] it has been used to regulate conditions in industries, such as the aviation and maritime industries, with an overseas or interstate trade component.[52]

41. It has also been used to extend the operation of the *Trade Practices Act, 1974* (Cth)[53] to outlawing secondary boycotts.[54]

Corporations

42. The *Work Choices Act* was not the first use of the corporations power for workplace relations purposes.

43. Section 45D of the *TP Act* outlawing secondary boycotts has been held to be a valid use of the corporations power by the High Court, insofar as it protects a corporation from conduct the purpose of which is to cause it loss or damage.[55]

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[47] *Australian Tramway and Motor Omnibus Employees Association v Commissioner for Road Transport and Tramways* (NSW) (1938) 58 CLR 436; *Caledonian Collieries Ltd v Australian Coal and Shade Employees Federation (No.1)* (1930) 42 CLR 527.
[48] Convention Debates, Vol. III, pages 782-784.
[49] *Victoria v The Commonwealth of Australia & Ors* (1995) 187 CLR 416.
[50] *O'Sullivan v Noarlunga Meat* (1954) 92 CLR 565 at 598 per Fullagar J; *Seaman's Union of Australia v Utah Development Co* (1978) 144 CLR at 138 per Gibbs J and 157 per Murphy J ("*Utah Developments*").
[51] Williams & Gotting, Other Heads of Power, at 268.
[52] Williams & Gotting, Other Heads of Power, at 268-269.
[53] "*TP Act*".
[54] *Utah Developments* at 137-139 per Gibbs J.
[55] *Actors & Announcers Equity Association v Fontana Films* (1982) 150 CLR 169 at 184-185 per Gibbs CJ; 201 per Mason J; 212 per Murphy J; 215 per Wilson J, 222 per Brennan J.

44. The corporations power was also relied upon extensively in relation to the inclusion of provisions in the *Workplace Relations Act, 1996* (Cth) concerning enterprise flexibility agreements, certified agreements, victimisation of employees and independent contractors, prohibited payments (for periods of industrial action), unfair dismissals and unlawful termination.[56]

Taxation

45. In *Northern Suburbs General Cemetery Reserve Trust v Commonwealth*[57] the High Court held that training guarantee legislation, the object of which was to achieve minimum levels of expenditure on training, was validly enacted in reliance on the taxation power under s.51(ii) of the Constitution.

Other Heads of Power – Conclusion

46. Prior to the *Work Choices Act* being passed by the Federal Parliament, and subsequently upheld by the High Court, there had been a broadening of federal jurisdiction in relation to workplace relations by a combination of powers, including the conciliation and arbitration, trade and commerce, external affairs and corporations powers.

Boilermakers – Fitting the system

47. Before turning to *Work Choices* it is necessary to note the fundamental structural change to the consideration and determination of federal industrial disputes wrought by *Attorney-General v R*[58] in which the Privy Council (by a 4-3 majority) upheld the High Court's decision that the Court of Conciliation and Arbitration could not exercise both arbitral and judicial power.[59] This was because of the constitutional division between Parliament, executive and the judiciary. Put shortly – judges could not arbitrate because the resulting form of an arbitrated award was a form of legal or legislative instrument, not a judgment.

48. Prior to *Boilermakers* there was a Court of Conciliation and Arbitration exercising both judicial and arbitral powers. That is:

    (a) it determined future rights by arbitrating industrial disputes and making awards; and

    (b) exercised judicial power by determining breaches of awards and enforcing past rights.

49. The effect of the split in *Boilermakers* has been significant. Industrial arbitration (as it then was) was split into two branches, the judicial and the arbitral, which have endured.

50. The judicial branch deals with breaches of the law, such as breaches of awards, civil penalty provisions and interpretation of awards, and other industrial instruments. The Commonwealth Industrial Court was created as a consequence of *Boilermakers* to deal with these types of issues. It was succeeded by the industrial division of the Federal Court, and then the Industrial Relations Court of Australia. When the Industrial Relations Court was abolished the powers that it exercised were returned to the Federal Court. More recently, both the Federal Court and Federal Magistrates Court have been given concurrent jurisdiction in matters such as interpretation of awards and certified agreements, unlawful terminations, breaches of federal awards and certified agreements; and breaches of provisions relating to freedom of association, duress under Australian Workplace Agreements and industrial action.

51. The arbitral branch, to resolve disputes and make awards, was vested in the Commonwealth Conciliation and Arbitration Commission, today the Australian Industrial Relations Commission.

[56] Williams & Gotting, Other Heads of Power, 271-272.
[57] (1993) 176 CLR 555.
[58] (1957) 95 CLR 529 ("*Boilermakers*").
[59] *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254.

52. Historically, the effect of splitting in *Boilermakers* has been to introduce a more legal and adversarial and less industrial system with less self help remedies.[60]

Work Choices – The Judgment

53. Two leading workplace relations law academics, Stewart and Williams have written:

> *For the States, the Work Choices case was lost as far back as the Engineers decision.*[61]

54. The *Work Choices Act* relied upon the corporations power under section 51(xx) of the Constitution to create a scheme of regulation of workplace relations between corporations and their employees. Although it was not the only power utilised to support much of the *Work Choices Act*, it was the principal power utilised. Thus the *Work Choices Act* did not rely upon the conciliation and arbitration power, as its primary focus. Utilising the corporations power to apply to employees of corporations Australia-wide, the *Work Choices Act* established:

    (a) key minimum entitlements relating to basic rates of pay and casual loading;

    (b) maximum ordinary hours of work;

    (c) various types of leave and related entitlements,

    most of which matters had formerly been dealt with by awards handed down by the Australian Industrial Relations Commission. The Australian Industrial Relations Commission's functions were reduced by the establishment of the Australian Fair Pay Commission to deal with many functions previously performed by the Australian Industrial Relations Commission in relation to setting wages. Further, the *Work Choices Act* provided for workplace agreements between employers and employees or involving unions which are registered organisations. It also dealt with industrial action and bargaining in respect of agreements.

55. By a 5-2 majority the High Court rejected the challenge to the *Work Choices Act*, and, in particular, upheld the Commonwealth's reliance on the corporations power. The conciliation and arbitration power was held not to be a law about employees or employment or minimum conditions but a law about the use of conciliation and arbitration to resolve interstate industrial disputes. The corporations power was summarised in *Work Choices* in exactly the same manner as Dixon J had summarised *Engineers* in *Melbourne Corporation*, as a power to legislate with respect to a given subject matter [in this case corporations] which enables the Commonwealth Parliament to make laws which, upon that subject, affect the operations of States and their agencies.

56. The central question in *Work Choices* was the capacity of the corporations power to validate the *Work Choices Act*. Section 51(xx) provides that the Commonwealth may make laws "with respect to", "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."

57. The *Work Choices Act* applied to an employee employed by an "employer", defined to mean "a constitutional corporation, so far as it employs, or usually employs, an individual"[62] that is a corporation to which the corporations power applies.

58. The plaintiff States and unions in *Work Choices* argued that the power conferred by the corporations power was restricted to power to regulate dealings of constitutional corporations with persons external to the constitutional corporation, but not with employees, or, seemingly, prospective employees. The majority in *Work Choices* said that the distinction between external and internal relationships of corporations when considering limitations to the corporations power was "an inappropriate and

[60] Solomon, The Political High Court, pages 142-144.
[61] A. Stewart & G. Williams, Work Choices. What the High Court Said (Leichhardt: The Federation Press, 2007) page 8.
[62] *Work Choices Act*, s.6(1) definition of "employer".

unhelpful distinction".[63] The majority found no support for that distinction in the Convention Debates or drafting history of the corporations power, and said that the distinction was "in any event … unstable".[64] To adopt the distinction 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."[65]

59. To the extent that the plaintiffs said that a test of distinctive character or discriminatory operation ought to be adopted the High Court said that the provisions of the *Work Choices Act* depended upon the corporations power singling out as the object of statutory command (and in that sense having a discriminatory operation) or being directed to protecting constitutional corporations from conduct intended and likely to cause loss or damage to the corporation. In that sense they were laws which prescribed "norms regulating the relationship between constitutional corporations and their employees, or affecting constitutional corporations" [66] in relation to the prescription of industrial rights and obligations of those corporations and their employees and the means by which they are to conduct their industrial relations, and were therefore laws with respect to constitutional corporations.[67]

60. This broad view of the corporations power followed from the adoption of the views of the minority in *Re Dingjan & Ors; Ex parte Wagner & Anor*[68] where the minority took a broad view of the reach of the corporations power. In particular the High Court in *Work Choices* made reference to the reasoning of Gaudron J, saying that:

> *"Her Honour's reasoning preceded by the following steps. 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 the business activities in Australia. Secondly, 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. Thirdly, 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".*[69]

61. The majority of the High Court in *Work Choices* then went on to specifically adopt the understanding of the corporations power set out by Gaudron J in *Pacific Coal* where Her Honour said:

> *"I have no doubt that 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 sub-section, 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."*[70]

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[63] *Work Choices* CLR at 121 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; HCA at para. 197 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.
[64] *Work Choices* CLR at 121 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; HCA at para. 197 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.
[65] *Work Choices* CLR at 121 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; HCA at para. 197 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.
[66] *Work Choices* CLR at 121 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; HCA at para. 198 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.
[67] *Work Choices* CLR at 121-122 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; HCA at pp121-122 and para. 198 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ. In so finding the majority of the High Court upheld what was said by Gaudron J in *Re Pacific Coal*; *ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375; [2000] HCA 34 ("*Pacific Coal*").
[68] (1995) 183 CLR 323 ("*Dingjan*").
[69] *Work Choices* CLR at 114 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at para. 177 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ, citing from Gaudron J's judgment in *Dingjan* CLR at 365.
[70] *Pacific Coal* CLR at 375 per Gaudron J; HCA at para. 83 per Gaudron J.

62. The majority of the High Court in *Work Choices* said "this understanding of the [corporations] power should be adopted."[71] From that it followed, as Gaudron J had said in *Pacific Coal*, "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'."[72]

63. The plaintiff States and unions also submitted that the corporations power should be read down, or restricted in its operation, by the conciliation and arbitration power, which conferred power on the Commonwealth Parliament to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

64. The majority of the High Court in *Work Choices* indicated that the relevant test was whether the conciliation and arbitration power contained a positive prohibition or restriction of a particular or general application that would require the corporations power to be construed as subject to the limitation. Reading the conciliation and arbitration power as a whole the majority concluded that it contained no element of positive prohibition or restriction by reason of which the corporations power was to be construed as subject to such positive prohibition or restriction.[73]

65. The majority in *Work Choices* also indicated that a passage by Gleeson CJ in *Pacific Coal* ought now be accepted and followed.[74] In that passage Gleeson CJ noted that it had often been pointed out that the conciliation and arbitration power did not empower the Commonwealth Parliament to legislate directly to regulate conditions of employment, but found that there was no negative implication, and no prohibition, on the Parliament relying upon some other power conferred by s.51 of the Constitution to legislate in relation to conditions of employment, and because there was no direct prohibition, it could do so indirectly.[75]

66. It was also argued that the conciliation and arbitration power operated to restrict the capacity of Parliament to enact a law which could be characterised as a law with respect to the prevention and settlement of industrial disputes. The majority rejected this contention indicating that the course of authority in the High Court denied to the conciliation and arbitration power a negative implication of exclusivity which would deny the validity of laws with respect to other heads of power which also had the character of laws regulating workplace relations in a fashion other than is required by the conciliation and arbitration power. The High Court noted that it had upheld the validity of laws pertaining to the relationship between employers and maritime employees supported by the trade and commerce power under s.51(i) of the Constitution in *Re Maritime Union of Australia; ex parte CSL Pacific Shipping Inc*.[76] The High Court also noted:

    (a) *Pidoto* where the defence power had been used to regulate terms and conditions of employment; and

    (b) the use of the power under s.51(v), the broadcasting and telegraph power, to enable the then Conciliation and Arbitration Commission to prevent or settle industrial disputes in respect of the

[71] *Work Choices* CLR at 115 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at para. 178 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ.
[72] *Work Choices* CLR at 115 Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at para. 178 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ, citing *Pacific Coal* CLR at 375 per Gaudron J; HCA at para. 83 per Gaudron J.
[73] *Work Choices* CLR at 127 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at para. 221 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ.
[74] *Work Choices* CLR at 130 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at para. 130 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ.
[75] *Work Choices* CLR at 228 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at para. 130 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ, citing Gleeson CJ in *Pacific Coal* CLR at 359-360; HCA at para. 29, wherein reference was also made to the use of the defence power to regulate conditions of employment in *Pidoto v Victoria* (1943) 68 CLR 87 ("*Pidoto*").
[76] (2003) 214 CLR 397.

Australian Telecommunications Commission Service under that legislative head of power rather than under the conciliation and arbitration power.[77]

67. The plaintiffs also sought to argue that the legislation upset the "federal balance" because of its potential effect upon the concurrent legislative authority of the States. Noting that no party sought to challenge the approach to constitutional construction in *Engineers*, and in particular the rejection of the doctrines of implied immunities and reserved powers, the High Court said that the federal balance could therefore only apply to that which might affect the continued existence as independent entities of the central government and the State governments separately organised.[78] Seemingly, the plaintiffs' argument failed because they were unable to establish that there was any content to the federal balance argument, and the "plaintiffs' proposition … stops well short of asserting that the favoured construction must be adopted less the States could no longer operate as separate governments exercising independent functions".[79]

Work Choices – Effects and the Future

68. *Work Choices* had immediate effects. In particular:

(a) it validated the corporations power as the foundation of current federal workplace relations laws;[80]

(b) by validating the comprehensive use of another head of power to enact workplace relations laws, and firmly indicating that it is legitimate to do so with respect not only to the corporations power but other heads of power, it has effectively consigned the conciliation and arbitration power to the historical dustbin,[81] unless for political reasons there is seen to be some advantage in its future utilisation;

(c) the long-standing State conciliation and arbitration systems have been "invalidated", at least "to the extent that they would otherwise apply to employers and employees covered by the federal system"[82] - and one need only look at the daily lists for the hearings of matters by the State Industrial Tribunals pre and post *Work Choices* to see the decimation in workload of those tribunals.

69. The influence of *Work Choices*, and the reliance upon the corporations power in the area of workplace relations, can also be seen in other events. These include:

(a) the passage of the *Independent Contractors Act, 2006* (Cth) relating to the freedom of independent contractors to enter into services contracts, the prevention of interference with the terms of genuine independent contracting arrangements, and the recognition of independent contracting as a legitimate form of work, primarily commercial,[83] based upon the corporations power;

(b) the revival of the debate as to whether there ought to be a single national industrial relations system;[84]

(c) the revival of debates as to whether there ought to be a single national systems for workplace relations related matters such as:

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[77] *R v Staples; ex parte Australian Telecommunications Commission* (1980) 143 CLR 614 at 627 per Stephen, Mason and Wilson JJ.
[78] *Work Choices* CLR at 118-120 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at paras. 190 and 194 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; and see *Melbourne Corporation* at 82 per Dixon J.
[79] *Work Choices* CLR at 120-121 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at para. 196 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ.
[80] Justice G Giudice, "The Constitution and the national industrial relations system" (2007) 81 ALJ 584 at 599 ("Giudice, National Industrial Relations System").
[81] Giudice, National Industrial Relations System at 599.
[82] Giudice, National Industrial Relations System at 599.
[83] *Independent Contractors Act, 2006* (Cth), s.3.
[84] See, for example, J. Gillard, "Forward with Fairness", Speech to the ALP National Conference, 28 April 2007, www.alp.org.au/media/0407/speir 280.php committing to "a single uniform national system for the private sector"; I. Salusinszky & B. Norington, "Julia Gillard's industrial relations vision draw nearer", The Australian, 13 June 2008.

i) workers' compensation;[85]

ii) occupational health and safety.[86]

70. It is trite to observe that the effects of *Work Choices* goes much further than workplace relations in respect to the scope for the use of the corporations power by the Commonwealth Parliament to enact valid federal legislation.[87]

Conclusion

71. For decades the potential for development and expansion of federal power in relation to workplace relations which lay at the heart of *Engineers* was largely exercised by the High Court in relation to the conciliation and arbitration power, and occasionally, but importantly, other heads of power.

72. The political will to exercise fully the power available to the Commonwealth Parliament since *Engineers* arguably reached its climax with the enactment of the *Work Choices Act* in 2005. Ironically, parts of the *Work Choices Act* have already been repealed by the Rudd Labour Government.[88] Exercises of political will, like legislation and governments, often pass in time. Constitutional judgments on the legislation enacted as a consequence of the exercise of political will, and more particularly the principles espoused in those judgments, tend to last longer. Some of those judgments become strainer posts: like *Engineers* and *Boilermakers*. *Work Choices* is likely to be a strainer post in Australian legal, constitutional and workplace relations history. *Work Choices* has reinforced for a new generation the fundamental tilting of constitutional balance in favour of federal power first, and fundamentally, espoused in 1920 by another workplace relations judgment of the High Court – *Engineers.* In the long term there can be little doubt that like *Engineers*, the impact of *Work Choices* will also be felt in many other areas within the valid reach of the power given to the Commonwealth Parliament under the Constitution.

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[85] See *Attorney-General (Vic) v Andrews* (2007) 81 ALJR 729; [2007] HCA 9, where a private sector employer, being a national telecommunications provider, was declared eligible for a licence which enabled it to choose it own insurer, or to self-insure, for workers' compensation payments, thereby removing it from the ambit of the relevant Victorian State legislation which compelled it to obtain workers' compensation insurance from a Victorian statutory authority.

[86] On 4 April 2008, the Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, announced a national review into model Occupational Health and Safety (OHS) Laws to report to the Workplace Relations Ministers' Council on the optimal structure and content of a model OHS act that is capable of being adopted in all jurisdictions: www.nationalohsreview.gov.au/.

[87] That potential was pointed up by Kirby J in *Work Choices* in the following paragraph: "*The States, correctly in my view, pointed to the potential of the Commonwealth's argument, if upheld, radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of the States' principal governmental activities. Such fields include education, where universities, tertiary colleges and a lately expanding cohort of private schools and colleges are already, or may easily become, incorporated. Likewise, in healthcare, where hospitals (public and private), clinics, hospices, pathology providers and medical practices are, or may readily become, incorporated. Similarly, with the privatisation and out-sourcing of activities formerly conducted by State governments, departments or statutory authorities, through corporatised bodies now providing services in town planning, security and protective activities, local transport, energy, environmental protection, aged and disability services, land and water conservation, agricultural activities, corrective services, gaming and racing, sport and recreation services, fisheries and many Aboriginal activities. All of the foregoing fields of regulation might potentially be changed, in whole or in part, from their traditional place as subjects of State law and regulation, to federal legal regulation, through the propounded ambit of the corporations power*": CLR at 224 per Kirby J; HCA at para. 539 per Kirby J.

[88] *Workplace Relations Amendment (Transition to Forward with Fairness) Act, 2008* (Cth).