INDUSTRIAL RELATIONS SOCIETY OF WESTERN AUSTRALIA

Patron's Dinner Speech

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The long march to Fair Work: A triumph of federalism or just a federal triumph?

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(*The views expressed in this paper are the views of Federal Magistrate Lucev. They are not, and do not purport to be, the views of the Federal Magistrate's Court or any other Federal Magistrate.)

Introduction

I thank the Society for the invitation to deliver the Patron's Dinner speech this evening. I acknowledge the presence of the patron Jack Gregor. When selecting the title for this speech I had Jack in mind: his has been a long march in industrial relations, and he has been a "federalist": serving as a Commissioner and Senior Commissioner of the Western Australian Industrial Relations Commission and as a Deputy President of the then Australian Industrial Relations Commission.

Well may you ask: "Why the long march to the *Fair Work Act*?"[1] Particularly when it can fairly be argued that the *Fair Work Act* was conceived as a consequence of the passage of the *Work Choices Act*[2] in 2005, and but one federal election and a short four years later the *Fair Work Act* was passed into legislation.

If one asked an eminent general historian about "the long march" she would probably tell you that there were two long marches, and that neither of them had anything to do with the *Fair Work Act*. The first long march was the march of Cyrus' army of 10,000 Greeks out of Persia following Cyrus' unsuccessful attempt to overthrow his brother Artaxerxes II in about 400 BC, the story of which is told in Xenophon's *The Persian Expedition* as a glorious retreat through Kurdistan, Armenia and back to ancient Greece.[3] The second long march is probably more familiar to a modern audience. It is Mao Zedong's famous 6,000 mile retreat into the interior of China from 1934 to 1937 to preserve the core of the Chinese communist forces from defeat by the nationalist Kuomintang,[4] and which led eventually to the communist re-emergence and victory in October 1949 and the creation of the People's

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[1] *Fair Work Act 2009* (Cth) ("*Fair Work Act*").
[2] *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ("*Work Choices Act*").
[3] Xenophon, *The Persian Expedition* (London: Penguin Books, 1972).
[4] E. Jocelyn and A. McEwen, *The Long March* (London: Constable & Robinson, 2006).

Republic of China:[5] an event for which the now mineral rich "island" of Western Australia might now be particularly grateful.[6]

Tonight, I will suggest to you that the *Fair Work Act* is the result of two long legal marches. The first is associated with s.51(xxxv) of the *Constitution*, the conciliation and arbitration power. The second is associated with s.51(xx) of the *Constitution*, the corporations power. I will also suggest that the answer involves a shorter "federalist referral" route march in respect of which the Western Australian Government refuses to participate – retreating to the "island" of Western Australia. Perhaps an "island" in the sense referred to by Shelley in *Prometheus Unbound*:

> *"Billowy mist ... islanding*
> *The peak whereon we stand"*[7]

Or perhaps in the sense referred to in the Shorter Oxford English Dictionary, namely, "*to insulate.*"[8]

The conciliation and arbitration power

Section 51(xxxv) provides the Federal Parliament with power 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."*

It was a power not intended to be much used, and a power not thought to be of wide import until the *Engineers'* case in the High Court in 1920.[9]

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[5] This is the orthodox view of China's communist history: see www.newworldencyclopedia.org/entry/Long_March. For a different perspective see F.S. Litten, "*The Myth of the "Turning –Point" – Towards a New Understanding of the Long March*", Bochumer Jahrbuch zur Ostasienforschung (2001) pp.3-44.

[6] The reference to Western Australia being an island is not geographically correct! Rather, it is a play on the title of the forthcoming Society convention "WA is an Island" which will explore, amongst other things, the Western Australian Government's decision to maintain a separate labour relations system in Western Australia.

[7] Z. Leader and M. O'Neill, *Percy Bysshe Shelley, The Major Works* (Oxford: Oxford University Press, 2003), page 268.

[8] Shorter Oxford English Dictionary on Historical Principles (Vol. I) (Oxford: Oxford University Press, 1973), page 1117.

[9] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd & Ors* (1920) 28 CLR 129 ("*Engineers*"); *Official Record of the Debates of the Australasian Federal Convention*, Volume 4, pages 197-198 (Sir Joseph Abbott). Australia's first Prime Minister, Sir Edmund Barton, said in his first election speech that a federal system of conciliation and arbitration would be established, but that it "*was a power, the necessity for the exercise of which it is hoped will seldom arise*": D. Solomon, *The*

The question for the High Court in *Engineers* was whether a dispute between unions and Western Australian Government trading concerns was subject to the conciliation and arbitration power. The result of *Engineers* was that it provided the foundation for a significant expansion of federal power over workplace relations, as well as other areas within the heads of power under the *Constitution.*[10]

Engineers may be summarised this way: a power to legislate with regard to a given subject matter (in *Engineers*, conciliation and arbitration) enables the Federal Parliament to make laws which, upon that subject, affect the operations of the States and their agencies.[11]

Engineers repudiated the doctrines of implied prohibitions and State reserve powers.[12] It also asserted the paramountcy of Commonwealth laws over inconsistent State laws, based on s.109 of the *Constitution.*[13]

Engineers' primary legacy is that it was a victory of the express over the implied, with the primacy of the text of the *Constitution* being asserted by the majority.[14] *Engineers*' second legacy was its practical impact. It resulted in an expansion of the powers of the Federal Parliament[15] and represented a fundamental shift in the High Court's attitude towards the distribution of Federal and State powers, allowing the Commonwealth to assume a dominant position in the Australian federation vis-à-vis the States.[16]

Over the years, the conciliation and arbitration power came to be broadly interpreted. In the *Social Welfare* case the High Court rejected any notion that the adjective "industrial" imports some restriction confining the constitutional

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political High Court: how the High Court shapes politics (Sydney: Allen & Unwin, 1999) page 134 ("Solomon, The Political High Court").

[10] See generally M. Coper & G. Williams (Eds), *How Many Cheers for Engineers* (Sydney: The Federation Press, 1997), Ch.4.

[11] *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*").

[12] *Engineers* at 150, 153-154 and 159-160 per Knox CJ, Isaacs, Starke and Rich JJ.

[13] *Engineers* at 155-158 per Knox CJ, Isaacs, Starke and Rich JJ.

[14] *Engineers* at 142, 149 and 152 per Knox CJ, Isaacs, Starke and Rich JJ; Hon. Justice M. Kirby, "Sir Isaac Isaacs – A Sesquicentenary Reflection" (2005) 29 MULR 880 at 891 ("Kirby, Sir Isaac Isaacs").

[15] Kirby, Sir Isaac Isaacs at 891.

[16] Hon Sir A. Mason, "*The High Court of Australia: A Personal Impression of Its First 100 Years*" (2003) 27 MULR 864 at 873.

conception of "industrial disputes" to disputes in productive industry and organised business carried on for the purpose of making profits.[17]

In *Re Australian Education Union; Ex parte Victoria*[18] 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 federal 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 or burden upon the operational activity of a State or the exercise of the State's constitutional powers.[19] The High Court did however exclude from federal industrial regulation:

a) a State Government's right to determine the number and identity of persons to be employed, the term of appointment of State 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 State 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.[20]

Thus, the conciliation and arbitration power was extended to:

a) professional employees and employees in non-productive industry; and

b) State government employees, with the exception of those vital to the integrity of the maintenance of a State's government and constitutional functions.

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[17] *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 312 per Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ ("*Social Welfare*").
[18] (1995) 184 CLR 188 ("*Australian Education Union*").
[19] *Australian Education Union* at 230 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
[20] *Australian Education Union* at 232-233 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

The latter exception was fundamental to the maintenance of the federal balance between the Commonwealth and the States, and to the continued independence of State governments. Otherwise, federal conciliation and arbitration might have covered the entire State Government field.

There were, over the years, other expansions of the conciliation and arbitration power critical to the expansion of federal coverage of industrial relations. In the *Burwood Cinema* case in 1925 it was held that unions acted for all of their members, a finding which allowed unions to fully participate in and run industrial disputes, and especially to run "paper disputes".[21] In a series of other cases, the concept of "disputes" was extended to the service of interstate "paper" disputes, and the recognition of ambit claims as genuine, notwithstanding the quantum of ambit, thereby significantly expanding the capacity for "industrial disputes" to be dealt with and determined federally.[22]

The conciliation and arbitration power, however, had limitations. Unlike most States' industrial relations legislation it did not cover "industrial matters" generally.[23] For the purposes of regulating national economic and social policy the conciliation and arbitration power was, simply, inadequate. So it was that the Federal Fraser Liberal, Keating Labor and Howard Liberal Governments turned to other heads of power under the *Constitution* to reform industrial relations on the national stage. So, for example, the trade and commerce and corporations powers were used as the basis for the introduction of secondary boycott provisions into the *Trade Practices Act*.[24] The insertion of provisions concerning minimum conditions of employment into the then *Industrial Relations Act*[25] by the Keating Labor Government in 1993 relied upon the external affairs power under s.51(xxix) of the *Constitution*.[26] The corporations

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[21] *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528 ("*Burwood Cinema*").

[22] *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; *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 183 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *Australian Tramway and Motor Omnibus Employees' Association v Commissioner for Road Transport and Tramways* (NSW) (1938) 58 CLR 436; *Caledonian Collieries Ltd v Australasian Coal and Shale Employees' Federation (No.1)* (1930) 42 CLR 527.

[23] See, for example, the definition of "industrial matter" in s.7(1) of the *Industrial Relations Act 1979* (WA).

[24] *Trade Practices Act 1974* (Cth), s.45D ("*TP Act*"); *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 137-139 per Gibbs J and 157 per Murphy J; *Actors and 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 and 222 per Brennan J.

[25] *Industrial Relations Act 1988* (Cth).

[26] *Victoria v The Commonwealth of Australia & Ors* (1996) 187 CLR 416.

power was also used by the Howard Liberal Government to found provisions with respect to certified and workplace agreements, employee victimisation, independent contractors, unfair dismissal and unlawful termination under the *Workplace Relations Act*.[27]

But none of this was enough to achieve a national industrial relations system, and by 2005 there was considerable debate about the necessity for a national industrial relations system.[28]

Corporations power

I leave off the conciliation and arbitration power for the time being, and turn to the corporations power. Section 51(xx) of the *Constitution* provides the Federal Parliament with the power to make laws with respect to:

> *"Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."*

We turn back a century to the High Court's decision in *Huddart Parker*[29] in 1909, the first occasion on which the High Court had to consider the corporations power. The corporations power was read down so as not to enable the Commonwealth to regulate conditions of employment of workers in particular industries. The High Court said that the Federal Parliament could deal with a corporation's external relations, but not its internal relations.[30]

The corporations power languished over the succeeding decades, but was "*rescued ... from oblivion*"[31] by the *Concrete Pipes* case in 1971.[32] Two views emerged from the *Concrete Pipes* case as to the scope of the corporations power. The first was a broad view that any law addressed to constitutional corporations was within power. The second was a narrower view requiring the

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[27] *Workplace Relations Act 1996* (Cth) ("*Workplace Relations Act*"). See the succinct summary in N. Williams and A. Gotting, "*The interrelationship between the industrial power and other heads of power in Australian industrial law*", (2001) 20 Aust Bar Rev 264 at 272.

[28] See, for example:
"*Howard plans to nationalise industrial relations system*", www.abc.net.au/am/content/2005/s1297439.htm (7 February 2005); B. Norington, "*States to resist federal IR takeover*", The Australian, 27 May 2005, page 5; W.J. Ford, "*Politics, the Constitution and Australian Industrial Relations: Pursuing a Unified National System*", (2005) 38 Australian Economic Review 220.

[29] *Huddart, Parker & Co Proprietary Limited v Moorehead* (1909) 8 CLR 330 ("*Huddart Parker*").

[30] *Huddart Parker* at 396 per Isaacs J.

[31] T. Blackshield, *New South Wales v Commonwealth: Corporations and Connections* (2007) 31 MULR 1135 at 1136 ("*Blackshield*").

[32] *Strickland v Rocla Concrete Pipes Limited* (1971) 124 CLR 468 ("*Concrete Pipes*").

law to be addressed to one of the classes of corporation: trading, financial, or foreign, referred to under s.51(xx).[33]

By 1995 and the handing down of the judgment in *Dingjan*[34] the High Court was content to simply say that the challenged law had to have a "*sufficient connection*" with the corporations power. In *Dingjan* the focus was on the business nature of the activities of the corporation and whether they provided sufficient connection in relation to a law relating to independent contractors.

And then came the High Court's judgment in *Pacific Coal.*[35] Not a corporations case at all. Rather, a case about allowable award matters and the conciliation and arbitration power. Nevertheless, Justice Gaudron said as follows:

> *"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 sub-section, the creation of rights, and privileges belonging to such 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."*[36]

The majority of the High Court in *Work Choices*, having quoted the above passage, said:

> *"this understanding of the [corporations] power should be adopted."*[37]

From that, the majority in Work Choices considered 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*

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[33] *Blackshield* at 1136-1137.
[34] *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 ("*Dingjan*").
[35] *Re Pacific Coal; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346; [2000] HCA 34 ("*Pacific Coal*").
[36] *Pacific Coal* CLR at 375 per Gaudron J; HCA at para.83 per Gaudron J.
[37] *New South Wales & Ors v The Commonwealth of Australia* (2006) 229 CLR 1 at 115 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2006] HCA 52 at para.178 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ ("*Work Choices*").

and their employees and the means by which they are to conduct their industrial relations.'"[38]

And it was this broad description of the power that was adopted by the High Court in *Work Choices*.

The central question in *Work Choices* was the capacity of the corporations power to validate the *Work Choices Act*.

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*".[39]

By a 5-2 majority the High Court rejected the plaintiff States and unions' challenge to the *Work Choices Act*, and, in particular, upheld the Commonwealth's reliance on the corporations power. 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 *Work Choices,* corporations) which enables the Commonwealth Parliament to make laws which, upon that subject, affect the operations of States and their agencies. 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. *Work Choices* thus had an immediate effect on the conciliation and arbitration power. By validating the comprehensive use of another head of power to enact workplace relations law, *Work Choices* effectively consigned the conciliation and arbitration power to the historical dustbin.[40] The long march of the conciliation and arbitration power was over.

This was almost a federal triumph – for if a corporation could be subject to federal parliamentary control in relation to industrial relations, then a national private sector industrial relations system had a distinct air of reality. But there was one substantial hiccup, and that was, what exactly was a trading or financial corporation?

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[38] *Work Choices* CLR at 115 Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; HCA at para.178 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, citing *Pacific Coal* CLR at 375 per Gaudron J; HCA at para.83 per Gaudron J.

[39] *Work Choices Act*, s.4AB; *Workplace Relations Act*, s.6(1); definition of "employer".

[40] Justice G Giudice "*The Constitution and the National Industrial Relations System*" (2007) 81 ALJ 584 at 599 describes the power as " ... *a matter, for the present and foreseeable future, of mainly academic interest.*"

In the Federal Court in *Etheridge Shire Council*,[41] Justice Spender held that a local government authority was not a corporation, because its trading activities lacked the essential quality of trade, and the purposes for which it was established under Queensland local government legislation were local government or public benefit purposes and not trading purposes. The scale of the Council's activities was such in monetary terms as to deny to it trading or financial corporation status. In *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No. 2)*[42] the majority of the Industrial Appeal Court in Western Australia held that the Aboriginal Legal Service was not a constitutional corporation. This was on the basis that the Aboriginal Legal Service was established to provide public welfare type benefits to persons of aboriginal descent, and did not trade, although its source of funds was via a service contract with the Commonwealth.

Perhaps, however, the hiccup has been cured, at least for now. In *Bankstown Handicapped Children's Association*[43] the Full Court of the Federal Court of Australia dealt with an association that operated in the disability and child care sectors providing accommodation, support services and a pre-school. Predominantly funded by government it offered fee-for-service services that relevant departments were free to purchase or reject. It negotiated prices, with some reference to the market, and invoices were provided and paid. The prices having been set on an essentially costs recovery basis, any negligible margin on those prices, was applied to cover expenses rather than to make a profit. An employee of the association took action under the unfair contracts provisions of s.106 of the New South Wales *Industrial Relations Act*.[44] The association, in its defence, pleaded that it was a constitutional corporation and therefore s.16 of the *Workplace Relations Act*[45] denied the New South Wales Industrial Court jurisdiction in the matter. The New South Wales Industrial Court found that the

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[41] *Australian Workers' Union of Employees, Queensland and Others v Etheridge Shire Council & Anor* (2008) 171 FCR 102; [2008] FCA 1268 ("*Etheridge Shire Council*").

[42] (2008) 228 FLR 318; [2008] WASCA 254 ("*Aboriginal Legal Service*").

[43] *Bankstown Handicapped Children's Centre Association Inc & Anor v Hillman & Ors* (2010) 182 FCR 483; [2010] FCAFC 11 ("*Bankstown Handicapped Children's Association*").

[44] *Industrial Relations Act 1996* (NSW).

[45] Section 16(1) of the *Workplace Relations Act* provided as follows:

"(1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:

(a) a State or Territory industrial law;

(b) a law that applies to employment generally and deals with leave other than long service leave;

(c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined in section 623);

(d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;

(e) a law that entitles a representative of a trade union to enter premises.

Note: Subsection 4(1) defines ***applies to employment generally***.

association was not a constitutional corporation and that it had jurisdiction to deal with the unfair contract matter.[46] An appeal was filed with the Full Court of the Federal Court on the basis that there was a matter arising under the *Workplace Relations Act*. The appeal was held to be competent because the defence raised a matter arising under the *Workplace Relations Act*, namely whether s.16 of that Act precluded the New South Wales Industrial Court from having jurisdiction. The Full Court of the Federal Court in *Bankstown Handicapped Children's Association* determined that the association was a trading corporation. It did so notwithstanding the fact that the association provided public welfare services, effectively on a cost recovery rather than a profit-making basis, because those activities did not detract from the essentially commercial nature of its relationship with government, particularly in the offering of fee-for-service services which, if utilised by government departments, were paid for.[47] Thus, it appears that any organisation which engages in activities which are essentially "commercial" is likely to be held to be a trading corporation. That potentially gives virtually identical provisions in the *Fair Work Act* a very wide remit.[48]

The Full Court of the Federal Court in *Bankstown Handicapped Children's Association* did however point out that "*there is no bright line delineating what is or is not a trading corporation*". Rather, it remained a question of fact and degree.[49]

The long march of the corporations power, which has resulted in it becoming the dominant power by which the control of industrial relations, particularly in the private sector, can now be regulated by the Federal Parliament, continues.

Federalism

A further issue emerged in *Work Choices*: namely, that it was argued that the *Work Choices* legislation upset the "federal balance" because of its potential effect upon the concurrent legislative authority of the States. It was said not to be in the spirit of federalism. Noting that no party sought to challenge the

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[46] *Hillman v Bankstown Handicapped Children's Centre Association Incorporated* (2008) 183 IR 376; [2008] NSWIRComm 64.
[47] *Bankstown Handicapped Children's Association* FCR at 511-512 per Moore, Mansfield and Perram JJ; FCAFC at paras.54-56 per Moore, Mansfield and Perram JJ.
[48] *Fair Work Act*, s.26.
[49] *Bankstown Handicapped Children's Association*, FCR at 511 per Moore, Mansfield and Perram JJ; FCAFC at para.52 per Moore, Mansfield and Perram JJ.

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.[50] Seemingly, the plaintiffs' argument failed because they were unable to establish that there was any content to the federal balance argument, and the:

> *"plaintiffs' submissions ... 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".*[51]

But what is federalism? Conceptualising it has been said to be contentious and difficult. Nevertheless, it can be said to have the defining feature of a division of power between central and regional governments, with the levels of government clearly defined, guaranteed by written *Constitution*, and subject to resolution of disputes by a judiciary independent of both spheres of government, and in particular by a court of final jurisdiction.[52]

That description is immediately recognisable as applicable in Australia. The problem remains, however, in delineating where the division of power lies, particularly in a modern society where a national government seeks to drive economic and social policy through a single set of national laws relating to a particular subject matter, such as industrial relations. The problem becomes acute for the national government when, as a consequence of the resolution of disputes by the court of final jurisdiction, the courts then carve out areas where the national law does not apply. Such has been the effect of the *Australian Education Union* in carving out, quite properly, an area to protect the independence and integrity of the States. Greater difficulty arises with respect to persons, be they single traders, partnerships, incorporated associations or other kinds of associations, which fall outside of the coverage of the national laws by reason of their not being "constitutional corporations".

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[50] *Work Choices* CLR at 118 and 119-120 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; HCA at paras.190 and 194 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; and see *Melbourne Corporation* at 82 per Dixon J.

[51] *Work Choices* CLR at 120-121 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; HCA at para.196 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

[52] N. Aroney, *The Constitution of a Federal Commonwealth: The Making And Meaning of the Australian Constitution* (Cambridge: Cambridge University Press, 2009), page 17.

As long ago as 1996 the State of Victoria perceived that the answer to this problem in the area of industrial relations was to refer its industrial relations powers to the Commonwealth under s.51(xxxvii) of the *Constitution.*[53] More recently, in 2009, the Rudd Labor government sought to solve the problem in a similar manner, and to plug the gaps in national coverage, by introducing and passing the *Commonwealth Referral Act.*[54] Put shortly, the *Commonwealth Referral Act* seeks to:

a) allow the States to refer their industrial relations powers to the Commonwealth, in a manner extending the application of the *Fair Work Act* to persons who would not otherwise be covered by it;

b) allow subsequent and ongoing amendment to the *Fair Work Act* with the concurrence of the States; and

c) allow the States to exclude certain public sector employees from coverage under federal laws.

All States, except the "island" of Western Australia, have referred their industrial relations powers (in different but, arguably, broadly similar form) to the Commonwealth.

There is an underlying inter-governmental agreement[55] which provides for:

a) any State which wishes to object to a future proposed amendment to the *Fair Work Act* to do so, and which then requires a two thirds majority of the States to agree, before that amendment can go forward;[56] and

b) for a State to terminate its reference on six months' notice.[57]

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[53] *Commonwealth Powers (Industrial Relations) Act 1996* (Vic); *Workplace Relations and Other Legislation Amendment Act (No. 2) 1996* (Cth); *Workplace Relations Act*, Part 21.
[54] *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Cth) ("*Commonwealth Referral Act*").
[55] Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector, September 2009 ("Inter-Governmental Agreement").
[56] Inter-Governmental Agreement, cl.2.19.
[57] Inter-Governmental Agreement, cl.3.5.2. See also A. Stewart, "*Extending the Fair Work Act: Modern Awards and the New National System*", April 2010, ELB160.

This is almost a triumph for federalism, the Commonwealth and States acting in a way which has been characterised as "co-operative federalism" to deliver an outcome many now perceive to be in the national interest, a single national industrial relations system, save for certain State public sector employees and State officeholders.[58]

I say "almost" because Western Australia remains, at this stage, an "island". Further, the position with respect to local government remains mixed and to some extent uncertain. Although some of those States (New South Wales, Queensland and South Australia) which have referred powers have excluded local government employees from the referral (thereby keeping them within the State system), other States (Victoria and Tasmania) have not. Thus, there will be local government employees within the national industrial relations system, and those within the State system in Western Australia that will arguably nevertheless be within the national industrial relations system if a federal court determines that a Western Australian local government entity is a constitutional corporation. The possibility of mixed Federal and State coverage therefore arises for local government within Western Australia.

Conclusion

The *Fair Work Act* is the result of two long marches:

a) a long march, and the gradual expansion and then abandonment of the conciliation and arbitration power, that abandonment primarily being a consequence of *Work Choices*; and

b) a long march for the corporations power, resurrected in the 1970's, with a full-blown renaissance as a consequence of *Work Choices* and the *Fair Work Act*, the latter entrenching its role as the primary head of power for the purposes of federal parliamentary control of a national industrial relations system.

The road that led to the *Fair Work Act*, especially via *Work Choices* and *Engineers*, does represent a federal triumph, but a federal triumph which is not complete. For without referral of powers or constitutional amendment there can never be complete federal control of industrial relations in Australia. By reason

[58] See generally, for example, R. Owens, "*Unfinished Constitutional Business: Building a National System to Regulate Work*" (2009) 22 AJLL 258.

of the *Commonwealth Referral Act* and the various State referrals that coverage is now almost complete in relation to the private sector, except for Western Australia, which remains an "island". That it is not complete is part of the beauty of federalism. Ultimately, States do have a say, or at least some say, in what is referred to the Commonwealth, and now, as a consequence of the inter-governmental agreement, what is changed and when under the *Fair Work Act*. Thus the *Fair Work Act* can be said to be almost a triumph of federalism, just as it can be said, as a consequence of *Work Choices*, to be almost a federal triumph.