

# FROM LABOUR'S PAIN COMES LABOR'S GAIN? THE HIGH COURT'S DECISION IN THE *WORK CHOICES CASE* AND THE COMMONWEALTH'S CORPORATIONS POWER

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The author contends that the High Court's emphatic joint majority decision in the *Work Choices Case* in 2006 exemplifies well established principles of constitutional interpretation in construing the heads of Commonwealth legislative power. However, in assessing the likely political ramifications of the decision, the author takes a broader historical perspective. He concludes that the majority judgment's unambiguous confirmation of the plenary scope of the Commonwealth's corporations power under the *Constitution* provides unbounded opportunities for a future federal Labor Government in Australia, in curbing and controlling the massive influence of 'The Corporation' in a globalised world.

John Howard offers a form of market fundamentalism...[b]y contrast, social democrats offer a different narrative for our country's long term future...Social democrats believe in the market. But we don't believe in market fundamentalism. We don't believe in an unconstrained market.

Current Federal Labor Leader & Leader of the Opposition, Kevin Rudd MP, 'Child of Hayek', *The Australian* (Sydney), 20th December 2006, 12.

## I INTRODUCTION

The decision of the High Court in November 2006 concerning the constitutionality of the Howard Government's *Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (Work Choices Act)*,<sup>1</sup>

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<sup>1</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1. At the time of publication of this paper, the decision has not yet been reported in the official series, the Commonwealth Law Reports. Its medium-neutral citation is [2006] HCA 52 (14 November 2006).

was one of the more politically charged (and politically significant) High Court constitutional cases since Federation. The challenge to the legislation by five Labor controlled States and two large unions (collectively ‘the plaintiffs’<sup>2</sup>) captured public attention in a way unseen for a constitutional case since the ‘Tasmanian Dam’ litigation in the early 1980s.<sup>3</sup> The plaintiffs’ challenge failed. On 14 November 2006 the High Court decisively determined, in *New South Wales v Commonwealth* (2006) 231 ALR 1 (‘the *Work Choices Case*’),<sup>4</sup> that the entirety of the *Work Choices Act* was constitutionally valid.

The plaintiffs’ defeat had been widely forecasted by academic commentators, although perhaps not the upholding of the validity of the *Work Choices Act* in its entirety.<sup>5</sup> In many quarters, the High

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<sup>2</sup> That is, the States of New South Wales, Western Australia, South Australia, Queensland and Victoria, and Unions NSW and the Australian Workers’ Union. The Labor Governments of Tasmania, the Northern Territory and the Australian Capital Territory also all intervened in support of the plaintiffs’ challenge: see *New South Wales v Commonwealth* (2006) 231 ALR 1, 7 [6] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>3</sup> The *Tasmanian Dam* litigation concerned the Commonwealth Government’s attempts to stop the Tasmanian Government building a large hydro electric dam on the Gordon river below its intersection with the Franklin river, thereby flooding the Franklin River valley, a pristine wilderness area. The Commonwealth’s attempts were successful: see *Commonwealth v Tasmania* (1983) 158 CLR 1 (‘*Tasmanian Dam Case*’). The Commonwealth’s actions in stopping the building of the dam were in fulfilment of election promises made during the 1983 Federal election campaign in which the building of the dam was one of the key election issues.

<sup>4</sup> By a clear majority of five (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) writing a joint majority judgment: see *New South Wales v Commonwealth* (2006) 231 ALR 1, 1-111 [1]-[422]. The dissentients were Kirby J (at 111-65 [423]-[616]) and Callinan J (at 165-276 [617]-[914]).

<sup>5</sup> See, eg, Darrell Barnett, ‘The Corporations Power and Federalism: Key Aspects of the Constitutional Validity of the *Workchoices Act*’ (2006) 29(1) *University of New South Wales Law Journal* 91; Anthony Gray, ‘Precedent and Policy: Australian Industrial Relations Reform in the 21<sup>st</sup> Century using the Corporations Power’ (2005) 10(2) *Deakin Law Review* 440; Ron McCallum, ‘The Australian Constitution and the Shaping of our Federal and State Labour Laws’ (2005) 10(2) *Deakin Law Review* 460, 467; Gonzalo Puig, ‘Constitutionality of Workchoices’ (2006) 44(1) *Law Society Journal* 64; Andrew Stewart, ‘Federal Labour Law and New Uses for the Corporations Power’ (2001) 14 *Australian Journal of Labour Law* 1, 12-13; Bill Ford, ‘The Corporatisation of Australian Labour Law: Completing Howard’s Unfinished Business’ (2006) 19 *Australian Journal of Labour Law* 144, 145, 155; John Williams, ‘The Constitution and the Workplace Relations Act 1996’ (2006) 16(2) *The Economics and Labour Relations Review* 62. Aspects of the legislation upon which some

Court's decision was received as a stunning victory for both the Howard Government and the forces supporting industrial 'reform',<sup>6</sup> who had long had the 'industrial relations club'<sup>7</sup> in their sights. Notwithstanding the Labor States' and unions' immediate loss (and the Commonwealth Coalition Government's win) however, the decision of the High Court in the *Work Choices Case* provides enormous opportunities for the legislative implementation of agenda more closely associated with the Australian Labor Party and the broader left movement, in ways that would have been unimaginable for the federal Labor administrations which governed Australia intermittently in the 20<sup>th</sup> century.<sup>8</sup> In a nutshell, the mammoth scope of the corporations power, now decisively confirmed by the majority

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commentators expressed doubt as to constitutional validity included the provisions relating to the regulation of unions: see, eg, Stewart at 19; the broad regulation making power, and those laws dealing with the exclusion of State industrial laws re corporations presently regulated within the States' industrial relations systems: see, eg, Ford at 160.

Indeed, the successful use by the Commonwealth of the corporations power to regulate industrial relations generally was foreshadowed by legal commentators decades earlier: see, eg, David Solomon, *The Political Impact of the High Court* (1992) 119; J O'Donovan, 'Can the Contract of Employment be Regulated Through the Corporations Power?' (1977) 51 *Australian Law Journal* 234; cf Andrew Stewart and George Williams, *Work Choices: What the High Court Said* (2007) 35, 152-3. See also *New South Wales v Commonwealth* (2006) 231 ALR 1, 17 [46] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, 212 (Murphy J).

<sup>6</sup> See, eg, the editorial of the right of centre national broadsheet newspaper *The Australian* on 15 November 2006 (the day after the High Court's decision was handed down) headed 'High Court Ruling a Reform Positive' (Editorial, 'High Court Ruling a Reform Positive', *The Australian* (Sydney), 15 November 2006, 17). For a brief but critical examination of the use of the word 'reform' in the context of changes to labour and employment laws, see Brian Brooks, 'The Reform of Labour Laws: An International Comparison' (2006) 29(1) *University of New South Wales Law Journal* 22, 22, 25.

<sup>7</sup> For a discussion of the coining and use of the pejorative term 'industrial relations club' to describe the perceived cosy alliance between the Industrial Relations Commission (and its predecessor, the Conciliation and Arbitration Commission) and peak employer and trade union groups under the long established system of compulsory arbitration and conciliation, see Braham Dabscheck, *Australian Industrial Relations in the 1980s* (1989) 124-6.

<sup>8</sup> See, eg, Michael Crommelin and Gareth Evans, 'Explorations and Adventures with Commonwealth Powers' in G. Evans (ed), *Labor and the Constitution 1972-1975* (1977) 24, 25-37 for a discussion of the constitutional travails experienced by the Whitlam Government in attempting to regulate aspects of the national economy.

in the *Work Choices Case*, provides virtually unlimited opportunities for the Commonwealth Government directly to regulate the activities of most corporations,<sup>9</sup> and by virtue of the corporation's ubiquitous presence in the 21<sup>st</sup> century economy, to regulate the economy itself.

This paper focuses primarily upon the five justice joint majority judgment in the *Work Choices Case*. It explains why the corporations power is central to the majority's determination and how the majority applies basic principles of constitutional characterisation to arrive at its conclusion about the scope of the corporations power. The paper also assesses, in the light of the majority judgment, the continuing relevance of federalism to the characterisation of Commonwealth legislative power. Finally, it attempts to place the corporations power aspect of the majority's decision in the *Work Choices Case* in a broader political context.

## II THE RELEVANCE OF THE CORPORATIONS POWER TO THE WORK CHOICES ACT

The *Work Choices Act* makes extensive amendments to the *Workplace Relations Act 1996* (Cth) ('the Amended Act'). While the Amended Act relies disparately on a number of different heads of power with respect to the constitutional validity of its provisions,<sup>10</sup> it

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<sup>9</sup> The remaining limitations include (i) that the 'corporations power' in pl 51(xx) is limited to '*trading and financial corporations*' (cf corporations simpliciter or all corporations): see Stewart & Williams, above n 5, 156; (ii) that to fall within the corporations power, Federal laws must be 'with respect to' constitutional corporations, ie there must be a 'sufficiency of connexion' between the Federal law and constitutional corporations: see, eg, *Re Dingjan; Ex parte Wagner* (2000) 203 CLR 323; (iii) that any Federal law cannot impair the institutional integrity of State governments (also known as the *Melbourne Corporation* principle); and (iv) that, consistent with the principle articulated in *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 ('*Schmidt*'), any law passed by reference to the corporations power must not be subject to an express limitation elsewhere in s 51, such as the prohibition on Commonwealth regulation of state banking in s 51(xiii). Limitations (iii) and (iv) are discussed later in this paper.

<sup>10</sup> There are of course other constitutional heads of Commonwealth legislative power relied upon to validate certain provisions in the Amended Act: see, eg, s 6(1)(d) (the interstate and international trade and commerce power) (*Constitution* s 51(i)); s 6(1)(e), (f) of the Amended Act (the territories power) (*Constitution* s 122); s 3(n) of the

is the use of the corporations power which gives it its massive coverage over Australian workplaces,<sup>11</sup> and grounds its aspiration to establish and maintain a 'national system of workplace relations'.<sup>12</sup> The scope and construction of the corporations power is therefore the 'principle issue'<sup>13</sup> as to the legislation's constitutional validity.

The 'linchpin'<sup>14</sup> connecting the Amended Act to the *Constitution* is found in ss 5 and 6 of the Amended Act. These sections contain the definitions of 'employee' and 'employer' respectively. An 'employee' is relevantly defined in sub-s 5(1) of the Amended Act as being an employee of an 'employer' as defined in sub-s 6(1); an 'employer' is in turn defined in paragraph (a) of sub-s 6(1) as including any 'constitutional corporation'; a 'constitutional corporation' is in turn defined in s 4 of the Amended Act as meaning 'a corporation to which paragraph 51(xx) of the Constitution applies'.<sup>15</sup>

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Amended Act (the external affairs power) (*Constitution* s 51(xxix)); sch 6 of the Amended Act (the industrial relations power) (*Constitution* s 51(xxxv)); pt 21 of the Amended Act which operates on employees and employers in the State of Victoria pursuant to a referral of power under the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic) (*Constitution* s 51(xxxvii)).

<sup>11</sup> See *New South Wales v Commonwealth* (2006) 231 ALR 1, 16-7, [45] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). Although, of course, the corporations power only relates to 'trading and financial corporations', (howsoever defined): see above n 9. Some commentators estimate that this could exclude up to a quarter of the Australian workforce: see Stewart & Williams, above n 5, 156; re the most populous state of New South Wales, one estimate is that approximately 75 per cent of employees in that state will be covered: see L Roth, *The New Federal Workplace Relations System*, Briefing Paper No 2/06, Parliamentary Research Service, Sydney, New South Wales.

<sup>12</sup> The Amended Act s 3(b) (emphasis added).

<sup>13</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 16 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>14</sup> Jill Murray, 'Work Choices and the Radical Revision of the Public Realm of the Australian Statutory Labour Law', (2006) 35(4) *Industrial Law Journal* 343, 351.

<sup>15</sup> The phrase 'constitutional corporation' is legislative shorthand for 'trading or financial corporations formed within the limits of the Commonwealth' or 'foreign corporations' as derived from s 51(xx) of the *Constitution*. The use of an express reference to s 51(xx) of the *Constitution* in drafting Commonwealth legislation which regulates corporations, in order to utilise the full scope of the head of power appears to date at least from the *World Heritage Properties Conservation Act 1983* (Cth) s 10(1), which was the subject of the *Tasmanian Dam* litigation. The use of the precise phrase 'constitutional corporation' in a statutory definition in like terms to that which appears

The use of the compendious phrase ‘constitutional corporation’ in the Amended Act means there was no issue, in the *Work Choices* litigation, as to the *types* of corporations that the Commonwealth, pursuant to the Amended Act, was constitutionally permitted to regulate.<sup>16</sup> The definition in the Amended Act is fully coextensive with the corporations power itself.<sup>17</sup> The issue therefore in the *Work Choices* litigation was whether the impugned legislation could be characterised as being ‘with respect to’<sup>18</sup> the corporations power.<sup>19</sup>

### III THE PLAINTIFF’S CASE AND THE CORPORATIONS POWER

The case for the plaintiffs against the constitutional validity of the Act, in so far as its validity rested on the corporations power, could be distilled to three arguments:<sup>20</sup>

1. The corporations power as expressed in s 51(xx) of the *Constitution* should be read down such that it only confers power on the Commonwealth legislature to pass legislation regulating corporations in their *external* relations, as opposed to their *internal* relations, and that a corporation’s relationship with its employees should be characterised as an internal relation of the corporation.
2. Partly following on from (1) above, the relevant test as to whether an impugned law was ‘with respect to’ the specific head of power contained in s 51(xx) was that there had to be a positive connexion between the corporation *qua* corporation and

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in s 6 of the Amended Act first appears in s 156 of the *Industrial Relations Act 1988* (Cth), the subject of litigation in *Victoria v Commonwealth* (1996) 187 CLR 416 and reappears in s 127C(2) of the *Industrial Relations Act 1988* (Cth), the subject of litigation in *Re Dingjan; Ex parte Wagner* (2000) 203 CLR 323. See also Ford, above n 5, 147.

<sup>16</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 9 [9], 20 [55] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>17</sup> *Ibid* 56 [185] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); see also 128-9 [474] (Kirby J).

<sup>18</sup> See *Australian Constitution* s 51.

<sup>19</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 56 [184] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 128-9 [474] (Kirby J).

<sup>20</sup> *Ibid* 21 [57] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

the nature or character of the impugned law, such that 'the nature of the corporation is significant as an element in the nature or character of the laws'. This test was labelled the 'distinctive character test'.<sup>22</sup>

3. The corporations power in s 51(xx) should be read down by reference to s 51(xxxv), the constitutional head of power with respect to the prevention and settlement of interstate industrial disputes by way of conciliation and arbitration. In other words the power of the Commonwealth Parliament to make laws with respect to industrial relations generally was restricted substantially by the express terms of s 51(xxxv).

There was an additional concern underlying all three of the above arguments, namely that there must be some restraint on 'the stirring giant'<sup>23</sup> of the corporations power in order to restrain Commonwealth legislative power and preserve the federal balance.<sup>24</sup>

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<sup>22</sup> See *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 182 (Gibbs CJ), 194 (Stephen J), 122 (Brennan J); *Tasmanian Dam Case* (1983) 158 CLR 1, 240 (Brennan J), 316 (Dawson J); *Re Dingjan; Ex parte Wagner* (2000) 203 CLR 323, 345-6 (Dawson J), 336 (Brennan J), 368-70 (McHugh J), cf 334 (Mason CJ), 352-3 (Toohey J).

<sup>23</sup> Greg Craven, 'Industrial Relations, the Constitution and Federalism: Facing the Avalanche' (2006) 29(1) *University of New South Wales Law Journal* 203, 204.

<sup>24</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 20 [54], 56 [183] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

## IV WHY THE MAJORITY REJECTED THE PLAINTIFFS' CASE AND UPHELD THE VALIDITY OF THE *WORK CHOICES ACT*

### A *General Comments*

The High Court upheld the validity of the *Work Choices Act in toto*, notwithstanding that 'the principal object' of the *Work Choices Act*, as expressly stated in its objects clause, was 'to provide a framework for cooperative workplace relations'<sup>25</sup> by, inter alia, 'establishing and maintaining a simplified national system of workplace relations'.<sup>26</sup> The majority's decision upholding the validity of the legislation exemplifies the High Court's 'non-purposive' approach to characterisation, 'that the purpose behind a law is irrelevant to its characterisation'.<sup>27</sup> Indeed, as will be the subject of further exposition in this paper, the majority in the *Work Choices Case* followed an impeccably orthodox approach to constitutional characterisation throughout.

### B *Why the Majority Rejected the Plaintiffs' First Argument*

The majority emphatically rejected the first argument of the plaintiffs that s 51(xx) only conferred a power to regulate the external relations of corporations rather than their internal relations. It maintained that the distinction between the external and internal relations of corporations was rooted in jurisprudence concerning choice of law:<sup>28</sup> as an aspect of the comity between nations, each jurisdiction accepted that foreign corporations would be *internally*

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<sup>25</sup> The Amended Act s 3.

<sup>26</sup> The Amended Act s 3(b). Of course whether the changes introduced by the *Work Choices Act* actually simplify work place regulation is a moot point: see, eg, Andrew Stewart, 'A Simple Plan for Reform? The Problem of Complexity of Workplace Regulation' (2005) 31(3) *Australian Bulletin of Labour* 210.

<sup>27</sup> Craven, above n 23, 208; see also Ford, above n 5, 150; Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4<sup>th</sup> ed, 2006) 785-7; Peter Hanks, Patrick Keyser and Jennifer Clarke, *Australian Constitutional Law* (7<sup>th</sup> ed, 2004) 43-5; B M Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234; Leslie Zines, 'Characterisation of Commonwealth Laws' in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives* (1992) 33.

<sup>28</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 32 [91] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

regulated by the laws of their country of origin, and that they would only regulate *external* activities of a foreign corporation within their own jurisdiction. It was therefore not helpful in interpreting the scope of a constitutional head of power within a federal nation.<sup>29</sup> Moreover, the distinction suffered from 'inherent instability',<sup>30</sup> as illustrated by the uncertainty as to whether a corporation's relationship with its employees, either current or prospective, could properly be characterised as an *external* or *internal* relationship of the corporation.<sup>31</sup>

Finally, consistent with the 'ultra-literalism'<sup>32</sup> of *Amalgamated Society of Engineers v Adelaide Steamship ('Engineers')*,<sup>33</sup> the majority determined that the plaintiffs' advocacy of a notion of internality and externality in construing the text of the corporations power was an attempt to place a superfluous, illegitimate and obscuring gloss upon that power. Simply put, there was no mention of externality or internality in the text of paragraph 51(xx).<sup>34</sup>

## C Why the Majority Rejected the Plaintiffs' Second Argument

### 1 General Comments

The plaintiffs' second argument grew from the proposition that for an impugned law to be sufficiently connected with the corporations power, the law must do more than have corporations as its 'object of command'.<sup>35</sup> The plaintiffs' formulation of a superadded 'distinctive character test'<sup>36</sup> was an attempt to give substance to that putative

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<sup>29</sup> Ibid 33-4 [94]-[95] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>30</sup> Ibid 32 [90] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>31</sup> Ibid 31-2 [88]-[90] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). In fact the majority favoured the view that a corporation's relationships with its employees be treated as a matter external to the corporation: see *ibid* 24 [66]. For a further critical discussion of the 'internal/external distinction', see Ford, above n 5, 156.

<sup>32</sup> Craven, above n 23, 208.

<sup>33</sup> (1920) 28 CLR 129.

<sup>34</sup> See *New South Wales v Commonwealth* (2006) 231 ALR 1, 34 [95] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>35</sup> Ibid 49 [156] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>36</sup> Ibid 21 [57] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

extra factor required to bring a law within s 51(xx). The majority rejected the test as an improper ‘piecemeal or sequential approach to characterisation of a law’.<sup>37</sup> Most importantly, in rejecting the test, the majority unequivocally endorsed an extremely broad, ‘plenary’<sup>38</sup> construction of the corporations power.<sup>39</sup>

## 2 *The Majority’s Construction of the Corporations Power in the Work Choices Case*

The majority in the *Work Choices Case* adopts the understanding of the corporations power developed by Gaudron J in her Honour’s dissenting judgments in *Re Dingjan; Ex parte Wagner* (*‘Dingjan’*)<sup>40</sup> and *Re Pacific Coal; Ex parte Construction, Forestry, Mining and Energy Union*<sup>41, 42</sup>

In *Dingjan* Gaudron J had stated:

[T]he power conferred by section 51(xx) extends, at the very least, to the business functions and activities of constitutional corporations and their business relationships. And those functions, activities and relationships will, in the ordinary course, involve individuals, and not merely individuals through whom the corporation acts... or the control of whose conduct is directly connected with the regulation or protection of the corporation. Once it is accepted that s 51(xx) extends to the business functions, activities and relationships of constitutional corporations, *it follows that it also extends to the persons by and through whom they carry*

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<sup>37</sup> Ibid 49 [155] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>38</sup> *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 208 (Mason J) (‘The [corporations] power should therefore...be construed as a plenary power with respect to the subjects mentioned free from the unexpressed qualifications which have been suggested’).

<sup>39</sup> For a discussion of the ‘broad’ and ‘narrow’ views of the corporations power, see George Williams, ‘The Constitution and a National Industrial Relations Regime’ (2005) 10 *Deakin Law Review* 498, 504. See also Stewart, above n 5, 10-11; Ford, above n 5, 149-51.

<sup>40</sup> (1995) 183 CLR 323.

<sup>41</sup> (2000) 203 CLR 346.

<sup>42</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 54 [177]-[178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

*out those functions and activities and with whom they enter into those relationships.*<sup>43</sup>

Her Honour clearly and expressly 'extends' the power conferred by s 51(xx) to the 'persons' 'through whom' the corporation carries out its business functions. The inclusion of the corporation's employees (and the industrial relations of the corporation generally) within the scope of the corporation's power is then made explicit in Her Honour's judgment in 2000 in *Re Pacific Coal; Ex parte Construction, Forestry, Mining and Energy Union*,<sup>44</sup> in what the majority in the *Work Choices Case* describe, in its endorsement of it, as Gaudron J's 'amplified'<sup>45</sup> understanding of the scope of the corporations power:<sup>46</sup>

I have no doubt that the power conferred by s 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that subsection, *the creation of rights and privileges belonging to such a corporation, the imposition of obligations on it* and, in respect of those matters, *to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business... I have no doubt that it 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.*<sup>47</sup>

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<sup>43</sup> *Re Dingjan; Ex parte Wagner* (2000) 203 CLR 346, 365. See also 333-4 (Mason J), 342 (Deane J), cf 352-3 (Toohey J), 364-6 (McHugh J) (references omitted & emphasis added).

<sup>44</sup> (2000) 203 CLR 346.

<sup>45</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 54 [178] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>46</sup> (2000) 203 CLR 346.

<sup>47</sup> *Re Pacific Coal; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 375 [83] (emphasis added).

### 3 *The Application of the Majority's Construction of the Corporations Power to the Work Choices Act*

Turning then to the crux of the issue in the *Work Choices Case*, as long as the impugned legislation specifically<sup>48</sup> singles out constitutional corporations as the person upon whom it casts obligations,<sup>49</sup> or specifically<sup>50</sup> singles out constitutional corporations in changing, regulating or abolishing the corporation's 'duties, powers and privileges' (to adopt the famous passage from Kitto J's judgment in *Fairfax v Federal Commissioner of Taxation*),<sup>51</sup> it falls within the ambit of the corporations power.<sup>52</sup> Pursuant to the definition of 'employer' and 'employee' contained in ss 5 and 6 of the Amended Act, a constitutional corporation – as an employer – is necessarily one party to the (contractual) employment relationship. Therefore, a Commonwealth law which regulates a corporation's 'workplace relations',<sup>53</sup> which necessarily and specifically includes a corporation as a party *as employer*, is *ipso facto* within the corporations power.<sup>54</sup>

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<sup>48</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 49 [155]-[156] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>49</sup> *Ibid* 46 [144] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>50</sup> *Ibid* 49 [155]-[156] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>51</sup> (1965) 114 CLR 1, 7: ('...the question of constitutional validity under section 51... is... to be determined by reference *solely* to the operation the enactment has if it be valid, that is to say *by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes*') (emphasis added). See also *New South Wales v Commonwealth* (2006) 231 ALR 1, 45 [142] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), cf 128-9 [473]-[474] (Kirby J).

<sup>52</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 76 [266] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). For a further summary of the relationship between the corporations power and the *Work Choices Act*, see Shae McCrystal, 'Smothering the Right to Strike: Work Choices and Industrial Action' (2006) 19 *Australian Journal of Labour Law* 198, 201.

<sup>53</sup> A usage which seems to have replaced 'industrial relations' (see, eg, the title of the *Workplace Relations Act 1996* (Cth) and also s 3), presumably because of the growth of the service sector of the economy and the reduction in employment in traditional 'industry'.

<sup>54</sup> See, eg, *New South Wales v Commonwealth* (2006) 231 ALR 1, 74-5 [257]-[258] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also Barnett, above n 5, 102.

Thus, the majority works its methodical way through a checklist of the challenged provisions of the Amended Act with relentless logic. Unaffected by feelings of sentiment for 'all those hard-fought decisions of [the High] Court and the earnest presentation of cases, the advocacy and the judicial analysis and elaboration within them concerning the ambit of s 51(xxxv)' <sup>55,56</sup> and decrying the fusty historical treasure hunt for the founding fathers' intention as 'the pursuit of a mirage',<sup>57</sup> the majority find each and every impugned provision of the legislation valid.<sup>58</sup>

To take but one example: s 755(1)(a)(i) of the Amended Act regulates the right to enter premises under a prescribed State or Territory 'OHS law'<sup>59</sup> where the premises are 'occupied or otherwise controlled by a constitutional corporation'. It is valid, according to the majority, as sufficiently connected with s 51(xx), as:

[The] question is the regulation of a right of entry to premises, and the premises to which the right of entry is controlled are premises 'occupied or otherwise controlled by' a constitutional corporation. This is a sufficient connection with s 51(xx), whether or not the entry that is thus regulated concerns a business being conducted on the premises by that corporation. The connection lies in the *controlling of entry to a constitutional corporation's premises. The law controlling entry is a law with respect to constitutional corporations.*<sup>60</sup>

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<sup>55</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 114 [434], 115 [476] (Kirby J).

<sup>56</sup> And for several relevant failed referenda: see *ibid* 41-4 [125]-[135] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), cf 115 [437], 126-7 [468] (Kirby J), 196-208 [707]-[735] (Callinan J).

<sup>57</sup> *Ibid* 39-40 [118]-[120]; see also 40-1 [121]-[123] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), cf 187 [683]-[684], 223-4 [772], 236 [802] (Callinan J); Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1. For a detailed summary of the history of the drafting of the corporations power, see John Williams, above n 5, 3-5.

<sup>58</sup> See, eg, *New South Wales v Commonwealth* (2006) 231 ALR 1, 62-3 [208] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>59</sup> The Amended Act s 737.

<sup>60</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 80 [284] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) (emphasis added). See also the discussion of the constitutional validity of pt 9 of the Amended Act: *New South Wales v*

There is an additional basis upon which impugned provisions of the Amended Act which regulate either a constitutional corporation's employees or third parties (ie a party who is not either (i) a constitutional corporation as employer, or (ii) one of its employees) can fall within the scope of the corporations power. Pursuant to the High Court's reasoning in *Actors and Announcers Equity Association of Australia v Fontana Films* ('*Fontana Films*') the ambit of the corporations power encompasses the regulation of non corporations where those regulations protect the corporation from the likelihood of harm.<sup>61</sup> Thus, for example, s 496(2) of the Amended Act, which permits the Australian Industrial Relations Commission to prevent industrial action by 'non federal system employees' or 'non federal system employers' (ie employers or employees who fall outside of the definitions contained in ss 5 and 6 of the Amended Act)<sup>62</sup> – where that industrial action may cause substantial damage or loss 'to the business of a constitutional corporation' – also falls within the scope of the corporations power, as being a law 'with respect to' constitutional corporations.<sup>63</sup> As put by Barnett with reference to the freedom of association provisions in Part 16 of the Amended Act:

The Part is concerned with protecting the integrity of the employment relationship, or potential employment relationship, between constitutional corporations and natural persons, from particularly union 'interference'. That the 'real' purpose of the Part may be to exclude, or at least significantly reduce the power and significance of, unions is not to the point. What is important is that

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*Commonwealth* (2006) 231 ALR 1, 73-6 [253]-[262], and the discussion of the constitutionality of sch 1 of the Amended Act re the regulation of the 'registered' organisations: *ibid* 85-8 [309]-[327].

61 In *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 the High Court largely upheld the validity of secondary boycott provisions in the *Trade Practices Act 1974* (Cth) which prohibited any person (including non corporations) from engaging in certain proscribed conduct which inflicted harm upon constitutional corporations: see the discussion of *Fontana Films* in *New South Wales v Commonwealth* (2006) 231 ALR 1, 49-51 [157]-[165] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also the discussion of *Fontana Films* in Barnett, above n 5, 106-7.

62 The Amended Act s 496(3)(a), (b).

63 *New South Wales v Commonwealth* (2006) 231 ALR 1, 60 [198], 75 [258] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

the conduct to which Part 16 applies is conduct that directly relates to the employment relationship between constitutional corporations and its actual or prospective employees and contractors. If the Commonwealth has power to regulate the terms and conditions of that relationship, *it also will have the power to protect the integrity of that relationship by, for example, prescribing the persons who may or may not be involved in, or 'interfere' with, various stages of that relationship.*<sup>64</sup>

### ***D Why the Majority Rejected the Plaintiffs' Third Argument – The Relationship between the Corporations Power and Section 51(xxxv)***

The fact that the *Work Choices Act* could broadly and accurately be described as legislation on the subject matter of industrial or workplace relations, which, nevertheless, largely falls *outside* the scope of s 51(xxxv) – as *not* being a law 'with respect to' the conciliation or arbitration of interstate industrial disputes – did not in any way inhibit the legislation's characterisation by the majority as being 'with respect to' the corporations power.

It has long been an accepted canon of constitutional construction that a law may be characterised as being with respect to more than one head of power.<sup>65</sup> Similarly a law may be characterised as being with respect to one head of power, even if it is also characterisable as outside of the scope of another head of power.<sup>66</sup> Moreover, according to the majority, s 51(xxxv) was not a vaguely defined 'industrial relations power', but rather a specific head of power with respect to a constitutionally prescribed method of resolving interstate industrial disputes. The misconstruction of s 51(xxxv) as a

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<sup>64</sup> Barnett, n 5 above, 109 (emphasis added and footnotes omitted).

<sup>65</sup> See Ford, n 5 above, 145-6.

<sup>66</sup> See, eg, *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 191-2 (Stephen J). See also *New South Wales v Commonwealth* (2006) 231 ALR 1, 45-6 [142], 66 [240] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, 285; Hanks et al, above n 27, 41-3; Blackshield & Williams, above n 27, 787-94. For a discussion of this point, see Ford, above n 5, 146.

generalised industrial relations power ‘compounds the error’<sup>67</sup> inherent in the plaintiffs’ argument that s 51(xxxv) operates to delimit the corporations power:

[T]he text of s 51(xxxv)...is concerned with a narrower subject-matter than industrial matters or relations and their regulation. Legislation may prescribe, independently of any mechanism for the resolution of disputes, a wide range of matters which may fairly be regarded as affecting the mutual relations of employers and employees...Why should the heads of power, particularly s 51(xx), which are relied upon by the Commonwealth...be construed as not doing so for the reason that s 51(xxxv) identifies particular means for the prevention and settlement of certain industrial disputes?<sup>68</sup>

According to the majority, the only time that the provisions of a particular head of power can be used to restrict the terms of another head of power is where the text of the first mentioned head of power contains a *positive* restriction or prohibition of *general application*.<sup>69</sup> So, for example, the Commonwealth could not use the corporations power to pass laws regulating State banking not extending beyond the limits of the State concerned, as this would offend the express, general prohibition contained in s 51(xiii), *viz* the phrase ‘other than State banking’.<sup>70</sup> The majority declined to extend this restriction to a negative implication that the express words of s 51(xxxv) contained an unexpressed prohibition (cf a *direct* prohibition) against

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<sup>67</sup> [The] error is compounded if the conclusion is reached about the “real” or “true” or “proper” character of a law proceeds from... the mischaracterisation of the subject matter of s 51(xxxv) as “industrial relations”. Resort to undefined concepts of “industrial affairs”, “industrial relations”, and “industrial matters” (all of which have different meanings) should not be permitted to obscure the fact that s 51(xxxv) uses none of these expressions; it speaks of “industrial disputes”’: *New South Wales v Commonwealth* (2006) 231 ALR 1, 19 [51] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>68</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 61 [203] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>69</sup> *Ibid* 65 [219] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>70</sup> See *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, as discussed in *New South Wales v Commonwealth* (2006) 231 ALR 1, 65 [219]-[221] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

alternative means for the Commonwealth to regulate industrial relations generally. Instead, it adopted in its entirety what had been stated in *Re Pacific Coal* in 2000 by Gleeson CJ:

[I]t is one thing to say that the nature of the power [under s 51(xxxv)] is such that it deals with instituting and maintaining a system of conciliation and arbitration, and it is only through such a system that conditions of employment may be regulated under s 51(xxxv); it is another thing to find some negative implication amounting to a prohibition against the Parliament enacting any law which has the effect of altering the conditions of employment... there is no such negative implication, and no such prohibition.<sup>71</sup>

## E *The Federal Balance*

### 1 *The Federal Balance as limiting the scope of the Corporations Power*

Given the plaintiffs' invocation of the federal balance in the *Work Choices Case*, and the expansive construction of the corporations power unambiguously articulated by the majority in response, one must ask whether there is any scope for any limitation upon the construction of the corporations power (or indeed any of the other placita in s 51) by reference to concerns about the federal balance between the States and the Commonwealth?

It appears not. In the *Work Choices Case* the majority is dismissive of what it labels as the 'social consequences' of its expansive construction of the corporations power:

Reference has often been made in the cases to what are said to be the possible consequences of concluding that a law whose object of command is only constitutional corporations is a valid law. In *Huddart, Parker* Higgins J spoke of possibilities that he saw as distorting constitutional arrangements... In part reference to such consequences seeks to present possible *social* consequences that it

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<sup>71</sup> (2000) 203 CLR 346, 359-60 as extracted with approval in *New South Wales v Commonwealth* (2006) 231 ALR 1, 67-8 [228] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) (references omitted). For a further discussion of this point, see Ford, above n 5, 156-9.

is said could flow if further legislation is enacted... as a reason to confine the reach of legislative power. Section 51(xx), like other powers, should not be given a meaning narrowed by an apprehension of extreme examples and distorting possibilities of its application to future laws.<sup>72</sup>

Thus, according to the majority, there is no basis for taking a ‘different approach’<sup>73</sup> to the corporations power.

Moreover, the majority finds the notion of the federal balance hopelessly ill defined and without content as a general delimiting principle in construing Commonwealth legislative power:

Thus when it is said that there is a point at which the legislative powers of the federal Parliament and the legislative powers of the States are to be divided lest the federal balance be disturbed, how is that point to be identified?... what exactly is the content of the proposition that a particular construction of s 51(xx) would, or would not, impermissibly alter the federal balance?... [T]o be valuable, the proposition that a particular construction of s 51(xx) would or would not impermissibly alter the federal balance, must have content, and the plaintiffs make no attempt to define that content.<sup>74</sup>

## *2 The Melbourne Corporation Principle & the Corporations Power*

In appealing to the notion of the federal balance, the plaintiffs understandably made reference to the ‘*Melbourne Corporation* principle’, so named after the High Court’s 1947 decision in

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<sup>72</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 57 [187]-[188] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) (references omitted), *contra* 147 [541] (Kirby J). In anticipation of this point, see Ford, above n 5, 156.

<sup>73</sup> *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 345 (Dawson J) as referred to in *New South Wales v Commonwealth* (2006) 231 ALR 1, 56 [183] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>74</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 59-60 [195]-[196] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), cf 212-3 [741], 224 [772] (‘Sight should never be lost of the verity that the Constitution is a constitution for a federation, and that it provides for a federal balance’), 226 [781], 234 [797] (Callinan J).

*Melbourne Corporation v Commonwealth*.<sup>75</sup> The principle provides that '[t]he Constitution predicates [the State Governments'] continued existence as independent entities';<sup>76</sup> therefore, federal power cannot be used 'for a purpose of restricting or burdening [a] State in the exercise of its constitutional powers',<sup>77</sup> as this would 'bring into question the independence from Federal control of [a] State in the discharge of its functions'.<sup>78</sup>

Since the High Court's decision in 1920 in *Engineers* 'exploded' the 'reserve powers doctrine',<sup>79</sup> some commentators have identified the *Melbourne Corporation* principle as a means of maintaining a federal balance between the powers of the Commonwealth and the States. Barnett, for example, has suggested that the High Court abandon its 'case by case' application of the *Melbourne Corporation* principle, and instead consider the question 'when account is taken of the particular legislation before the court in light of other legislative, and perhaps even executive, measures undertaken by the Commonwealth, is the capacity of the States to play a practical role in the Federation significantly impaired or curtailed?'<sup>80</sup>

Notwithstanding the *Melbourne Corporation* principle's not infrequent invocation by the States before the High Court since 1947,<sup>81</sup> there are only three cases (albeit two relatively recent) where the High Court has used the principle to invalidate

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<sup>75</sup> (1947) 74 CLR 31.

<sup>76</sup> Ibid 82 (Dixon J).

<sup>77</sup> Ibid 80 (Dixon J).

<sup>78</sup> Ibid. For a discussion of the *Melbourne Corporation* principle, see Hanks et al, above n 27, 590-626; G. Winterton et al, *Australian Federal Constitutional Law* (2<sup>nd</sup> ed, 2007) 963-1035; Blackshield & Williams, above n 27, 1142-68.

<sup>79</sup> See *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 485 (Barwick CJ).

<sup>80</sup> Barnett, above n 5, 124; see also Amelia Simpson, 'The Australian Education Union Case: A Quiet Revolution?' (1998) 7(1) *Griffith Law Review* 30.

<sup>81</sup> See, eg, *Victoria v Commonwealth* (1971) 122 CLR 353 ('*Payroll Tax Case*'), 372 (Barwick CJ), 399, 401, 403 (Windeyer J), 421, 423-6 (Gibbs J); *State Chamber of Commerce and Industry v Commonwealth* (1968) 163 CLR 329; *Tasmanian Dam Case* (1983) 158 CLR 1, 128, 139 (Mason CJ), 280-1 (Deane J), 214-5 (Brennan J); *Richardson v Forestry Commission* (1988) 164 CLR 261; *Western Australia v Commonwealth* (1995) 183 CLR 373 ('*Native Title Act Case*'), 481 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

Commonwealth legislation.<sup>82</sup> The *Melbourne Corporation* principle must now also be assessed in the sobering light of the majority's treatment of it in the *Work Choices Case*.

The majority in the *Work Choices Case* take a dourly minimalist approach to the *Melbourne Corporation* principle.<sup>83</sup> Reiterating Dixon J's observation in *Melbourne Corporation* that the constitutional framers 'appear... to have conceived the States as bodies politic *whose existence and nature are independent of the powers allocated to them*',<sup>84</sup> the majority emphatically reject the contention that the principle has anything to say about the balance or allocation of legislative functions between the States and the Commonwealth:

And because the [State government] entities, whose continued existence is predicated by the Constitution, are polities, they are to continue as separate bodies politic each having legislative, executive and judicial functions. *But this last observation does not identify the content of any of those functions. It does not say what those legislative functions are to be.*<sup>85</sup>

Thus, according to the majority, the *Melbourne Corporation* principle provided no assistance to the plaintiffs in the *Work Choices*

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<sup>82</sup> *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; *Austin v Commonwealth* (2003) 215 CLR 185. *Victoria v Commonwealth* (1996) 187 CLR 416 ('*Industrial Relations Case*') is excluded from the list as the application of the *Melbourne Corporation* principle in that case resulted in the reading down of Commonwealth legislation 'so as not to impact on the employment conditions of higher level public servants, the hiring policies of the States, the determination of the length of a State employee's term of employment, and the ability of States to sack people on the basis of redundancy' (Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2<sup>nd</sup> ed, 2006) 260), rather than the invalidation of Commonwealth legislation.

<sup>83</sup> *Contra* Callinan J: see, eg, *New South Wales v Commonwealth* (2006) 231 ALR 1, 230 [787].

<sup>84</sup> *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 as extracted in *New South Wales v Commonwealth* (2006) 231 ALR 1, 59 [195] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>85</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 59 [194] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) (emphasis added), cf 149 [550] (Kirby J).

*Case.* Only the minority justices, Kirby and Callinan JJ were prepared to adopt a more expansive approach to the principle. They determined that the *Work Choices Act* was invalid largely by reference to the likely overall consequences for the States if the legislation were found to be valid. As expressed by Kirby J:

In my view, the use of section 51(xx) exhibited in [the *Work Choices Act*] carries with it, if valid, a very large risk of destabilising the federal character of the Australian Constitution. When such a conclusion is reached only a formulaic approach to the law of the Constitution would lead this court to ignore it. In effect, the risk to which I refer is presented by a shift in constitutional realities from the present mixed federal arrangements to a kind of optional or 'opportunistic' federalism in which the Federal Parliament may enact laws in almost every sphere of what has hitherto been a State field of lawmaking... it would be completely contrary to the text, structure and design of the Constitution for the states to be reduced, in effect, to service agencies of the Commonwealth.<sup>86</sup>

In the light of the joint majority judgment in the *Work Choices Case*, the *Melbourne Corporation* principle's only application to the States in terms of the *Work Choices* legislation is likely to be in precluding federal regulation of employment conditions for 'high level' State officials and in barring any attempt by the Commonwealth to determine the composition of a State's workforce.<sup>87</sup> Given that the *Work Choices Case* was litigated as a demurrer, these issues did not arise for consideration in that case. They may be the subject of further High court litigation at a later date.

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<sup>86</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 147 [542]-[543], 149 [549]. See also 225-6 [779] (Callinan J).

<sup>87</sup> Stewart, above n 5, 5 referring to *Re Australian Education Union; ex parte Victoria* (1995) 184 CLR 188, 232-3. For a further discussion of this point see Williams, above n 39, 507-10.

## V KIRBY AND CALLINAN JJ'S DISSENTING JUDGMENTS

### A *General Comments*

Given the strength of the five justice joint majority judgment in the *Work Choices* Case, this paper focuses primarily on that judgment, specifically in relation to the majority justices' delimitation of the scope of the Commonwealth's corporations power, and the majority judgment's political implications. Nevertheless, the two dissenting judgments of Kirby and Callinan JJ are both lengthy and significant and address issues of relevance to this paper.

The minority justices read down the corporations power by reference both to the provisions of s 51(xxxv) and to the effect of an (impermissibly) broad reading of the corporations power on the position of the States and, by implication, the federal balance.

### B *The Federal Balance, the Corporations Power & Constitutional Interpretation*

Contrary to the approach taken by the majority, neither dissenting Justice expresses a decided view of the scope of the corporations power, although Callinan J appears to favour the internal/external dichotomy urged upon the court by the plaintiffs.<sup>88</sup> For the dissenting Justices the issue of the scope of the corporations power is subsumed within the broader question of the federal balance – 'the central issue in these proceedings is not, as such, the corporations power, standing alone'<sup>89</sup> – and specifically, the likely consequences for the States if the corporations power is construed broadly enough to validate the *Work Choices Act*.<sup>90</sup> When the *Work Choices Act* is viewed as a whole by reference to its 'overall design',<sup>91</sup> it is invalid because of its consequences for the States and the federal balance.

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<sup>88</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 250 [841]-[842], 262 [880], cf 164-5 [614] (Kirby J).

<sup>89</sup> *Ibid* 131 [484] (Kirby J).

<sup>90</sup> *Ibid* 146-7 [539]-[540], 164 [611] (Kirby J), 233 [794] (Callinan J).

<sup>91</sup> *Ibid* 150 [554] (Kirby J).

Kirby J proceeds from the truism that 'the Constitution must be read as a whole and as a coherent document'<sup>92</sup> to assert that 'the abiding object of the task at hand is to secure an interpretation of the constitutional provisions that gives harmonious effect to the entire document'<sup>93</sup> as 'one coherent instrument of government'.<sup>94</sup> Callinan J mounts a more direct assault on the High Court's seminal 1920 decision in the *Engineers Case* – 'it is a case which does not deserve the reverence which has been accorded to it'<sup>95</sup> – and the strict textualism that that case espoused is inconsistent both with the democratic impetus behind the drafting of the *Constitution* and its passage through the Imperial Parliament, and with 'current orthodox purposive techniques of statutory interpretation'.<sup>96</sup> For both Justices, upholding the validity of the *Work Choices Act* would 'carry with it a large risk of destabilising the Federal character of the Australian Constitution'.<sup>97</sup>

### *C The Relationship between the corporations power and s 51(xxxv)*

Both Callinan and Kirby JJ make pointed reference to the history and litigation surrounding s 51(xxxv) as providing 'a constitutional context in which, for more than a century, legislators and courts... assumed that any law with respect to industrial disputes had to conform'.<sup>98</sup> While each arrives at the same conclusion – that the corporations power must be read down by reference to s 51(xxxv) such that the entirety of the *Work Choices Act* is invalid – their judgments again have different emphases. Callinan J maintains that those involved in the drafting of the *Constitution* never envisaged

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<sup>92</sup> Ibid 127 [469].

<sup>93</sup> Ibid 128 [472].

<sup>94</sup> Ibid 133 [491].

<sup>95</sup> Ibid 214 [747].

<sup>96</sup> Ibid 212-3 [741].

<sup>97</sup> Ibid 147 [542] (Kirby J). See also 223 [772], 225 [779], 230 [230], 234 [797], 275 [913] (Callinan J).

<sup>98</sup> Ibid 113-14 [431] (Kirby J). See also 114-17 [432]-[442] (Kirby J), 235 [801] (Callinan J).

that the corporations power could be used to regulate industrial affairs,<sup>99</sup> and that they intended there to be a division of power between Federal and State Governments over interstate and intrastate industrial disputes respectively.<sup>100</sup> Kirby J instead applies the ‘settled’<sup>101</sup> principle of construction articulated by Dixon CJ in *Attorney-General (Cth) v Schmidt* (‘*Schmidt*’)<sup>102</sup> to restrict the ambit of the corporations power. By construing s 51(xxxv) as imposing two ‘safeguards, restrictions or qualifications’<sup>103</sup> on Commonwealth legislation with respect to industrial disputes, namely, (i) interstate; and (ii) independent resolution by way of conciliation and arbitration, his Honour concludes that the Commonwealth cannot validly pass a law with respect to industrial disputes which lacks those guarantees and overrides those limitations by use of another general head of power, such as the corporations power.<sup>104</sup>

### D A Critique of the Minority Judgments

The judgments of Kirby J and Callinan J are inconsistent with the evolved – at least since the High Court’s decision in *Engineers* in 1920 – corpus of High Court jurisprudence on the question of characterisation of the Commonwealth’s legislative powers. Enough has been said already in this paper about the majority’s application of basic principles of constitutional construction, such as the

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<sup>99</sup> Ibid 195 [706].

<sup>100</sup> Ibid 189 [690].

<sup>101</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 137 [504].

<sup>102</sup> (1961) 105 CLR 361. The principle in *Schmidt* holds that ‘it is in accordance with the soundest principles of interpretation to treat the conferral of an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject matter or to a particular effect as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorised the same kind of legislation but without the safeguard, restriction or qualification’: see *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 160 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) as extracted by Kirby J in *New South Wales v Commonwealth* (2006) 231 ALR 1, 136-7 [503].

<sup>103</sup> *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361, 371 (Dixon CJ).

<sup>104</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 113 [430], 138 [510]. See also 248 [834] (Callinan J).

acceptance of dual characterisation and the focus on the 'rights, duties, powers or privileges' as grounding the process of characterisation. By contrast, if the approach of the dissenters had prevailed, it would have represented a fundamental diversion of 'the flow of constitutional law into new channels'<sup>105</sup> and produced pronounced uncertainty on questions of constitutional interpretation.

It is now well established that the heads of power within s 51 are not to be read down by reference to each other (subject to the principle in *Schmidt*), or by reference to inchoate concerns for the federal balance. For example, the interstate and international trade and commerce power in s 51(i) was construed in *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* to permit the regulation of the relationship between employers and maritime employees in a manner that falls outside of s 51(xxxv);<sup>106</sup> the defence power in s 51(vi) was construed in *Pidoto v Victoria* as unlimited by the terms of s 51(xxxv), at least in times of national emergency;<sup>107</sup> and the 'treaty implementation aspect'<sup>108</sup> of the external affairs power in s 51(xxix) has been validly used to halt *intrastate* industrial development,<sup>109</sup> and to incorporate employment standards promoted by the International Labour Organisation into domestic law in a manner partially outside the scope of s 51(xxxv).<sup>110</sup> Kirby J's attempts to explain these decisions by reference to the 'very special'<sup>111</sup> nature of the defence and external

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<sup>105</sup> *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J).

<sup>106</sup> (2003) 214 CLR 397, a unanimous decision of seven justices. See also *New South Wales v Commonwealth* (2006) 231 ALR 1, 66 [224] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) *contra* 156-7 [578]-[582] (Kirby J).

<sup>107</sup> (1943) 68 CLR 87, a determination of a bench of five. See also *New South Wales v Commonwealth* (2006) 231 ALR 1, 66-8 [227]-[229] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) *contra* 152-4 [562]-[569] (Kirby J); 238 [810] (Callinan J).

<sup>108</sup> See, eg, Joseph & Castan, above n 82, 111-27.

<sup>109</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, cf *New South Wales v Commonwealth* (2006) 231 ALR 1, 186 [679] (Callinan J).

<sup>110</sup> *Victoria v Commonwealth* (1996) 187 CLR 416 ('*Industrial Relations Act Case*') *contra* *New South Wales v Commonwealth* (2006) 231 ALR 1, 154-6 [570]-[576] (Kirby J);

<sup>111</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 154 [569] (Kirby J).

affairs power,<sup>112</sup> whilst maintaining that the corporations power should be so read down, strikes the author as unconvincing.

Specifically, Kirby J's application of the principle articulated in *Schmidt* to limit the scope of the corporations power by reference to s 51(xxxv) is misconceived. For the *Schmidt* principle to apply to the *Work Choices Act* it must be an Act on the 'particular subject matter' of conciliation and arbitration or it must 'produce the same effect' as a law on conciliation and arbitration.<sup>113</sup> The *Work Choices Act* fulfils neither criterion. There is no mention of either conciliation or arbitration in its objects clause;<sup>114</sup> on the contrary, its express purpose is to create an industrial relations system which 'ensur[es] that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level'.<sup>115</sup>

While federalism may be desirable as an 'overriding constitutional arrangement', as 'contributing to diversity and experimentation in law making, intergovernmental co operation within the Commonwealth and the protection of individual rights',<sup>116</sup> it is too abstract a principle to determine the precise content of a specific Commonwealth head of power. For example, both Callinan J and Kirby J are adamant that the curtailment of the State industrial relations systems by the Commonwealth's use of the corporations power to regulate workplace relations is invalid because 'there would be little of substance left for the States'<sup>117</sup> and that this therefore upsets the federal balance. This smacks of an arbitrary political judgment. The effective obliteration of most (if not all) of the States' individual industrial relations systems does not obliterate the State Governments themselves, as evidenced by the Government of the State of Victoria's continued ability to thrive, notwithstanding

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<sup>112</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 152 [562], 154 [569].

<sup>113</sup> See above n 102.

<sup>114</sup> Section 3 of the Amended Act.

<sup>115</sup> Section 3(d) of the Amended Act. See also Barnett, above n 5, 114.

<sup>116</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 118 [446] (Kirby J).

<sup>117</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 233 [795] (Callinan J).

its referral in 1996 of its industrial relations powers to the Commonwealth.<sup>118</sup>

## VI POLITICAL CONTEXT

### A A Broader Context

It has been argued thus far that the majority's reasoning with respect to the corporations power in the *Work Choices Case* has merely built on orthodox approaches to constitutional interpretation. As such, there is little of great jurisprudential significance in the majority judgment. The significance of the High Court's decision lies elsewhere and must be assessed by reference to its broader political and social implications, outside of the boundaries of a narrow, legalistic analysis. The starting point for that assessment is historical.

### B History

The insertion of s 51(xxxv) into the text of the *Constitution* in the 1890s was a victory for liberal 'progressives',<sup>119</sup> with the constitutional prescription of conciliation and arbitration to resolve industrial disputes extending beyond any one State opening up 'a new province for law and order'<sup>120</sup> and providing the new Commonwealth 'with the creative opportunity to civilise capitalism'.<sup>121</sup> The advent of the 'new economy' in the mid 1980s

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<sup>118</sup> By means of the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).

<sup>119</sup> See, Tim Rowse, 'Elusive Middle Ground: A Political History' in Joe Issac and Stuart MacIntyre (eds), *The New Province for Law and Order* (2004) 17, 20-1, 24-5; James Macken, *Australian Industrial Laws* (2<sup>nd</sup> ed, 1980) 10-13; see also *New South Wales v Commonwealth* (2006) 231 ALR 1, 190-2 [696]-[697] (Callinan J).

<sup>120</sup> As coined by Higgins J in his article 'A New Province for Law and Order: Industrial Peace Through Minimum Wage and Arbitration' (1915) 29 *Harvard Law Review* 13 as referred to in *New South Wales v Commonwealth* (2006) 231 ALR 1, 193 [699] (Callinan J).

<sup>121</sup> Rowse, above n 119, 22. For a discussion of the place of the Australian industrial relations system as a 'key institution... that served as the basis on which social policy was reconciled', see Judy Fudge, 'Precarious Employment in Australia and Canada: The Road to Labour Law Reform' (2006) 19 *Australian Journal of Labour Law* 106.

brought with it sustained pressures to transform Australia's industrial relations system.<sup>122</sup> The Howard Government's *Work Choices Act* dramatically accelerates that transformation, but does so in a way that will almost certainly favour individualised enterprise bargaining over unionised collective bargaining.<sup>123</sup> The High Court's decision in the *Work Choices Case* upholding the validity of that legislation will have the effect of rendering s 51(xxxv), with its textual restrictions of interstateness and of the prescription of conciliation and arbitration, largely otiose.<sup>124</sup> The passage of the *Work Choices Act* and its validation by the High Court are therefore both ostensibly significant victories for the adherents of a 'neo liberal' approach to labour law.<sup>125</sup> As described by Murray, with reference to the legislative haste which marked the passage of the *Work Choices Act*:

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For a brief discussion of the international history of the notion of conciliation and arbitration as a means of regulating industrial relations, see Ron McCallum, 'The New Work Choices Laws: Once Again Australia Borrows Foreign Labour Law Concepts' (2006) 19 *Australian Journal of Labour Law* 98, 100-101.

<sup>122</sup> Editorial (2006) 19 *Australian Journal of Labour Law* 95, 96.

<sup>123</sup> Anthony Forsyth and Carolyn Sutherland, 'Collective Labour Relations Under Siege: the Work Choices Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* 183; see also Andrew Stewart, 'Work Choices in Overview: Big Bang or Slow Burn?' [2006] 16(2) *Economic and Labour Relations Review* 25.

<sup>124</sup> For a discussion of the likely demise of the arbitration power, see Stewart & Williams, above n 5, 162-5 ('RIP Industrial Arbitration?'), although as pointed out by the authors (at 165) the use of the corporations power does not of itself necessitate the abandonment of conciliation and arbitration. Section 51(xxxv) may still be relevant however in providing a head of legislative power for Commonwealth laws re the settlement or prevention of interstate industrial disputes between two non corporate entities, as uncommon as such disputes are in reality likely to be: see *New South Wales v Commonwealth* (2006) 231 ALR 1 [474] (Kirby J). Re the decline of industrial awards, see Rosemary Owens, 'Working Precariously: The Safety Net After Work Choices' (2006) 19 *Australian Journal of Labour Law* 161, 177; Murray, above n 14.

<sup>125</sup> For a discussion of the *Work Choices Act* in the context of the ideology of neo liberalism, see, eg, McCallum, above n 121; Fudge, above n 121. For analyses of the negative impact of the *Work Choices Act* on the position of employees generally, see, eg, Marilyn Pittard, 'Back to the Future: Unjust Termination of Employment under the Work Choices Legislation' (2006) 19 *Australian Journal of Labour Law* 225; Joel Fetter, 'Work Choices and Australian Workplace Agreements' (2006) 19 *Australian Journal of Labour Law* 210; Shae McCrystal, 'Smothering the Right to Strike: Work Choices and Industrial Action' (2006) 19 *Australian Journal of Labour Law* 198; Anthony Forsyth and Carolyn Sutherland, 'Collective Labour Relations Under Siege: the Work Choices Legislation and Collective Bargaining' (2006) 19 *Australian Journal of Labour Law* 183; Owens, above n 124.

Law-making of this kind suggests something of the triumphant settling of scores against an old enemy. In a real sense, the traditional labour law system... is that old enemy... Australian unions were promoted and gained status through the links with the federal tribunal under the Constitutional conciliation and arbitration power. Unions in Australia are also structurally linked to the main opposition party in the federal Parliament, the Australian Labor Party. It therefore makes good political sense for the government to move against this traditional foe, especially since it had since July 2005 a majority in both Houses of Parliament. As one member of the government put it, 'there is only one industry in Australia that needs to fear this legislation – the trade union bureaucracy and, of course, their sycophants in this place'.<sup>126</sup>

It is therefore ironical that the expansive interpretation of the corporations power affirmed in the *Work Choices Case* is likely significantly to increase the Commonwealth Government's powers to regulate economic activity, an objective historically associated more with the Australian Labor Party<sup>127</sup> (at least prior to the deregulatory reforms of the Hawke and Keating Labor Governments

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<sup>126</sup> Murray, above n 14, 365. The member of the government referred to is Wilson Tuckey, MHR.

<sup>127</sup> The Fisher Labor government of 1910-13 made two (unsuccessful) attempts through referenda (in 1910 and 1913) to widen the Commonwealth's constitutional powers, including re the nationalisation of monopolies and re the operation of business and commerce: see Brian McKinlay, *A Short History of the Australian Labor Party* (1981) 34-5. The Curtin Labor government of 1940-45 put the 'Fourteen Powers Bill' to referendum on 19 August 1944, having introduced the Bill to Parliament in 1942. The package would have given the Commonwealth extensive powers over the national economy. It was defeated, failing to gain a majority in all States bar South Australia and Western Australia: see, Ross McMullin, *The Light on the Hill* (1991) 229-32. The Chifley Labor government of 1945-49 sought to confer power on the Commonwealth through referenda, inter alia, over 'industrial employment' (put unsuccessfully on 28 September 1946) and 'rents and prices' (put unsuccessfully on 29 May 1948): see, Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (4<sup>th</sup> ed, 2006) 1449-50. In 1973 the Whitlam Labor government sought Commonwealth control over prices and incomes. Both referenda were defeated: see Blackshield & Williams at 1450. See also *New South Wales v Commonwealth* (2006) 231 ALR 1, 42-3 [127]-[130] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 196-208 [708]-[735] (Callinan J).

which governed Australia federally from 1983 to 1996)<sup>128</sup> than the conservative Coalition parties.

### *C The Economic Base and the Constitutional Superstructure*

The High Court's approach to the process of characterisation has 'made possible over the years a very substantial expansion of Commonwealth legislative authority, without the need for securing formal amendment of the Constitutional text'.<sup>129</sup> That approach, and the willingness of the States to refer their powers to the Commonwealth, have not however been the only factors in expanding Commonwealth powers in the hundred years since Federation. The growth in the power and prevalence of corporations over the 20<sup>th</sup> century, aided and abetted by the ascendancy of an agenda of privatisation and out sourcing, means that the Commonwealth's corporations power is far more significant than it was in 1901. The Commonwealth therefore now has considerable power, via the direct regulation of the corporation, to regulate economic activity.<sup>130</sup> In the crudest Marxist terms, primary changes in the economic base have determined the epiphenomenal legal super structure,<sup>131</sup> causing the Commonwealth's legislative powers radically to change notwithstanding that they are 'frozen'<sup>132</sup> in their textual form.

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<sup>128</sup> For a discussion of those reforms within the broader, Labor social democratic tradition, see, eg, Don Watson, *Recollections of a Bleeding Heart* (2002) 240, 264, 316-7.

<sup>129</sup> Ford, above n 5, 147.

<sup>130</sup> The Amended Act, predicated as it is upon various heads of Commonwealth legislative power, is not able to cover the entirety of the Australian workforce. The Australian Bureau of Statistics figures used in the litigation before the High Court and cited in the judgment suggest that approximately 15 per cent of the workforce will not be regulated by the Amended Act. This would include many workers previously regulated under State awards. See *New South Wales v Commonwealth* (2006) 231 ALR 1, 16-7 [45] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>131</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 67 [25], 40-1 [121]-[122] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>132</sup> See, Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 208: 'Constitutionally speaking, Australia is the frozen continent'.

### D *The Quixotic Corporatisation Thesis*

McCallum expresses pessimism about the future of an industrial relations system based on the corporations power, as one which will not recognise the uniquely human dimension of the employment relationship.<sup>133</sup> He contends that 'the words of every specified head of federal power shape the laws enacted in reliance upon it' and that the corporations power (like all heads of power in the Constitution) is itself a form of constitutional 'DNA'.<sup>134</sup> Consequently, the supplanting of the industrial relations power by the corporations power will lead inevitably to the 'corporatisation of Australian labour law'.<sup>135</sup> This concern is shared by Kirby J in his dissenting judgment in the *Work Choices Case*. He characterises s 51(xxxv) as enshrining 'the ideal of "a fair go", due process, transparent negotiations, and ultimately (where necessary), public disposition by an independent decision maker'.<sup>136</sup> His Honour warns that:

[s]uch elements of fairness would not necessarily be assured by an unlimited focus of federal law on the activities of employers as constitutional corporations. Under that power, attention is addressed to the corporation which is the employer, not, as such, the employment or the workplace relationship.<sup>137</sup>

With respect, both McCallum and Kirby J tilt quixotically at a windmill.

It is a given that the changes ushered in by the *Work Choices Act* obliterate much of the industrial relations history and culture in this country.<sup>138</sup> This results, however, not from the constitutional head of power upon which the lawfulness of the *Work Choices Act* rests, but directly from the objectives and substance of the *Work Choices Act*

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<sup>133</sup> McCallum, above n 5; see also *New South Wales v Commonwealth* (2006) 231 ALR 1, 118 [446] (Kirby J).

<sup>134</sup> McCallum, above n 5, 461.

<sup>135</sup> *Ibid* 467.

<sup>136</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 140 [519].

<sup>137</sup> *Ibid* 118 [446]. See also 163 [609].

<sup>138</sup> *Ibid* 115 [115] (Kirby J).

itself. While it is true that the textual restrictions contained in s 51(xxxv) have shaped the Australian industrial relations system,<sup>139</sup> the corporations power, as a ‘super placitum’,<sup>140</sup> has now been defined so broadly that the content of labour and industrial relations law in the *Work Choices* era and beyond will be overwhelmingly shaped by political and economic considerations, rather than legal or constitutional ones.<sup>141</sup> To take that other ‘super placitum’, the external affairs power, as one point of comparison, one cannot accurately say that the Commonwealth legislation unsuccessfully challenged in the *Tasmanian Dams Case* was any less protective of the environment because it was passed ‘with respect to’ external affairs.<sup>142</sup>

As pointed out by Stewart and Williams, the use of the corporations power as the primary mechanism to regulate industrial relations does not of itself necessitate the abandonment of ‘industrial fairness’<sup>143</sup> or independent arbitration as a system that embodies ‘egalitarian and idealistic values’<sup>144</sup> that had ‘profoundly influenced the nature and aspirations of Australian society’:<sup>145</sup>

But if there is nothing about the corporations power that dictates the maintenance of those values, then nor is there anything that requires their abandonment. It is open to a future Commonwealth Government to use the corporations power to reinvigorate the federal award system, to restore the role of the [Australian Industrial Relations Commission] (or some successor) in resolving disputes, and to make a renewed commitment to the principle of industrial fair play – if it wants to.<sup>146</sup>

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<sup>139</sup> McCallum, above n 5, 462-3.

<sup>140</sup> Craven, above n 23, 206.

<sup>141</sup> *Contra* McCallum, above n 5, 467-9.

<sup>142</sup> The decision in the *Tasmania Dams Case* was also based on the corporations power in addition to the external affairs power: see, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 151-2 (Mason J), 269-70 (Deane J).

<sup>143</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 140 [519].

<sup>144</sup> *Ibid* 144 [530].

<sup>145</sup> *Ibid*.

<sup>146</sup> Stewart & Williams, above n 5, 165, see also 172-3; see also Stewart, above n 5, 18. See also below n 158, re the ALP’s current industrial relations policy.

***E Post the Work Choices Case – The Australian Labor Party, the Left, Corporatisation & Federalism***

At the conclusion of his paper 'The Australian Constitution and the Shaping of Our Federal and State Labour Laws',<sup>147</sup> McCallum shares his thoughts on globalisation, and the growing influence of trans-national corporations:

Economic globalisation has increased the fragility of nation states like Australia because they are more vulnerable to the economic pressures of trans national capital than was previously the case. In truth, nation states like Australia have to share economic power with corporations... As government coffers shrink in size through cuts in direct and indirect taxation, the social slack is being taken up by the corporate sector. If corporate power is further unleashed... the corporate sector will obtain a huge increase in power and influence to the great detriment of the Australian nation and especially to the long term disadvantage of working women and men.<sup>148</sup>

McCallum is right to sound the tocsin on the growth of the political power of corporations in our increasingly deregulated and globalised nation.<sup>149</sup> To respond to that challenge, the Australian nation's strongest government, the Commonwealth Government, needs to be armed with a clear, broad constitutional power to regulate corporations.<sup>150</sup> As summarised by Gray:

[O]nly the national government can exercise the kind of strong control that is necessary over a corporation. The history of corporate law in Australia has reflected an eventual recognition of the need for federal regulation of the topic, and a movement away from the original position where State law regulated companies... The point is this then in relation to the corporations power – the

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<sup>147</sup> McCallum, above n 5.

<sup>148</sup> Ibid 469.

<sup>149</sup> See also Judy Fudge, above n 121, 106. For a brief discussion of globalisation as a rationale for the changes introduced by the *Work Choices Act*, see Murray, above n 14, 361-2.

<sup>150</sup> Contra *New South Wales v Commonwealth* (2006) 231 ALR 1, 150-1 [555]-[556], 164 [612] (Kirby J). See also Gray, above n 5, 451.

Commonwealth's ability to regulate corporations must be read broadly because corporations dominate economic activity in Australia, and the Commonwealth is responsible for the economy.<sup>151</sup>

Prior to the High Court's decision in the *Work Choices* case, the scope of the corporations power 'remain[ed] very much open'.<sup>152</sup> After almost a century of equivocation, in its emphatic joint majority judgment in the *Work Choices Case*, the High Court has finally provided the Commonwealth with a clear plenary power to legislate with respect to corporations.

Some commentators have viewed a broad reading of the corporations power as providing the opportunity to deregulate wages as 'affecting the competitiveness of Australian business'<sup>153</sup> in order to 'produce labour market arrangements which are compatible with an internationalised economy'.<sup>154</sup> It is equally valid to speculate how, with its virtually untrammelled power directly to regulate corporations and indirectly to regulate economic activity, a 'social democratic' Commonwealth Labor government committed to a rejection of 'market fundamentalism'<sup>155</sup> might in the future use its powers. It is not without significance that all but one of the failed referenda attempts to expand Commonwealth government control over the national economy were initiatives of Labor governments.<sup>156</sup>

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<sup>151</sup> Gray, above n 5, 452 (footnotes omitted).

<sup>152</sup> Williams, above n 39, 507. See also Stewart, above n 5, 11.

<sup>153</sup> See, eg, Gray, above n 5, 453 and the various authorities he cites in apparent support of this proposition at 453-6.

<sup>154</sup> Judith Sloan, 'Until the End of Time: Labour Market Reform in Australia' (1992) *Australian Economic Review* 65, 66, as quoted in Gray, above n 5, 454.

<sup>155</sup> Federal ALP leader Kevin Rudd, 'Child of Hayek', *The Australian* (Sydney), 20 December 2006, 12, as quoted at the beginning of this paper.

<sup>156</sup> The exception being the *Constitution Alteration (Industry and Commerce) Bill 1926* (Cth) which was the initiative of the conservative Nationalist-Country Party coalition government lead by Stanley Bruce PM: see *New South Wales v Commonwealth* (2006) 231 ALR 1, 204-6 [724]-[726] (Callinan J). This bill was however supported by the Labor Party, then in opposition: see reference to the words of Opposition Leader (and leader of the Federal Parliamentary Labor Party) Matt Charlton in *New South Wales v Commonwealth* (2006) 231 ALR 1, 205 [726] (Callinan J); see also at 119 [451]

By way of comparison, in 1973 and 1974 the Whitlam Labor government sought to promote equal pay for women. Defeated in its attempts to seek specific powers over prices and incomes in the referendum of 8<sup>th</sup> December 1973, it made submissions in support of equal pay to the then Arbitration Commission.<sup>157</sup> Now, in the aftermath of the *Work Choices Case*, a future Labor government could directly regulate conditions of employment within corporate employers, to introduce salary capping within the upper echelons of corporate management, to fix prices and incomes in large sectors of the economy and to set high and comprehensive minimum conditions of employment, including severance and retirement conditions.<sup>158</sup>

Moreover, as observed by Stewart and Williams, although the *Work Choices Case* concerned the constitutionality of laws concerning industrial relations, the scope of the corporations power as delimited by the majority in the *Work Choices* case is not confined to the industrial relations context:

Central to the High Court's reasoning was a general statement about the scope of the corporations power... This finding was applied in the specific industrial relations context to uphold the *Work Choices* law, but could equally be applied elsewhere in the future. It is certainly not limited to any one context, there being nothing in the words of the power that could justify this.<sup>159</sup>

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(Kirby J). As observed in the *Work Choices Case*, most of these attempts have been retrospectively superseded by the enlarged scope of the corporations power as affirmed in that case, given the vastly increased role of the corporate entity in national economic life.

<sup>157</sup> See Evans, above n 8, 26.

<sup>158</sup> The current ALP policy on industrial relations, *Forward with Fairness*, commits the ALP, if it wins government federally, to '10 legislated national employment standards which will apply to all Australian employees' including conditions relating to four weeks guaranteed annual leave, penalty rates on public holidays, and redundancy pay: see Australian Labor Party, *Forward with Fairness* (April 2007) <[http://www.alp.org.au/download/now/fwf\\_finala.pdf](http://www.alp.org.au/download/now/fwf_finala.pdf)> at 5 July 2007.

In implementing the plan the ALP states that '[i]n government, Labor will rely upon all of the Constitutional powers available to it to legislate national industrial relations laws to reduce complexity and duplication' (at 3).

<sup>159</sup> Stewart & Williams, above n 5, 168.

The Commonwealth's powers could extend therefore to mandate places on boards of relevant corporations to employee representatives, and to impose environmental standards on corporations.<sup>160</sup> One may contrast this open field of Commonwealth regulatory opportunity cleared by the majority's judgment in the *Work Choices Case*, with the federal minefield that would have been laid had the plaintiffs' 'narrow and pedantic'<sup>161</sup> arguments been successful.

Assume, for instance, that the High Court had adopted the plaintiffs' argument that a distinction between the external and internal activities of the corporation should circumscribe the operation of the corporations power. At some point, a Commonwealth Labor government might wish to establish a national system of occupational health and safety regulation, effectively to supplant the differing regimes in the six States.<sup>162</sup> If it could not reach agreement with six separate State Governments, it may attempt to achieve legislative coverage of approximately 85 per cent of the workforce by reliance primarily on the corporations power,<sup>163</sup> given that it has no specific legislative head of power with respect to occupational health and safety. But would such a law be a regulation of the external or the

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<sup>160</sup> Analogous to its direct regulation under the *Work Choices Act* of some minimum standards of pay and conditions: see, eg, the five 'key minimum entitlements' outlined in s 171(2) of the Amended Act. The current platform of the Australian Labor Party, under the heading 'Corporate Social Responsibility' states that 'Labor will introduce policies that encourage... executive salary restraint and responsibility; decent corporate standards for environmental protection... [and] active participation by companies in disadvantaged communities': Australian Labor Party, *2004 Platform – Chapter Two*, Item 17 <[http://www.alp.org.au/platform/chapter\\_02](http://www.alp.org.au/platform/chapter_02)> at 30 January 2007. It remains a matter of speculation whether this stated position of 'encouragement' through 'policy' will ever become one of *compulsion* through *legislation*.

<sup>161</sup> *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 490 (Barwick CJ) ('I must not be taken as suggesting that the question whether a particular law is a law within the scope of [the corporations] power should be approached in any narrow or pedantic manner').

<sup>162</sup> Interestingly the Howard Government has chosen not to use the *Work Choices Act* as a vehicle to introduce a national system of occupational health and safety regulation: see Amended Act s 16, esp ss 16(2)(c), 16(3)(c).

<sup>163</sup> That is, based on the same logic (and heads of power) as the Amended Act: see *New South Wales v Commonwealth* (2006) 231 ALR 1, 16-7 [45] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

internal activities of the corporation? That speculative question is further complicated when one considers that current State occupational health and safety laws, as one comprehensive regulatory package, (rightfully and logically) protect both employees and non employees, including independent contractors, and also other third parties (such as members of the public) from hazards that can arise from an employer's workplace.<sup>164</sup> Applying the plaintiffs' first argument, the coverage of employees would be considered as going to matters 'internal' to the corporation and would fall outside of the scope of the corporations power, (unless it could be characterised as 'incidental' to it, a further complication);<sup>165</sup> coverage of members of the public would presumably be categorised as going to matters 'external' to the corporation and could be covered, whereas the categorisation of legislation covering independent contractors would be moot. The broad sweep of the majority's construction of the corporations power, as found in the *Work Choices Case*, cuts this finical, federalistic Gordian knot.<sup>166</sup> To apply the words of Rose to the plaintiffs' attempts to limit the scope of the corporations power by reference to a dichotomy between the corporation's internal and external activities, '[t]he limits on constitutional power might not be worth the social price involved in distinctions that are complex and artificial in the real world'.<sup>167</sup>

Of course, there still remain restraints on the Commonwealth's use of the corporations power. Some commentators have suggested that post the *Work Choices Case*, the High Court might revisit its approach to determining the identity of 'trading or financial corporations' which currently extends the reach of the power to corporations which engage in substantial or significant trading activities ('the activities test'), even if they are a non profit

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<sup>164</sup> See, eg, *Occupational Health and Safety Act 2004* (Vic) ss 21 (re 'employees'), 21(3) (re 'independent contractors'), 23 (re 'other persons').

<sup>165</sup> Pursuant either to the 'express incidental power' (s 51(xxxix)) or the 'implied incidental power': see generally Hanks et al, above n 27, 42.

<sup>166</sup> Similarly, there have been numerous problems and limitations with the use of the arbitration power as a principle source of federal regulation of industrial relations: see, eg, Stewart, above n 5, 2-4.

<sup>167</sup> D Rose, 'Commentary', (1994) 14(3) *Federal Law Review* 251, 254.

organisation, or incorporated for non commercial purposes.<sup>168</sup> If the High Court does either discard the activities test, or curtail its reach in some way by articulating a hitherto unenunciated limitation upon it, then this will be a significant limitation on the scope of the corporations power in regulating a range of corporations, including a range of statutory corporations, such as local councils, universities and public hospitals. It is contended however that a radical reappraisal of the activities test is unlikely.<sup>169</sup>

The ‘national system’ of industrial relations purportedly created by the *Work Choices Act* ‘is not a truly national system’.<sup>170</sup> It does not include many employees who are employed by non constitutional corporations; state legislation still applies in ‘non excluded’ subjects such as workers compensation and occupational health and safety.<sup>171</sup> Despite these limitations, the dramatic expansion of the Commonwealth powers over industrial relations in the Australian economy will, of necessity, result in a diminution of the powers of the States.<sup>172</sup> Corporations (whether public or private) play a significant and increased role in areas traditionally the primary or exclusive responsibility of State governments. The pervasive presence of the corporate entity combined with the breadth of the corporations power as construed in the *Work Choices Case*, allows

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<sup>168</sup> See, eg, *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282. For a discussion of the development of the ‘activities’ test, see John Williams, above n 5, 7-8.

<sup>169</sup> Given that the test has been developed in a ‘significant succession of cases’: see *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438.

<sup>170</sup> Stewart & Williams, above n 5, 156.

<sup>171</sup> Although there appears to be no constitutional limitation on the Commonwealth legislating to cover these ‘non excluded’ areas if it wished to do so: see Stewart & Williams, above n 5, 156-7.

<sup>172</sup> An outcome prefigured by the dissenting justices in the *Work Choices Case*: see *New South Wales v Commonwealth* (2006) 231 ALR 1, 119 [451] (Kirby J), 224-34 [774]-[797] (Callinan J).

the Commonwealth, if it so wishes, to 'cover fields'<sup>173</sup> traditionally the responsibility of the States.<sup>174</sup>

Time, and the political alignments of State and Federal governments, will tell whether the progress of Australian Federalism post the *Work Choices Case* is characterised by a cooperative 'referral approach',<sup>175</sup> or 'opportunistic federalism',<sup>176</sup> with the Commonwealth 'cherry picking' responsibilities from the States where it sees political advantage in doing so.<sup>177</sup> The end result will inevitably be a stronger central Commonwealth government. From the perspective of those political forces opposed to 'neo liberalism' and 'market fundamentalism', this may be no bad thing.

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<sup>173</sup> See *Constitution* s 109. Re the High Court's jurisprudence on inconsistency between Commonwealth and State laws, including the 'covering the field' test of indirect inconsistency, see generally, Hanks et al, above n 27, 510-60.

<sup>174</sup> Perhaps by using the external affairs power in addition to the corporations power: see, eg, Stewart & Williams, above n 5, 159 re the use of International Labour Organisation (ILO) standards by an ALP government to create national laws on matters such as collective bargaining. As discussed by Professor Stewart, the external affairs power is the power that comes closest to the ideal of uniform regulation: see Stewart, above n 5, 5-6. For a critical discussion of the *Work Choices Act* from the perspective of Australia's international obligations, see Colin Fenwick and Ingrid Landau, 'Work Choices in International Perspective' (2006) 19 *Australian Journal of Labour Law* 127. The process of passing Commonwealth laws which would override inconsistent State laws would be facilitated by the unanimous High Court holding in *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453 that inconsistency can be 'manufactured' by express words in a federal statute: see, eg, s 4 [re definition of 'State industrial authority' and 'State or Territory industrial law'], s 16 of the Amended Act. For a discussion of the 'manufacturing' of inconsistency, see Williams, above n 39, 508-9.

<sup>175</sup> Some commentators have speculated that the *Work Choices Case* may provide an impetus for further referrals of power from the States to the Commonwealth; furthermore, they have advocated in favour of such a 'referral approach': see Stewart & Williams, above n 5, 160 ('The referral approach has the advantage of security and simplicity. It would provide an assailable constitutional foundation for a one stop national law on employment. It also provides maximum flexibility as to the form of the new law, and thus real advantages in its design. Normally the first order of business is: which constitutional powers can we rely on and, given their constraints, which of the policies we want to achieve are still possible? Under a referral, the question is simply: what sort of law do we want?').

<sup>176</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 147 [543] (Kirby J).

<sup>177</sup> Craven, above n 23, 214; see also *New South Wales v Commonwealth* (2006) 231 ALR 1, 146 [543] (Kirby J); Stewart & Williams, above n 5, 171-3.

The dynamic of federalism, with its division of powers amongst separate and delimited governments, each confined to their prescribed spheres of responsibility, does not work in favour of strong government per se.<sup>178</sup> Capital by its nature is generally more mobile than labour:<sup>179</sup> in a domestic imitation of globalisation, competing systems of regulation within the one national economic free trade zone can lead to flights of capital from one ‘overregulated’ jurisdiction to a nearby ‘deregulated’ jurisdiction.<sup>180</sup> As expressed by Fudge, with reference to labour market regulation, ‘mobile capital will select jurisdictions that minimise the costs associated with labour law and that embrace a market model of labour law as sites for investment and production’.<sup>181</sup> Overreaching State governments have outbid each other in their attempts to be even more low taxing than their neighbours, leading, in part, to the various State governments’ unholy reliance on revenues from

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<sup>178</sup> *New South Wales v Commonwealth* (2006) 231 ALR 1, 150 [555] (Kirby J), 224 [775] (Callinan J) and note esp fn 955. Until the late 1960s the Australian Labor Party was pledged to the abolition of federalism and its replacement by a unitary system of government: see, Brian Galligan, ‘Federalism’s ideological dimension and the Australian Labor Party’ (1981) 53(2) *The Australian Quarterly* 128, 133; E G Whitlam, ‘The Constitution versus Labor’ in E G Whitlam, *On Australia’s Constitution* (1977) 15-45. By contrast, the Liberal Party has had since its inception at least a token commitment to federalism. The party’s first federal platform in 1946 pledged the party ‘to preserve the Federal system’: see Graeme Starr, *The Liberal Party of Australia A Documentary History* (1980) 101.

<sup>179</sup> A point not lost on the radical opponents of Federation at the turn of the 19<sup>th</sup> century: see ‘Gavah’, ‘Federation and Factories’, *Tocsin* (Melbourne), 2 December 1897 in Hugh Anderson (ed) *Tocsin: Radical Arguments Against Federation 1897-1900* (1977) 5.

<sup>180</sup> Of course, this dystopic (from a left wing perspective) model of federalism at work may be recast (from a neo liberal right wing perspective) as a business friendly utopia. Hence, the economic dynamics of a federal system are one of the reasons federalism has its, albeit isolated, cheerleaders on the right: see, eg, John Roskam, ‘Federalism is a safer way’, *Australian Financial Review* (Sydney), 17 November 2006; Wolfgang Kasper, ‘Making Federalism Flourish’ in *Upholding the Australian Constitution* (1993) 167; *contra* Business Council of Australia, *Reshaping Australia’s Federation* (2006) <<http://www.bca.com.au/Content.aspx?ContentID=100802>> at 31 January 2007. See also *New South Wales v Commonwealth* (2006) 231 ALR 1, 118 [446] (Kirby J). For a discussion of the so called ‘regulatory race to the bottom hypothesis’, see Fudge, above n 121, 121.

<sup>181</sup> Fudge, above n 121, 121.

gambling<sup>182</sup> and handouts from the Commonwealth,<sup>183</sup> and a chronic long term underinvestment in vital public infrastructure.<sup>184</sup> A strong centralised government, which can apply uniform taxes across the national economy and impose uniform national regulation, does not suffer, at least domestically, from these structural deficiencies.<sup>185</sup>

## VII POSTSCRIPT – BLAINEY'S SEESAW AND THE RETURN OF SOCIALISM?

Blainey is fond of using the metaphor of the seesaw in describing the tilt and sway of counterbalancing political and social moods in the course of global history since the mid 18<sup>th</sup> century.<sup>186</sup> He has drawn on this metaphor in predicting the possible resurrection of socialism as an influential political ideology, in opposition to the current dominance of free market liberalism and economic rationalism.<sup>187</sup> Whether or not his predictions concerning the

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<sup>182</sup> For example, in 2005-06 the Victorian Government derived \$1497 million from gambling taxes, out of total taxation revenue of \$10 770 million (ie approximately 14 per cent of total taxation revenue): see Victoria, *Statement of Finances 2006-07*, Budget Paper No 4 (2006) 134.

<sup>183</sup> For example, in 2006-07 the State Government of Victoria estimates that 46 per cent of its revenue in 2006-07 will derive from Commonwealth Grants: see Victoria, *Victorian Budget Overview 2006-07* (2006) 9.

<sup>184</sup> As is reported almost weekly in the country's various state based broadsheet newspapers: see, eg, 'Schools "worst in the country" principals say', *The Age* (Melbourne), 6 July 2006 (re the state of Victorian public school infrastructure); Stephen Moynihan, 'Collapse Feared in Great Train Strain', *The Age* (Melbourne), 4 November 2006 (re the state of the Victorian metropolitan railway infrastructure); the state of the nation's water resources and infrastructure (a traditional responsibility of the States), in particular in the Murray-Darling Basin which traverses the states of Queensland, New South Wales, Victoria and South Australia, is now a matter of public notoriety.

<sup>185</sup> A point recognised by the pro business (and anti federalist) Business Council of Australia: see Access Economics, 'The Costs of Federalism' (Appendix 2 to *Reshaping Australia's Federation*, Business Council of Australia, 2006) 6, 14, 16, 20.

<sup>186</sup> See generally, Geoffrey Blainey, *The Great Seesaw* (1988).

<sup>187</sup> See P Sheehan, 'Socialism will rise: Blainey', *The Age* (Melbourne), 9 August 1998, 6; see generally, Blainey, above n 186, 305-9. With reference to Blainey's prognostications, at least one commentator, P P McGuinness, greeted the High Court's decision in the *Work Choices Case* as the striking of 'a blow for socialism'(!): see P P

influence of socialism turn out to be correct in Australia,<sup>188</sup> there will almost certainly be significant calls in the first half of the 21<sup>st</sup> century for increased government regulation in relation to what is perceived to be ‘anti social’ corporate activity,<sup>189</sup> as well as to address the ‘social dimension of globalisation’,<sup>190</sup> including inequalities in the distribution of income, and to regulate corporations on environmental grounds.<sup>191</sup> As observed by Standing, ‘every period of economic reconstruction, associated with major technological change and the renewed pursuit of flexibility, has eventually induced a counter-movement to provide new systems of social protection compatible with new structures and processes’.<sup>192</sup> In Australia, these calls will not likely be made under the banner of socialism, but by reference to more contemporary political movements such as environmentalism, or anti globalisation. And there’s the rub in *Work Choices* for the right: its prosecution of industrial relations ‘reform’ has lead, by virtue of the litigation of the *Work Choices Case*, to the augmentation of the Common-

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McGuiness, ‘Judges strike a blow for socialism’, *The Australian* (Sydney), 15 November 2006, 16.

188 For example, within days of assuming the leadership of the Australian Labor Party, Kevin Rudd expressly disavowed any association with socialism: ‘I am not a socialist, I have never been a socialist and I never will be a socialist’: Michelle Grattan, ‘Rudd rejects socialism in vision for new Labor’, *The Age* (Melbourne), 14 December 2006, 1. See also above n 103. Of course, while Blainey’s prognostications may not bear out in Australia, they may prove to be remarkably prescient in Latin America, given the rise of elected governments in a number of Latin American countries this century committed to some form of socialism, eg, Brazil, Venezuela, Bolivia and Nicaragua. For a brief analysis of the likely impact of the *Work Choices Act* on the distribution of wealth between capital and labour, see Fetter, above n 125, 212.

189 See, eg, the current platform of the Australian Labor Party under the heading ‘Corporate Social Responsibility’: see above n 160.

190 Fudge, above n 121, 109.

191 As has been prefigured by current Federal Labor leader, Kevin Rudd: see Rudd, ‘Child of Hayek’, above n 155 (‘The failure to act on climate change is one of the greatest evidences of market failure in modern times. The Prime Minister exclusively offers what he describes as market-based solutions to deal with comprehensive market failure. Whereas the reality is that government intervention is required to implement a national emissions trading scheme as well as establishing a substantial mandatory renewable energy target’).

192 Guy Standing, *Global Labour Flexibility: Seeking Distributive Justice* (1999) 50 as quoted in Fudge, above n 121, 125.

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wealth's corporations power, and the potential to strengthen the visible hand of government in economic and social affairs.

