The Corporations Power and Federal Industrial Relations Regulation: The Prospects of a Successful High Court Challenge to the *Workplace Relations Work Choices Amendment Act 2005 (Cth)*

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Introduction

In December 2005 the Howard Government enacted the *Workplace Relations Work Choices Amendment Act*. This federal enactment has sought to implement a national or unitary industrial relations framework whereby employees falling under State legislative arrangements will now be governed by (and transferred to) federally imposed industrial awards and standards. What is particularly distinctive, however, with respect to the *Work Choices Act* is that it purports to derive its constitutionality or constitutional validity from the corporations power — found in s 51 (xx) of the *Constitution* — and not the conciliation and arbitration power which is traditionally perceived to be the constitutional basis for industrial relations legislation. The several States have challenged the constitutional validity of this Act and have sought to reinstate their jurisdiction and their control over matters pertaining to the industrial relations of employees and (in particular) public servants.¹ In the relatively recent *Submission to the Inquiry of the Senate Employment, Workplace Relations and Education Committee into the Workplace Relations Amendment (Work Choices) Bill 2005* the States claimed that laws enacted pursuant to the corporations power were ones essentially oriented to the activities of

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¹ The States of New South Wales, Queensland, South Australia, Western Australia, Tasmania and Victoria have filed challenges in relation to the validity of the *Workplace Relations Work Choices Amendment Act 2005 (Cth)*. See the *State of New South Wales & Ors v Commonwealth (Workplace Relations Challenge)* [2006] High Court of Australia Transcripts 235 (11 May 2006). Note by the Editor: This case has since been decided. See the High Court's judgment: New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia [2006] HCA 52 (14 November 2006).
corporations and not about their internal industrial relations. They asserted that the Bill was constitutionally invalid and could not be grounded in, or based on, the corporations power.

Accordingly, it is the purpose of this article to investigate both the scope and limits of the various constitutional heads of powers in respect to federal industrial regulation. Particular attention will be focused on the corporations power and the capacity for this power to support federal industrial relations laws and to provide a constitutional basis (more specifically) for the Workplace Relations Work Choices Amendment Act 2005 (Cth). As will be shown, the existing jurisprudence — and, notably, the High Court decision in Re Dingjan; Ex parte Wagner — would seem to support the capacity for the corporations power to regulate, at least, some aspects of federal industrial relationships and to undermine the States' present (High Court) challenge to the Work Choices Act. As well as the corporations power, the paper also examines the potential for the reference, arbitration, and external affairs powers to support the development of a distinctively national and uniform industrial relations framework. As will be seen, there appears to be significant room within the constraints of these existing constitutional provisions to support more significant and extensive federal or national industrial regulation. It is concluded, however, that the ability for any one of these constitutional powers to support a genuinely uniform industrial relations system and comprehensive federal industrial regulation is limited. To support comprehensive industrial regulation at a federal level would seem to require the use of a combination of different constitutional powers.

As part of the structure of the paper, an examination will first be undertaken of the framing or drafting of the conciliation and arbitration power and the scope which the framers provided for federal intervention in, and Commonwealth regulation of, industrial relations. Attention then moves to the possibilities which inhere in alternate federal heads of powers, such as the reference and the external affairs powers, to support federal regulation of the industrial sphere. Particular attention, in this regard, will be devoted to the federal corporations power and

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2 See the Submission to the Inquiry of the Senate Employment, Workplace Relations and Education Committee into the Workplace Relations Amendment (Work Choices) Bill 2005 on behalf of the Governments of New South Wales, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, 9 November, 2005. See also State of New South Wales & Ors v Commonwealth (Workplace Relations Challenge) [2006] High Court of Australia Transcripts 235 (11 May 2006) 43.


4 Australian Constitution s 51(xxxxviii).

5 Australian Constitution s 51(xxxxv).

6 Australian Constitution s 51(xxix).
consideration will be given to whether this head of power has the potential to support the Commonwealth regulation of the industrial activities and industrial relations of corporations. Accompanying this focus will be an extended discussion of the constitutional validity of the Workplace Relations Work Choices Amendment Act 2005 (Cth). An examination, in particular, will be undertaken into the submissions that have been raised by the States in relation to the adequacy of the corporations power as a constitutional basis for this legislation. Finally, the feasibility of amending the Constitution so as to include a wider or more expansive industrial relations power will be briefly canvassed.

The Framing of the Arbitration Power

The potential for the existing federal powers to support — or provide a constitutional basis for — a genuinely uniform and national industrial relations framework has remained largely unexplored. The principal provision included in the Commonwealth Constitution intended to support industrial relations regulation was the conciliation and arbitration power — found in s 51 (xxxv) of the Constitution. The purpose here is to examine the drafting of this provision in the 1890s constitutional conventions and to investigate the scope of its operation and application as (originally) envisaged by the framers. As will be shown, the framing of the conciliation and arbitration clause reflects the essentially limited (constitutional and political) horizons of the framers and their conservative outlook. In a contemporary political context, this would seem to present significant impediments to developing a national (and comprehensive) federal industrial relations framework and an expanded Commonwealth role in the industrial realm.

Proposals for the inclusion of a constitutional power regulating the topic of industrial relations in the Constitution Bill were first mooted by South Australian delegate, Charles Cameron Kinston, in the 1891 Sydney Convention when he sought to incorporate a provision conferring the Commonwealth with power for the ‘settlement of industrial disputes.’ This provision was committed to the direct parliamentary settlement of industrial disputes (as opposed to indirect arbitral resolution of disputes) and was concerned with providing a jurisdiction regulating all industrial relations disputes — not simply those that were ‘interstate’ in character (as required in the later arbitration provision in s 51 (xxxv)). His proposal, then, would appear to have been more wide-ranging and interventionist in

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7 However, see George Williams, Labour Law and the Constitution (1998).
8 In this context, see Robin Gollan, Radical and Working Class Politics (1960).
orientation than Henry Bournes Higgins’ draft clause that was, in fact, later adopted in the 1897 Convention Debates. Nevertheless, like Higgins’ clause, Kingston’s proposal centred on the important limiting concept of an *industrial dispute* and (thus) did not seek to provide the Commonwealth with unfettered jurisdiction to regulate industrial relations and, in particular, to regulate the terms and conditions of labour’s employment.

However, Kingston’s motion was defeated due to essentially conservative objections which claimed that it would interfere with individual property rights and that it ‘might entirely depreciate the value of a property in a State or drive an industry out of a State.’ This repudiation of an expanded federal role in industrial relations regulation did not, however, prevent the Victorian delegate, Henry Bournes Higgins, from amending Kingston’s proposal in the 1897 Adelaide Constitutional Convention and recommending the inclusion of a clause conferring jurisdiction on Parliament relating to:

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

As was previously indicated, this clause revised Kingston’s original motion by committing to more indirect *arbitral* intervention and by requiring the existence of an ‘interstate’ dispute before federal regulation could, in fact, be triggered. Despite this, Higgins’ clause continued to reflect Kingston’s emphasis on the regulation of *industrial disputes*.

The inclusion of this distinctive ‘interstate’ element was prompted or facilitated by the general widespread industrial disputation in the colonies in the 1890s. When the first Federation Convention assembled in Sydney in March 1891, the colonies had recently experienced a bitter maritime strike which involved key wool and shipping industries. They were also to experience (in March) the Queensland pastoral strike. This heralded nearly a decade of intense industrial struggle between unions and employers. As Frazer notes, this strike and its attendant consequences drew attention to the economic interdependence of the colonies and the significant economic and social disruption that was, indeed, caused to the colonies as a result of the industrial disputation. According to Breen Creighton:

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10 Adelaide Constitutional Convention, 1897, 780.
11 Sydney Constitutional Convention, 1891, 782 (Samuel Griffith).
12 Adelaide Constitutional Convention, 1897, 780.
13 In this context, see J L Macken *Australian Industrial Laws: The Constitutional Basis* (1980) 6-10.
Several of the disputes [in the 1890s] were long drawn out, and in a number of instances were accompanied by serious levels of violence. They involved enormous hardship for striking workers and their families, and gave rise to widespread social and economic disruption. They were also distinguished by the fact that, for the first time in Australian history, they involved concerted industrial action in two or more colonies.\textsuperscript{15}

These developments coincided with the move towards Federation and fostered a concern on the part of the framers (and Higgins in particular) to ensure that there would be no repetition of the industrial disputation in the 1890s — or that if there were, indeed, a repetition that Parliament would take remedial action.\textsuperscript{16} It was in this industrial context that Higgins pursued the inclusion of a clause providing for jurisdiction over ‘industrial disputes extending beyond the limits of any one State.’ At the 1897 Adelaide Constitutional Convention, for example, Higgins emphasised the inadequacy of leaving the regulation and resolution of industrial disputes to purely State adjudicatory mechanisms:

> It may be said, ‘Leave the industrial disputes to the States’; but it is well known that these disputes are not confined in their evils to any one State. If there is a shipping dispute in Sydney it is sure to be felt in Melbourne; if there is a coal dispute in Newcastle it is sure to be felt at Korumburra. Any one State is unable to cope with the difficulty. If it should hereafter be found expedient to have a Court of Conciliation and Arbitration, it must be a Federal Court which can extend its power over the whole Federation. As Australia is so isolated from the other countries of the world be sea, it would be eminently apt to have a Federal Court of Conciliation and Arbitration for the purposes of Australia. I shall therefore move the addition of the sub-clause I have read...\textsuperscript{17}

Higgins also justified the inclusion of an arbitral clause in the draft Constitution Bill on pragmatic grounds emphasising the need for constitutional flexibility and drawing attention to the fact that convention delegates should provide for the contingency that a federal arbitral mechanism may be required sometime in the future.\textsuperscript{18} He declared at the Melbourne Convention that:

> I do not ask the committee to say that arbitration shall be compulsory or even that any steps shall be taken to secure the settlement of industrial

\textsuperscript{15} Breen Creighton ‘One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?’ (2000) 24 Melbourne University Law Review 839 at 840.

\textsuperscript{16} Henry Bournes Higgins, in this respect, demonstrated a keen concern for ensuring the inclusion of an industrial relations power that would be able to coordinate industrial affairs on a national level: see H B Higgins, A New Province of Law and Order, (1922). See also John Rickard, H B Higgins: The Rebel and the Judge (1984).

\textsuperscript{17} Adelaide Constitutional Convention, 1897, 792.

\textsuperscript{18} Melbourne Constitutional Convention, 1898, 180.
disputes, I simply wish to give the Federal Parliament power to legislate on
the subject ... I merely want to leave the thing open. 19

Federal arbitration, then, was perceived by Higgins as an essentially
practical instrument in which to promote the conditions of industrial
stability, rather than one that would facilitate radical industrial
transformation and promote greater centralised industrial intervention.20

In this context, the primary architects of arbitration — notably, Higgins
and Kingston — were not particularly radical or progressive in their
philosophical outlook nor did they reflect any ideological commitment to
expanding the state’s role in the industrial realm. 21 Henry Bournes
Higgins, for example, was firmly committed to the operation of the free
market and the important role that it could perform in promoting
individual freedoms.22 This philosophical commitment to a moderated
market was particularly evident in the rationale that Higgins provided for
including a federal arbitration clause in the Constitution which he
justified on the basis that it was needed to promote industrial harmony for
the operation and flourishing of a free market economy.23

It is difficult, then, to regard the inclusion by Higgins of arbitration as a
measure that was designed to facilitate or promote federal intervention in
the industrial realm or to expand the Commonwealth’s role in the
economy. Rather, it would appear that a federal arbitration power was
introduced into the Constitution specifically for the purpose ‘to make
laissez-faire possible and to regulate it as a social and economic force.’24

In this respect, the incorporation of an arbitration power was perceived as
an essentially pragmatic mechanism to facilitate the conditions (and

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19 Melbourne Constitutional Convention, 1898, 180. It should be noted here that Charles
Kingston voted in favour of Higgins’ proposal: Melbourne Constitutional Convention,
1898, 215.

20 Higgins later placed great emphasis on the fact that the requirements of social justice
and equity demanded an increasing state role in the industrial realm: see Higgins,
above n 16, 161.

21 See John Rickard Class and Politics (1976), 266. As Rickard acknowledges: ‘No
matter how they [Kingston and Higgins] cooperated with the labour party; the labour
movement remained a foreign world which they would not have thought of entering’:
Rickard, (1976), 266.

22 Dowd argues that Higgins was firmly committed to individual achievement and
individual effort through the institutional mechanism of the free market: Stephen
(Law Society of South Australia) 32.

23 See the Adelaide Constitutional Convention, 1897, 780; Higgins, above n 16, 7-22,
171. See also J A La Nauze The Making of the Australian Constitution, Melbourne:
University Press, 1972, 128. This pragmatic approach was particularly
emphasised in Higgins’ later declaration that arbitral and legal control over industrial
relations was ‘forced on the court by the facts of life’: Higgins, above n 16, 171.

24 John Ward, The State and the People: Australian Federation and Nation-Making
reproduction) of capitalism and for promoting general economic stability. As Stuart MacIntyre contends, the inclusion of arbitration was merely regarded, at the time, as:

one aspect of a more general endeavour to maintain the conditions under which capitalist accumulation could proceed and the reproduction of capitalist relations occur ... Arbitration was conceived ... as a way of restoring harmony and order to class relations ... It was initiated neither by labour nor capital but by liberals who stood at a remove from both; and that insofar as sections of the labour movement took up arbitration; they did so within a political paradigm that the liberals had established. 25

A similar contention is expressed by Frank Castles who argues that the inclusion of an arbitration clause was conceived as:

a shock absorber designed by the state to protect and stabilise the economic structures from excessive disturbance and from exogenous forces. 26

The limitations, which inhered in the drafting of the arbitration power, were further emphasised by the fact that there appeared to have been little understanding of the potential benefits for developing a federal role in industrial relations regulation among convention delegates. Labour and the more progressive liberals, in particular, demonstrated little interest in introducing a more general or comprehensive industrial relations power. Victorian unionist, William Trenwith, supported Higgins’ federal arbitration provision, but doubted its efficacy, arguing that there was no general requirement for an industrial relations power since such a role could already be performed by the States. 27 Trenwith, in this respect, appeared uninterested during the Commonwealth Convention Debates in developing a federal role in industrial regulation and was sceptical of the purported advantages supposedly accruing from centralised industrial regulation. For example, in the 1898 Melbourne Convention, he declared (in the context of Higgins’ proposed arbitration clause) that:

25 Stuart MacIntyre ‘Neither Capital, Nor Labour: The Politics of the Establishment of Arbitration’ in Stuart MacIntyre and Richard Mitchell (eds) The Foundations of Arbitration (1989) 197. Similarly, John Ward argues that the motivation behind the idea of including a federal arbitration clause was the belief among the framers that it was ‘the duty of the state to make laissez-faire possible and to regulate it, not to replace it as a social and economic force’: Ward, above n 24, 71.


27 See Mark Hearn and Glen Patmore ‘Freedom or Federation’ (2001) 122 Workers Online 3.
I confess that ... I think it highly improbable that the Federal Parliament will be able to deal with it effectively ... [However], we shall be no worse off than we are now if it transpires that the Federal Parliament is unable to deal with it. 28a

His cautious approach to extending federal power was also evident in his observation at the Melbourne Session that:

In handing over this question to the Federal Parliament we do not deal with it: we merely say that it is an important subject which ought to be in the power of Federal Parliament to deal with. If the Federal Parliament finds it impossible to deal effectively with the question, the probability is that it will not deal with it. 29

Labour and the more progressive liberals were thus ambivalent to the inclusion of an industrial relations provision and a power over arbitration was only sought by them to avoid the conservative members at the constitutional conventions from developing a more damaging and regressive provision. As Mark Hearn and Greg Patmore argue (in relation to labour’s attitude to the inclusion of an arbitration clause):

Few labour supporters’ thought of Federation as a sure means of gaining or expediting the reforms of politics and industry that they sought. Rather, they hoped for a growing role for governments and parliaments in the changing conditions of industrialised countries, and because they regarded Federation as inevitable, decided to ensure that it would not damage liberal or reform causes. For these people, the most essential part of Constitution-making was to ensure that the new Constitution of the Commonwealth did not favour conservatives or reactionaries. 30

The one labour organisation that did call, in fact, for a wider federal role in industrial arbitration — the Victorian labour movement — was critical of Higgins’ proposal, advocating industrial regulation through the mechanism of the States, in preference to that of the Commonwealth. 31 In 1899, for example, the Victorian labour newspaper, Tocsin, complained that Higgins’ proposed power failed specifically to provide for a minimum wage and a uniform Factories Act and predicted that industry would gravitate to those colonies in which ‘wages are lower, the Factories Act least stringent and the workers most helpless.’ 32

This implicates the important point that the possibilities of federal regulation over industrial relations (and the economy in general) were not fully comprehended by the Convention delegates. There appeared to be

28 Melbourne Constitutional Convention, 1898, 195.
29 Melbourne Constitutional Convention, 1898, 194.
30 Hearn and Patmore, above n 27, 3.
31 Ibid, 3-4.
32 See Hugh Anderson (ed.) Tocsin: Radical Arguments Against Federation, 1897-1900 (1977) 106.
little awareness of the greater economic and social stability that could result from regulating industry and industrial relations. This failure to adequately comprehend the potential advantages of federal intervention and public regulation has had the consequent effect of producing an unduly narrow and excessively technical industrial relations provision. It has also — as the Joint Committee on Constitutional Review emphasised in 1959 — resulted in the omission of more general industrial relations powers, thereby precluding a wider and more extensive federal role in the industrial sphere.  

As the Committee declared:

> When the *Constitution* was drafted, no government in Australia was responsible for the general state of the economy, including the level of employment, stability of the value of the currency and the rate and balance of economic development. It was not until many years after Federation that the achievement of economic understanding had made the factors in determining these matters sufficiently clear for governments to take action. It was not surprising, in these circumstances, that the *Constitution* was not concerned with the allocation between the Commonwealth and the States of the powers needed to implement a general economic policy.

In an associated context, the scope of the arbitration power is circumscribed by more practical factors, such as the social and cultural horizons of the framers. The fact that the *Constitution* was written at the turn of the century and is (therefore) reflective of the assumptions and attitudes of that particular era is another fundamental constraint on its potential to support an expanded federal role in the industrial sphere. The *Australian Constitution* is not in the position of more recently enacted constitutions that have been drafted in a contemporary political context and which tend to embrace more sophisticated understandings of the role that can potentially be performed by the state.

Clearly, then, the federal arbitration power would seem to be grounded in, and one that is operating from, a somewhat limiting pragmatic and conservative philosophy — one that imposes constraints on the capacity for Federal Parliament to intervene and regulate the industrial realm. Accordingly, attention needs to be given to the issue as to what extent can the arbitration power, as well as other alternative powers, support an expanding federal role in the sphere of industrial relations and to what extent can dynamic and unexplored interpretations of these powers provide a basis for a national and uniform industrial relations framework. It is these issues to which attention is now turned.

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33 See the Joint Committee on Constitutional Review Final Report of the Constitutional Committee, Canberra: AGPS, 1959, 133.

34 Ibid, 133.

35 See, for example, the *South African Constitution* (1996).
The Conciliation and Arbitration Power

The *Australian Constitution*, through the mechanism of the arbitration power, would seem to provide only qualified support for establishing a genuinely national and uniform framework of laws regulating industrial conditions. Several limitations inhere in the arbitration power and these would seem to inhibit Parliament's capacity to support comprehensive industrial relations regulation. The arbitration power, in particular, does not permit Federal Parliament to legislate directly on industrial terms and conditions, requiring the existence of an industrial dispute before government intervention can be triggered. Further, the provision does not authorise generalised federal intervention in the industrial realm, but rather requires that regulation only extend to cover the specific terms (or the ambit) of an industrial dispute. These restrictions have had the consequent effect of producing significant complexity and artificiality in litigation and in constitutional interpretation regarding the topic of industrial relations.

Despite this, the federal arbitration power has been interpreted in essentially dynamic ways and this has resulted in an expansion of the jurisdiction of the federal industrial tribunal and an extension of the coverage of industrial awards beyond the parties to the immediate dispute. The High Court, for example, has approached the nature of an

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36 *Australian Constitution* s 51 (xxxv).


38 See *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association* (1920) 28 CLR 209 at 218; *Re Pacific Coal; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 172 ALR 257 at 263. The need for a dispute raises additional issues regarding its breadth and scope leading to the further associated issue of 'ambit' claims: see *R v Ludecke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 182-3 per Gibbs CJ, Mason, Brennan, Deane and Dawson JJ.

39 Clearly, then, federal involvement in the industrial sphere is limited by the characteristic nature of industrial disputes: see Neil Williams and Andrew Gotting 'The Interrelationship Between the Industrial Power and Other Heads of Power in Australian Industrial Law' (2001) 20 *Australian Bar Review* 4. The Commission is only permitted to declare awards within the ambit of the relevant industrial dispute on which it is required to adjudicate. It has been characterised as a 'delegate' of the parties (*Australian Boot Trade Employees' Federation v Whybrow (No. 1)* (1910) 10 CLR 266 at 294 ) and as an institution incapable of declaring 'common rule' awards: *Australian Boot Trade Employees' Federation v Whybrow* (1910) 11 CLR 266 at 318 per Griffith CJ. The judicial nature of federal arbitration can be traced to *Federated Saw Mill and Employees of Australasia v James Moore and Son (Woodworkers Case)* (1908) 8 CLR 465.


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'industrial dispute' in such a way that unions can act as representatives of employees in arbitration proceedings and this understanding has had the significant effect of extending coverage of federal industrial awards to non-union employees and future employees. Furthermore, the Court has interpreted 'industrial disputes' as not being confined to 'disputes in industry' and applying (as well) to school teachers, insurance companies, as well as public servants, and this has had the consequence of extending federal industrial regulation beyond the immediate realm of 'industry' as narrowly conceived.

Despite this, the High Court has insisted that the relevant industrial dispute must relate to an 'industrial matter.' This has generally arisen from the legislative definition of 'industrial dispute' which is contained in the Conciliation and Arbitration Act 1904 (Cth) and which provides that an 'industrial dispute' means 'a dispute in relation to industrial matters.' According to the Act, 'industrial matters' includes all matters relating to 'work, pay, wages, reward, hours, privileges, rights or duties of employers or employees, or the mode, terms, and conditions of employment or non-employment.'

There has, however, been some High Court authority for the proposition that the constitutional definition of industrial dispute is broader than the legislative definition contained in the Conciliation and Arbitration Act 1904 (Cth). For example, in Re Alcan Australia Limited; Ex parte Federation of Industrial, Manufacturing and Engineering Employees it

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42 See Burwood Cinema v Australian Theatrical and Amusement Employees’ Association (1925) 35 CLR 528 at 551 per Starke J; at 541 per Isaacs J. Isaacs J cited dicta from Higgins J in Australian Workers’ Union v Pastoralists’ Federal Council (1917) 23 CLR 22 at 26. The actual effect of this interpretation has been to hold that industrial awards bind employers in respect of all employees, whether members of a union or not: Metal Trades Employers Association v Amalgamated Engineering Union (1935) 54 CLR 387 at 402-3 per Latham CJ cf Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) (1993) 178 CLR 352. Despite this, the Court has resolutely held that the power of 'conciliation and arbitration' does not extend to the making of a 'common rule' award for an industry: R. v Kelly; Ex parte Victoria (1950) 81 CLR 64.


44 Federated State School Teachers’ Association of Australia v Victoria (School Teachers Case) (1929) 41 CLR 569.

45 Australian Insurance Staffs’ Federation v Accident Underwriters Association (Insurance Staffs Case) (1923) 33 CLR 517.

46 R v Coldham; Ex parte Australian Social Welfare Union Case (CYSS Case) (1983) 41 CLR 569.

47 See R v Kelly; Ex parte Victoria (1950) 81 CLR 64.

48 Conciliation and Arbitration Act 1904 (Cth) s 4.

49 Conciliation and Arbitration Act 1904 (Cth) s 4.

50 (1994) 181 CLR 96.
was held that a demand requiring employers to deduct union dues from wages and pay them to the union was not an industrial matter within the Act but may, indeed, be a matter forming the basis for an industrial dispute within the broader constitutional meaning. In this respect, the High Court declared that:

Even though a dispute as to the deduction of union dues falls within s 51 (xxxv) of the Constitution (at least if it relates to authorised deductions), it will not be an industrial dispute within the jurisdiction of the Commission unless it is also a dispute as defined in the Act. By s 4(1) of the Act, 'industrial dispute' is defined, so far as subject matter is concerned, as meaning 'an industrial dispute ... that is about matters pertaining to the relationship between employers and employees' and as including 'a demarcation dispute.' To the extent that the definition requires the subject matter of a dispute to pertain to the relationship between employers and employees (and that is the only part of the definition that is relevant to this case), it is different from the definitions of 'industrial matters' considered in \textit{R v Kelly} and, later, in \textit{Reg. v Portus} (which were concerned with 'the relations of employers and employees') only in the manner of its expression.\textsuperscript{51}

In general, the High Court has approached the underlying concept of an industrial dispute widely, even acknowledging that a dispute may be legitimately manufactured.\textsuperscript{52} This has enabled unions to invoke federal industrial regulation through the simple expedient of 'paper disputes' whereby a log of industrial claims is served on employers whose rejection of these transforms industrial grievances into genuine industrial disputes amenable to federal adjudication.\textsuperscript{53}

Finally, the High Court has interpreted the ambit (or boundaries) of a dispute (on which the Commission is to adjudicate) in a wide and flexible manner so as to accord the Australian Industrial Relations Commission significant regulatory potential in the industrial realm. So long as the log of claims is not 'so far-fetched' (so) as to be 'lacking in industrial reality'\textsuperscript{54} then the Commission may legitimately adjudicate on, and regulate, the industrial issues arising from the dispute. In this respect, then, judicial interpretations of the arbitration power have served as an important basis for an expanding federal role in the industrial realm. As George Williams argues, creative interpretations of the arbitration power

\textsuperscript{51} \textit{Re Alcan Australia Limited; Ex parte Federation of Industrial, Manufacturing and Engineering Employees} (1994) 181 CLR 96 at 104-5.

\textsuperscript{52} \textit{Caledonian Collieries v Australasian Coal and Shale Employees Federation (No. 2)} (1930) 42 CLR 558 at 572 per Gavan Duffy, Rich, Starke and Dixon JJ (cf. Isaacs J (dissenting) at 569-70).

\textsuperscript{53} Stewart, above n 40, 146.

\textsuperscript{54} \textit{Re State Public Services Federation; Ex parte Attorney General (WA) (SPSF Case)} (1993) 178 CLR 249.
have been a useful and continuing source of federal authority in the field of industrial relations by underpinning the federal award system.'

However, there are several features that inhere in the arbitration power that have yet to be fully explored and which hold the potential for realising a more centralised and uniform industrial relations framework. Furthermore, unexplored aspects of other (seemingly) unrelated constitutional powers, such as the federal corporations and external affairs provisions, may also have the capacity to provide a constitutional basis for supporting a more uniform industrial relations framework.

One aspect of the arbitration power which remains under-developed and which could potentially be exploited relates to the 'prevention' of industrial disputes. As Deane J declared in Wooldumpers, the federal arbitration power confers jurisdiction on Parliament to prevent, as well as to settle, interstate disputes:

If the Constitution means what it says when it confers a broad power to make laws with respect to conciliation and arbitration for the prevention of interstate industrial disputes in the abstract, it is far from evident either that there is any constitutional need to make the manufacture of an interstate dispute, whether paper or real, a condition of the existence of jurisdiction conferred pursuant to that grant of legislative power or that it would not suffice for constitutional purposes if, for example, the grant of jurisdiction to an expert tribunal such as the Commission were merely conditioned upon the opinion of the tribunal that circumstances exist in which the tribunal’s conciliation or arbitration procedures may be conducive to the prevention of interstate industrial disputes.

Given this concern, then, with the prevention of disputes it is far from clear that there is any need for the existence of an interstate dispute as a condition for triggering federal intervention in the industrial realm. Accordingly, this 'preventive' element of the federal arbitration power has been a 'rather neglected source of power by the legislature' and one

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55 Williams, above n 41, 83.
56 See ss 51 (xx) and 51 (xxix).
58 Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Victoria) (the Wooldumpers Case) (1989) 166 CLR 311 at 328 per Deane J. Despite this dicta, the narrow concept of arbitration (as outlined in Whybrow) was not challenged in Wooldumpers. Thus, the potential for s 51(3xxv) to support a 'common rule' award preventing the actual onset of an industrial dispute was not canvassed. Wooldumpers was approved in Attorney General (Qld) v Riordan (1997) 146 ALR 445.
59 See Wooldumpers' (1989) 166 CLR 311 at 320 per Mason CJ. As well, see Re Pacific Coal; Ex parte CFMEU (2000) 172 ALR 257 at 270-71 per Gaudron J; Attorney-General (Qld) v Riordan (1997) 146 ALR 445 at 464 per Gaudron and Gummow JJ.
that could be used to not only limit the (further) extension of existing disputes, but also to prevent the actual onset of an industrial dispute. Reliance on the prevention aspect of the arbitration power might also provide a basis for the operation of significantly wider awards than those currently being declared by the Arbitration Commission (to settle interstate industrial disputes). The Court may be reluctant to invalidate federal industrial awards made in order to prevent industrial disputes because of the difficulties in proving or disproving an association between a potential dispute and an award that seeks to avoid its onset. There appears to be parliamentary acknowledgement of the utility of this particular ‘prevention’ limb in supporting enhanced federal regulation of the industrial realm with the enactment of the Workplace Relations Act 1996 (Cth). Section 170 LN, for example, confers on the Commission jurisdiction to make industrial orders so as to ‘prevent industrial disputes’ and to prevent ‘industrial situations giving rise to industrial disputes.’ In short, then, the prevention limb can support federal regulation that seeks to prevent the extension of existing industrial disputes, as well as federal regulation that prevents the actual onset of ‘threatened’ industrial disputes. In this respect, significant possibilities would seem to inhere in the arbitration power.

Nevertheless, realistic account must also be taken of the fact that the jurisprudence on the arbitration power is a quite mature (and comprehensive) one and that it is unlikely that the Court will, in the future, extend the provision’s operation beyond these particular aspects.

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60 As Murphy J pointed out in R v Turbet; Ex parte the Australian Building Construction Employees’ and Builders’ Labourers Federation (1980) 144 CLR 335 at 354: The Constitutional power may be used not only to prevent the extension of an industrial dispute beyond one state, but to prevent the coming into existence of an industrial dispute so extending. As well, see Attorney General (Qld) v Riordan (1997) 146 ALR 445 at 464 per Gaudron and Gummow JJ.

61 According to Gaudron and Gummow JJ in Riordan: ‘The ambit doctrine is grounded in the notion that the powers of conciliation and arbitration are to be exercised only with respect to an actual dispute the limits of which can be identified precisely both as to its parties and its subject matter. However, it is not apparent that that is required by s 51(xxxv)’: Attorney General (Qld) v Riordan (1997) 146 at 464 per Gaudron and Gummow JJ.

62 The implications of this ‘preventive’ element for the expanding reach of federal awards were noted by Mason J in R v Gaudron; Ex parte Uniroyal (1978) 141 CLR 204 at 211.

63 In this context, see Frazer, above n 14.

64 Conciliation and Arbitration Act 1904 (Cth) s 4.

As David McCann points out:

The jurisprudence upon this power is a nevertheless mature one. There seems to be little chance that judicial interpretation could (or should) be unshackled from the clear terms of what is a limited purposive and not plenary power ... Despite some inkling in recent cases it appears unlikely that the Commonwealth could successfully advance a significantly wider view in the High Court.66

Attention, then, clearly needs to turn to the potential for alternate federal powers to support national and uniform industrial relations regulation.

The Reference Power

An issue that needs to be addressed before considering the possibilities of the various other federal heads of power is whether the constitutional boundaries prescribed in the arbitration power impliedly constrain the scope or the application of the other federal powers.67 This concern is a particularly relevant one since, if it is established that the arbitration power limits the ability of the other powers to support industrial relations regulation, then it would seem that the (current) Workplace Relations work Choices Amendment Act 2005 (Cth) is constitutionally invalid as it purports to derive its validity from the corporations power — and not the conciliation and arbitration power.

The presumption has been, in this respect, that the constitutional powers should be interpreted in isolation so that the potential operation (or limits) of one placitum does not circumscribe the functioning of other placita in the Constitution.68 The High Court decision in Pidoto v Victoria69

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67 The issue as to whether the content of one placitum effects or circumscribes the operation of other constitutional heads of power is particularly canvassed by Nicholas Aroney: see Nicholas Aroney 'The Ghost in the Machine: Exorcising Engineers' (2002) 14 Proceedings from the Sir Samuel Griffith Society 1.

68 This presumption flows from the Engineers’ Case (1920) 28 CLR 129 principle which, as well as emphasising that interpretive priority is to be given to the construction of federal legislative power, is taken to insist on the general principle that each head of federal power is to be interpreted separately — each without implying a limitation on the scope of operation of the other powers.

69 (1943) 68 CLR 87. Pidoto concerned the validity of National Security (Industrial Peace) Regulations made under the Conciliation and Arbitration Act 1904 (Cth) which authorised Parliament to submit industrial disputes to the Court of Conciliation and Arbitration if it deemed these disputes to have the potential to cause industrial arrest. Victoria contended that the arbitration power was a 'negative', as well as a 'positive', provision and, in this regard, imposed constitutional limits on the other federal powers. Latham CJ, however, declared that 'in my opinion this argument cannot be supported. Section 51 (xxxv) is a positive provision conferring a specific power. The particular terms in which this power is conferred are not, in my opinion, so expressed as to be
established the principle that the arbitration power does not prejudice the potential capacity of the defence power\textsuperscript{70} to support industrial relations regulation. Accordingly, consideration needs to be given to the regulatory possibilities of alternate constitutional powers to support a more unitary and essentially national industrial relations framework.\textsuperscript{71}

One alternate power that has potential to support a more uniform and essentially national industrial relations framework is the federal reference power — contained in s 51 (xxxvii) of the \textit{Australian Constitution}. The potential for the reference power to support a uniform and national industrial framework was particularly evident in the referral of Victorian industrial relations powers to Commonwealth Parliament.\textsuperscript{72} Under the \textit{Commonwealth Powers (Industrial Relations) Act 1996 (Cth)} powers relating to minimum wages and industrial conditions for Victorian employees were transferred to Parliament, thereby facilitating federal regulation over essentially intra-State disputes.\textsuperscript{73} This had the significant centralising effect of extending federal influence to purely State industrial concerns — ones that had previously been incapable of federal regulation under the arbitration power.\textsuperscript{74} As Stuart Kollmorgen observed in 1997 (following the referral of Victorian industrial relations powers):

The Commonwealth is now able to extend the reach of its existing powers under the \textit{Workplace Relations Act} to capture Victorian employers and employees not otherwise open to regulation by the Commonwealth in relation to conciliation and arbitration, agreement making, termination of

\textsuperscript{70} Section 51(vi).
\textsuperscript{71} However, it needs to be emphasised here that the Court has not consistently adopted this principle interpreting the prohibition on State banking in s 51(ii), for example, as limiting the operation of the alternate federal powers (\textit{Melbourne Corporation v Commonwealth} (1947) 74 CLR 31 at 52 per Latham CJ), while also approaching the 'just terms' requirement in the acquisitions power as inhibiting the legislative capacities of the other constitutional powers: \textit{Clunies-Ross v Commonwealth} (1984) 155 CLR 193 at 201-2 per Gibbs CJ, Mason, Wilson, Brennan and Deane JJ.
\textsuperscript{73} Section 4(2) of the \textit{Commonwealth Powers (Industrial Relations) Act 1996 (Cth)} referred matters of conciliation and arbitration for the prevention and settlement of industrial disputes purely within the limits of Victoria to the Commonwealth. Furthermore, s 4(3) transferred matters pertaining to the relationship between an employer and employee to Federal Parliament. As well, s 4(4) ceded powers relating to the matter of minimum terms and conditions of employment for employees in the State to the Commonwealth.
\textsuperscript{74} George Williams and Amelia Simpson ‘The Expanding Frontiers of Commonwealth Intervention in Industrial Relations’ (1997) 10 \textit{Australian Journal of Labour Law} 222.
employment, freedom of association and the resolution of industrial disputes. 75

A limitation with this provision is that the referral of all State constitutional powers relating to industrial relations is impractical and one that is, ultimately, incapable of realisation. 76 In the first place, the efficacy of the provision depends upon Federal-State (or intergovernmental) agreement. Secondly, the referral of State powers can be subject to later revocation by the States. 77 Thus, while confirming the validity of Tasmania’s transfer of powers to Federal Parliament in *R v Public Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airlines*, 78 Dixon CJ, Kitto, Menzies, Windeyer and Owen JJ, nevertheless, declared that the States could countermand the transfer of federal power. 79

Another potentially problematic aspect with the reference provision is that the transfer of State constitutional powers may be subject to the implied limitations of the *Constitution*. The Commonwealth cannot exercise or impose federal power which has the effect of impairing the capacity of States to function as independent political entities or which has the potential to prejudice the institutional capacity to regulate particular subject matter. 80 According to the majority in *Re Australian Education Union; Ex parte State of Victoria* 81 central to the ability to operate in an independent manner is the capacity to regulate the industrial conditions of senior public servants, such as ministers, ministerial

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75 Kollmorgen, above n 72, 158.
76 The problems associated with developing a national industrial relations framework reliant on State references of power are well illustrated by recent Victorian experiences where the Kennett Government withdrew from commitments to transfer further industrial powers to the Commonwealth because its *Fair Employment Bill 2000 (Vic)* was defeated in the Bill’s Second Reading Speech.
77 *R v Public Licensing Appeal Tribunal (Tas); Ex parte National Airlines* (1964) 113 CLR 207.
78 (1964) 113 CLR 207.
79 (1964) 113 CLR 207 at 226. This declaration, however, was obiter dicta. According to their Honours, this revocation can be effectuated by providing for this in the legislation itself or by indicating that the referral of powers will be (impliedly) revoked if certain circumstances are to develop: (1964) 113 CLR 207 at 226.
assistants and heads of department. State activities, then, relating to the setting of wages and fixing of employment conditions for senior public employees would not be able to be overridden by federal industrial regulation or intervention.

It could well be argued, however, that the implied limitations of the Constitution do not apply to cases where the States have voluntarily and affirmatively ceded their constitutional (industrial relations) powers to the Commonwealth. The decision in AEU related to the imposition of federal industrial relations regulations (made under the Industrial Relations Act 1988 (Cth)) on the State of Victoria as employer of public servants and did not concern the exercise of federal industrial powers which had been referred by the State of Victoria.

One provision that appears more capable of supporting a significantly national and uniform industrial relations framework is the federal external affairs power, which is contained in s 51(xxix) of the Constitution. On the basis of this provision, it would appear that parliamentary ratification of international labour instruments and, more particularly, ILO instruments has potential to support national industrial regulation. Provided an appropriate treaty can be found relating to industrial relations legislation that is needed, and provided that the relevant labour law can, indeed, be considered to be 'reasonably capable of being considered appropriate and adapted to implementing a treaty,' then the external affairs power could potentially act as an important basis or foundation for genuinely national industrial regulation.

The potential for this power to support significant federal regulation of the industrial realm is particularly evident in the extensive range of

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82 (1995) 128 CLR 609 at 630-31 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

83 There is some suggestion that this implied limitation should apply to State constitutional powers which also concern the regulation of junior or lower level public servants, as well as to senior State public employees: see the dissenting judgment of Dawson J in AEU (1995) 128 CLR 609 at 643.

84 There is no suggestion in the judgement that the implied limitations would have applied or operated had the State of Victoria voluntarily referred its powers over the industrial conditions of its employees: see Ginters, above n 80, 269.

85 Victoria v Commonwealth (Industrial Relations Act Case) (1996) 187 CLR 416 at 489 per Brennan CJ, Gaudron, McHugh and Gummow JJ.

86 The potential for the external affairs power to sustain industrial intervention was acknowledged in the Industrial Relations Act Case where the Court confirmed that the treaty provisions of ILO instruments could support government regulation of industrial conditions: (1996) 187 CLR 416 at 510 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. On the basis of this decision, Federal Parliament has sought to rely on the external affairs power (subsequently) to enact provisions in the Workplace Relations Act 1996 (Cth) relating to minimum wages, unlawful termination and parental leave.
(labour) conventions which have been adopted by the International Labour Organisation (ILO) and that have been ratified by Australia. These have included the *Minimum Wage Fixing Convention 1970*; the *Equal Remuneration Convention 1951*; the *Termination of Employment Convention 1982*; the *Right to Organise and Collective Bargaining Convention 1949*; the *Workers With Family Responsibilities Convention 1981*; and the *Discrimination (Employment and Occupation) Convention 1958*. These Conventions, and their subsequent ratification by Parliament, could support national industrial relations legislation.

Furthermore, the general nature of these Conventions would *not* appear to negate their ability to support specific federal labour legislation. For example, in the *Industrial Relations Act Case*, while acknowledging the limits associated with the wide nature of the terms of international labour instruments, Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ, nevertheless, insisted that there was discretion available to the Court to determine whether these Conventions could support industrial enactments. Their Honours cited dicta by Deane J in the *Tasmanian Dam Case* who declared that:

> Absence of precision does not, however, mean any absence of international obligation. In that regard, it would be contrary to both the theory and practice of international law to adopt the approach which was advocated by Tasmania and deny the existence of international obligations unless they be defined with the degree of precision necessary to establish a legally enforceable agreement under the common law.

While emphasising that the terms of treaties could not be purely ‘aspirational’ and needed to be sufficiently precise to support federal labour legislation, their Honours argued that considerations involving whether treaty provisions contained the required level of ‘specificity’ was one that was a matter of degree and was (citing Judge Dillard in *Appeal Relating to the Jurisdiction of the ICAO Council*):

> one of the most delicate and difficult problems of law and especially so in the international arena where generally accepted objective criteria for determining the meaning of language in light of aroused expectations are more difficult to ascertain and apply than in domestic jurisdictions.

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87 These Conventions were listed in *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 475.


91 (1972) ICJ Rep 46 at 107.

92 (1996) 187 CLR 416 at 486. This dicta was also cited by Brennan J in the *Tasmanian Dam Case* (1983) 158 CLR 1 at 226. This emphasis on the fact that international treaties can support legislative enactments was evident when the Court examined
The potential for the external affairs power to support expanded (and national) industrial relations regulation is also evident in the considerable latitude that the High Court has accorded to the legislature in how it is to implement the provisions of international labour treaties. According to the Court in the *Industrial Relations Act Case*:

> It is for the legislature to choose the means by which it carries into or gives effect to the treaty provided that the means chosen are reasonably capable of being considered appropriate and adapted to that end.  

So long as the underlying purpose of the law is to implement the relevant labour law treaty then it will be considered by the High Court to be constitutionally valid. This ‘purposive aspect’ has been employed by the High Court in a wide sense — one which does not require that federal legislation promote international relations (or external affairs), but rather one which requires that industrial legislation implement the provisions of the relevant treaty. The external affairs power, therefore, provides considerable room for enacting legislation which promotes the industrial objectives of international labour conventions.

The potential for the federal external affairs power to act as a foundation for national industrial relations regulation would seem to be particularly significant if the power is considered as one not only authorising federal legislation in accordance with international Conventions, but also supports the enactment of this legislation in accordance with other international instruments — such as recommendations regarding the implementation of Conventions. The difficulty for developing such an expansive approach is that the High Court in the *Industrial Relations Act Case* declared that federal industrial legislation, enacted on the basis of whether Articles 3-4 of the *Minimum Wage Fixing Convention 1970* could support s 170 AE of the *Industrial Relations Act 1988* (Cth): see (1996) 187 CLR 416 at 496.

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94 (1996) 187 CLR 416 at 489. It has been suggested that a law will not be capable of being seen as appropriate and adapted in the required sense unless there is ‘reasonable proportionality’ between that purpose and the means adapted by the law to pursue it: *Richardson v Forestry Commission* (1988) 164 CLR 261 at 311-12. However, this was rejected in the *Industrial Relations Act Case* (1996) 187 CLR 416 at 488. As well, see the test developed by Evatt and McTiernan JJ in *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 688 which was rejected in *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 172 and *Chu Keng Lim v Minister for Immigration* (1992) 176 CLR 1 at 75.


96 See *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 322 per Brennan J.

97 (1996) 187 CLR 416 at 517-8. In this context, the Commonwealth sought to rely on the *Termination of Employment Convention 1982*, as well as the recommendations to the Convention, as the basis for the enactment of s 170DE of the *Industrial Relations Act 1988* (Cth). This provision declared that termination of employees’ employment was
the external affairs power, can only be supported directly by the provisions of international Conventions and cannot be sustained indirectly through, for example, recommendations associated with the implementation of Conventions.

Yet, despite this, there has been dicta by one previous justice of the Court, Murphy J, to indicate that the external affairs power is capable of supporting the enactment of legislation that is independent of the existence of any treaty obligation. According to Murphy J, the external affairs power has the potential to support federal industrial legislation which relates to matters 'of international concern,' as well as to matters contained in treaties. Although this interpretation has not been accepted by other (past and present) members of the Court, it indicates the important regulatory potential that inheres in the external affairs power.

However, at a more practical level, it would appear that the possibilities which inheres in the external affairs power to support more expansive federal involvement are not nearly as significant as theorists (such as George Williams) claim. Williams proposes the establishment of a uniform framework of essentially positive industrial relations laws on the basis of the external affairs provision. He suggests that legislative action could be taken to create full employment through Article 1 of the Employment Policy Convention (1964) and that steps could also be taken to limit the amount of unpaid overtime performed by employees in accordance with the International Convention on Economic, Social and Cultural Rights (1966). The clear implication of Williams’ commentary is that a new dynamic reading of the external affairs power can promote greater national federal involvement in the Australian industrial realm.

Yet, despite these claims by Williams, there are still several difficulties that inheres in the external affairs power’s capacity to support this distinctive national industrial relations framework. In particular, it needs

ineffective if it could be perceived as being ‘harsh, unjust and unreasonable’ and the section purported to derive its constitutionality from Article 4 of the Termination of Employment Convention that placed an obligation on states to hold their termination as being illegal unless a ‘valid reason’ was given. In the event that the Convention itself did not support s 170DE the Commonwealth sought to rely on the recommendations to the Convention. However, the Court declared that this section was an additional grant of power exceeding the Convention’s requirements and one that could not be constitutionally grounded in the external affairs power. The Court also held that the Commonwealth could not indirectly rely on the recommendations to the Convention as a mechanism on which to support s 170DE.

98 See Koowarta v Bjelke-Petersen (1982) 153 CLR 168 at 242. Further, in the Tasmanian Dam Case (1983) 158 CLR 1 at 170 Murphy J offered a similarly expansive view declaring that the external affairs power ‘extended to the execution of treaties by discharging obligations or obtaining benefits, but it is not restricted to treaty implementation.’

99 Williams, above n 41, 99-100.
to be emphasised that while the general nature of the provisions of treaties do not prevent them from having the capacity to support industrial legislation it, nevertheless, makes it more difficult to establish an association between their provisions and the substantive detail of industrial relations legislation.100

Another practical constraint on the capacity for the external affairs power to support uniform and national federal intervention in the industrial realm is that international treaty instruments (such as ILO Conventions) do not encompass all aspects of industrial relations regulation and cannot, therefore, provide a basis or foundation for comprehensive and national (industrial) legislative regulation. As Neil Williams and Andrew Gotting argue:

The Commonwealth Parliament has power to make laws [through the mechanism of the external affairs power] with respect to termination of employment, an issue previously within the sole legal domain of the States. It can, to a limited extent, provide for minimum terms and conditions of employment, at least with respect to periods of notice of termination. As is clear ... however, there are limitations inherent in the external affairs power. The ILO Conventions do not cover all industrial relations subject matter.101

A further (essentially pragmatic) limitation here is that reliance on the external affairs power would seem to restrict the policy flexibility of Federal Parliament in regulating industrial relations since it shifts the influence of industrial relations regulation to such international bodies as the International Labour Organisation.102 Parliament loses its political sovereignty when legislators on the basis of the federal external affairs power because its political agenda is effectively set by the ILO. As David McCann argues, 'reliance on this power thus shifts influence to the ILO and probably reduces the range of policy alternatives to the federal government.'103 Clearly, then, a dynamic reading of the external affairs power can only achieve so much in an industrial relations context. Even the most creative interpretations of the external affairs power cannot support genuinely national and comprehensive industrial relations regulation.

100 McCann, above n 66, 87.
102 McCann, above n 66, 87.
103 Ibid, 87.
The Corporations Power

Another constitutional power that has significantly greater potential to support federal involvement in the industrial relations realm is the corporations power. As indicated previously, the corporations power is particularly relevant since it has been utilised by the Howard Government as the basis for supporting the provisions of the Workplace Relations Work Choices Amendment Act 2005 (Cth). The six States have, however, challenged the constitutionality of the Act on the basis that the corporations power — on which it is founded — does not, indeed, authorise industrial regulation and (further) that the Act infringes on each of the States' rights to autonomy and to independence. There appear to be arguments both supporting, as well as repudiating, the capacity or ability for the corporations power to provide a constitutional foundation for federal industrial regulation. As will be shown, the corporations power seems to be capable of supporting the regulation of (at the very least) some aspects of the industrial activities of corporations. Accordingly, this capacity to regulate internal corporate activities tends to undermine the current submissions being made by the States in their present challenge to the validity of the Workplace Relations Work Choices Act.

There has been some suggestion that the corporations power can only regulate the external activities of corporations and that it cannot, in fact, support the internal activities or (internal) industrial organisation of companies. Such a contention was first articulated as early as 1909 by Isaacs J in Huddart Parker v Moorehead. According to his Honour:

_Viewing a corporation as a completely equipped body ready to exercise its faculties and capacities, it must be that outward exercise which naturally and inevitably remains as the subject of federal control. This disposes of the contention that, if these sections be valid, the Commonwealth Parliament would be entirely at large, and that a schedule of wages and hours could be prescribed for these corporations, so also as to the qualifications of their directors; all that is purely internal management and equipment and in no way directly affects the exercise of their capacities of trading or their financial operations or other public capacities, nor is it incidental to the control of their activities._

According to Isaacs, the formation or creation of corporations was a matter for the States and was one that was beyond the scope of federal legislative regulation. The Commonwealth could not, in this respect,

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104 Section 51(xx).
105 See below.
106 (1909) 8 CLR 330.
107 (1909) 8 CLR 330 at 396 per Isaacs J.
regulate the process of incorporation nor could it regulate the internal management or operation of companies. On the basis of Justice Isaacs' approach, then, the federal corporations power would clearly not be able to support national and uniform regulation of corporate industrial relations and corporate industrial activities.

However, this argument can be criticised. In particular, it needs to be emphasised that Justice Isaacs' contention was based on the 'reserved powers' doctrine in which particular topics (such as industrial relations) were essentially reserved or confined to the States. Justice Isaacs' approach, then, was premised on the belief that the subject matter of industrial regulation was one that was a matter of State responsibility and State concern. This notion of 'reserved powers', however, has been repudiated and no longer has any relevance in the contemporary constitutional context of industrial relations.108

Furthermore, Justice Isaacs' approach was not accepted by the majority in *Huddart Parker* who held that the federal corporations power would, in fact, support the internal (industrial) regulation of corporations. For example, according to Griffith CJ:

> The Commonwealth Parliament can make any laws it thinks fit with regard to the operation of the corporation. It, for example, may prescribe what officers and servants it shall employ, what shall be the hours and conditions of labour, what remuneration shall be paid to them...109

While this dicta does not represent the current constitutional position in relation to the corporations power and needs to be clearly qualified,110 it demonstrates that Justice Isaacs' division between the internal and external activities of companies was not accepted even by members of the High Court at the time of the decision.

Second, there has been further argument that the federal corporations power should be confined to supporting the regulation of the trading activities of trading corporations — as opposed to any activities performed by a corporation. In this respect, it has been argued that the relevant legislation must influence or significantly touch on the trading activities of companies. For example, in *Actors and Announcers Equity v Fontana Films*, Gibbs J declared that:

> the nature of the corporation to which the laws relate must be significant as an element in the nature or character of the laws...111

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108 See *Amalgamated Society of Engineers. v Adelaide Steamship (Engineers' Case)* (1920) 28 CLR 129.

109 (1909) 8 CLR 330 at 348 per Griffith CJ.

110 However, the High Court has since affirmed that the Commonwealth can regulate the incorporation of companies: *New South Wales v Commonwealth (Incorporation Case)* (1990) 169 CLR 482.

111 (1982) 150 CLR 169 at 182 per Gibbs J.
Gibbs J further argued that:

the fact that the corporation is a foreign (or trading) corporation should be significant in the way the law relates to it.\footnote{112}{(1982) 150 CLR 169 at 182 per Gibbs J.}

This approach has also been particularly adopted by Dawson J in the \textit{Tasmanian Dam Case}.\footnote{113}{\textit{Commonwealth v Tasmania (Tasmanian Dam Case)} (1983) 158 CLR 1.} Justice Dawson held that the relevant legislation in the \textit{Tasmanian Dams Case} — the \textit{National Parks and Wildlife Conservation Act 1975 (Cth)} — was unsupported, in fact, by the corporations power because there was nothing precisely in the Act that related to corporations in the way specifically of \textit{trading} corporations. Dawson J concluded that (according to the Commonwealth Parliament’s approach in the Act) the federal heads of power were being treated as merely:

pegs upon which Parliament has sought to hang legislation on an entirely different topic.\footnote{114}{\textit{Commonwealth v Tasmania (Tasmanian Dam Case)} (1983) 158 CLR 1 at 202 per Dawson J.}

The proposition that the corporations power should be confined in its operation to laws that touch on the trading activities of trading corporations can also be criticised. There have been conflicting dicta in the constitutional jurisprudence suggesting that the corporations power can support \textit{any} activities performed by corporations. In \textit{Actors and Announcers Equity v Fontana Films}, for example, Mason J held that:

The constitutional grant of legislative power should not be read pedantically. Nothing required that only trading activities of trading companies be regulated...\footnote{115}{\textit{Actors and Announcers Equity v Fontana Films} (1982) 150 CLR 169 at 207 per Mason J.}

Similarly, in \textit{Commonwealth v Tasmania}, Murphy J held that the constitutional grant:

enables Parliament to make laws covering all internal and external relations of any foreign corporation and trading or financial corporation: to enact a civil and criminal code dealing with the property and affairs of such corporations, or a law dealing with any aspects of the affairs of any such corporation or corporations...\footnote{116}{\textit{Commonwealth v Tasmania} (1983) 158 CLR 1 at 179 per Murphy J.}
This issue pertaining to the activities of corporations will be explored in greater detail below. However, at the very least, it would seem that the corporations power will support legislation in respect of the employment activities of corporations that have been undertaken for the purposes of trade. This would seem to extend beyond Justice Gibbs’ formulation in Dingjan that s 51(xx) only supports laws touching on the trading activities of companies. As Anthony Gray argues:

It seems relatively uncontroversial that the Commonwealth can regulate the employment of employees under s 51(xx) since this activity is an action done for the purposes of trade, at least where it is carried out by an organisation that is trading corporation. There should be no constitutional objection then to the Commonwealth mandating some minimum terms and conditions establishing a level of fair pay and to simplifying awards. 117

An additional argument that has been made is that the corporations power will not support a uniform or national industrial relations framework because such a structure will still not eliminate the presence or existence of State industrial relations frameworks. 118 This argument, however, does not take account of the broad interpretation accorded by the High Court to the ‘inconsistency’ provision in s 109 of the Constitution. Section 109 provides that:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid.

In interpreting this provision the High Court has moved from a strict or narrow ‘direct obedience’ 119 understanding to a wide and expansive ‘cover the field’ 120 conception. According to this latter approach, if Parliament evinces an intention to be the sole or the exclusive regulator of a topic then the relevant State law will be deemed to be inconsistent and thus invalid. An example of the operation of this approach can be found in Botany Municipal Council v Federal Airports Corporation 121 where it was held that the Commonwealth could, by regulation, expressly render inoperative several recited New South Wales laws that impacted on the building of a third runway at the Sydney Airport. As George Williams argues, this ‘cover the field’ test:

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118 This argument has been one that has been outlined by Gray, above n 117, 442.
119 See, for example, R v Licensing Court of Brisbane; Ex parte Daniell (1920) 28 CLR 23; Clyde Engineering v Cowburn (1926) 37 CLR 466.
120 See, for example, Ex parte McLean (1930) 43 CLR 472.
121 (1992) 175 CLR 453.
makes s 109 a much more powerful instrument for ensuring the supremacy of the Commonwealth.122

In view of this, it appears clear that federal industrial relations legislation (based on the corporations power) could be expressed to directly override State laws that are applying in the industrial relations field.

Another argument has been that on the basis of the Court's present understanding of, or approach to, the corporations power, it cannot be used to constitutionally support the development of a national and uniform industrial relations framework.123 Despite this contention, it is apparent that the High Court has accorded the corporations power a wide and expansive operation and this clearly indicates its potential to provide a basis for industrial regulation.124 As noted earlier, it is now well established that the corporations power authorises Parliament to regulate the trading activities of trading corporations.125 According to this test — established in the High Court decision of *Strickland v Rockla Concrete Pipes*126 — the relevant legislation:

must have something to do with the characteristic that brings corporations within the Commonwealth power. This would mean, for example, that only trading activities of a trading corporation could be regulated and not any of the other activities of that corporation can be regulated by the Commonwealth (including the relationship of a constitutional corporation with its employees).127

However, this well accepted constitutional interpretation was considerably widened in *Re Dingjan; Ex parte Wagner*128 where the Court declared that the provision could sustain federal laws associated with a corporation's 'activities, functions, relationships or businesses.'129

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125 This proposition was clearly established in *Strickland v Rockla Concrete Pipes* (1971) 124 CLR 468. It was reiterated in *R v Federal Court of Australia; Ex parte Western Australia National Football League* (1979) 143 CLR 190.

126 (1971) 124 CLR 468.

127 Williams, above n 122, 504.


129 (1995) 183 CLR 323 at 333-34.
The term ‘relationships’ that was used in Dingjan could extend to regulating employment relations and, in particular, to regulating all aspects of a company’s relations with its workforce and with any unions representing that workforce. As Andrew Stewart declares:

If we assume that the Commonwealth may legitimately use s 51(xx) to pass laws which have some significance for its ‘activities, functions, relations or business’ where does that leave the possibility for regulation of employment conditions and workplace relations? The term relations would plainly encompass a corporation’s relationship with its workforce, matters which are intimately connected with its functions or business.\(^\text{130}\)

Specifically, all of the justices in Re Dingjan, with the exception of Dawson J, were prepared to accept that the corporation provision could support legislative regulation extending beyond the trading activities of companies to their more general business functions.\(^\text{131}\) The dissenting decision of Mason CJ, Gaudron and Deane JJ developed, in particular, a significantly wide understanding of the power’s ambit, declaring that it could support laws which had only a general connection with the business activities, functions or relationships of a corporation.\(^\text{132}\)

Their Honours’ approach, in this respect, could provide a constitutional basis for regulating the internal (industrial) relations of a corporation. Although not as general or dynamic in scope as Justice Murphy’s understanding of the corporations provision — he considered that the power could act as a basis for any laws that were associated with the activities of a company — the minority’s approach in Dingjan appeared to incorporate particular features of this concept.\(^\text{133}\)

\(^{130}\) Stewart, above n 40, 146.

\(^{131}\) However, in Dingjan, the majority (Brennan, Dawson, Toohey and McHugh JJ) held that ss 127A and 127B of the Industrial Relations Act 1988 (Cth) — authorising the Industrial Relations Commission to review workplace contracts made between a corporation and a sub-contractor — were invalid. In this respect, they sought to place qualifications on the operation of s 51(xx): see at 336 per Brennan J; at 345 per Dawson J; at 354 per Toohey J; at 369 per McHugh J.

\(^{132}\) Gaudron J (with whom Mason CJ and Deane J agreed) declared that: ‘At the very least, a law which is expressed to operate on, or by reference to, the functions, activities or relationships of a constitutional corporation is a law with respect to those corporations’: (1995) 183 CLR 323 at 375.

\(^{133}\) Murphy J adopted a broad approach to the corporations power in which laws associated with (or evenly remotely connected to) corporations could effectively be supported by the power: see Actors and Announcers Equity v Fontana Films (1982) 150 CLR 169 at 212 per Murphy J; Commonwealth v Tasmania (1983) 158 CLR 1 at 179 per Murphy J. In Actors and Announcers Equity Murphy J declared that the Commonwealth can make laws ‘dealing with industrial relations so that in relation to such corporations Parliament, uninhibited by the limitations expressed in the arbitration power, may legislate directly about the wages and the conditions of employees and other industrial matters’: (1982) 150 CLR 169 at 212 per Murphy J.
As mentioned, an even wider approach — and one that has yet to receive formal acceptance by all members of the High Court — has been that advocated by Justice Murphy who declared in 1983 that the constitutional grant in the corporations power:

enables Parliament to make laws covering all internal and external relations of any foreign corporation and trading or financial corporation: to enact a civil and criminal code dealing with the property and affairs of such corporations, or a law dealing with any aspects of the affairs of any such corporation or corporations... 134

However, this wide approach was neither adopted nor endorsed by the majority in Dingjan. The majority emphasised that the relevant laws must have 'significance' for the activities of a corporation and that such a law cannot simply be brought within the scope of the provision by reference to a 'constitutional corporation.' 135 According to McHugh J:

A law operating on the conduct of outsiders will not be within the power conferred by s 51(xx) unless that conduct has significance for trading, financial or foreign corporations. In most cases, that will mean that the conduct must have some beneficial or detrimental effect on trading, financial or foreign corporations or their officers, employees, or shareholders. 136

In this context, McHugh J emphasised the fact that it was insufficient that the relevant law merely refer to, or operate on, a corporation. It needed to have some substantive connection with, or relationship to, a corporation. According to McHugh J:

it is not enough, however, to attract the operation of s 51(xx) that the law merely refers to or operates upon the existence of a corporate function or relationship or a category of corporate behaviour... So, where a law seeks to regulate the conduct of persons other than s 51(xx) corporations or the employees, officers or shareholders of those corporations, the law will generally not be authorised by s 51(xx) unless it does more than operate by reference to the activities, functions or business of such corporations. 137

In a similar context, Brennan J (also in the majority) found that the law had to actually discriminate against constitutional corporations and other persons. It had to have a differential effect on constitutional corporations in order to fall within the scope or the ambit of the corporations power:

The legislative power conferred by s 51(xx) is not a power to make laws with respect to things relating to corporations or things relating to the businesses of corporations. A law of that kind bears the character of a law with respect to constitutional corporations only if the relationship governed

134 Commonwealth v Tasmania (1983) 158 CLR 1 at 214 per Murphy J.
135 (1995) 183 CLR 323 at 370 per McHugh J.
136 (1995) 183 CLR 323 at 370 per McHugh J.
137 (1995) 183 CLR 323 at 370 per McHugh J.
by the law affects constitutional corporations in a discriminatory manner. If this be the test by which the character of a law is determined, constitutional corporations must be affected in some respect sufficiently material to give significance to their discriminatory treatment.\(^{138}\)

In this respect, then, it would seem uncertain as to whether the corporations power can support the legislative regulation of all industrial matters (and relations) arising from the operation of companies. The Court in *Dignan* would appear to have been nearly evenly divided regarding the precise or exact extent to which the corporations power can support the legislative regulation of a corporation’s industrial activities. Another complicating factor here is that none of the judges who presided in *Dignan’s Case* are adjudicating in the present constitutional challenge by the States to the *Workplace Relations Work Choices Amendment Act*. As George Williams argues:

Uncertainty about the scope of the corporations power means that it cannot be said with confidence that a law that sought to regulate the full range of industrial matters that can arise between employers and employees in a s 51(\(xx\)) corporation would be a valid enactment under the power. This uncertainty is magnified by the fact that the issue will be determined by a High Court composed entirely of judges who did not sit on the last major decision on the power, *Re Dingjan; Ex parte Wagner*... The scope of the power thus remains very much open...\(^{139}\)

Yet, despite this uncertainty, it would seem that the decision in *Dingjan* does support the capacity for the federal corporations power to support, at least, some aspects of the internal industrial relationships of corporations and, in this respect, it would appear to undermine the States’ present challenge to the federal industrial relations legislation. In particular, five of the seven judges in *Dingjan* (Mason CJ, Gaudron and Deane JJ as well as Brennan J and McHugh J) expressly confirmed the Commonwealth’s ability to use the corporations power to regulate (some aspects of) work relationships. Furthermore, Justice Gaudron reiterated this capacity or ability for federal Parliament to regulate the internal industrial relations of companies in the subsequent decision of *Re Pacific Coal*\(^{140}\) when her Honour declared that:

I have no doubt that it [the corporations power] extends to laws prescribing the individual rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations.\(^{141}\)

While the relevant legislative provision in *Dingjan* — s 45D of the *Trade Practices Act 1974* (Cth) — was invalidated by the High Court, it would

\(^{138}\) (1995) 183 CLR 323 at 339 per Brennan J.

\(^{139}\) Williams, above n 122, 506.

\(^{140}\) (2000) 172 ALR 257.

\(^{141}\) (2000) 172 ALR 257 at 275 per Gaudron J.
The Corporations Power and Federal Industrial Relations Regulation

seem that the decision supports the extension of the corporations power, at the very least, to certain aspects of the industrial relationships of companies. As Anthony Gray argues:

The High Court in Re Dingjan imposed some boundaries on the use of the corporations power in this context. Yet even though the law was struck down, it is submitted the States might find the case more of a hindrance than of assistance in seeking now to prevent the Commonwealth from legislating in this area. 142

The concept of the ‘relationships’ of a corporation, then, would appear to encompass industrial relations between employers and employees of a corporation and could, therefore, provide a constitutional basis for a uniform industrial relations legislative framework — of the type, for example, that is contained in the Workplace Relations Work Choices Amendment Act. This interpretation of the corporations power is supported by the fact that the High Court has accepted — in Victoria v Commonwealth (Industrial Relations Act Case)143 — the validity of the power as a constitutional basis for industrial regulation. In the Industrial Relations Act Case, the High Court chose to accept concessions by Victoria as to the constitutionality or validity of provisions of the Industrial Relations Act 1988 (Cth) regarding Part VIB Division 3, allowing corporations to negotiate specific contractual agreements with non-union employees regulating their industrial relations.

Apart from these constitutional reasons, there also appear to be good policy reasons for extending the application of the corporations power to the industrial relations of companies.144 The industrial relations and internal activities of corporations influences, in a significant way, the operation of the economy. It is therefore desirable (for the purposes of economic management) for Federal Parliament to have the constitutional power to regulate all aspects of corporations — particularly in relation to their internal industrial activities.145 While the Commonwealth — through the mechanism of the corporations power — has the power to regulate corporations, it still lacks the capacity to manage their internal industrial relations and this is a significant constitutional failing in the context of federal control of national economic affairs. According to Gray:

The point is this then in relation to the corporations power — the Commonwealth’s ability to regulate corporations must be read broadly because corporations dominate economic activity in Australia, and the

142 Gray, above n 117, 440.
145 In this context, see the Joint Committee on Constitutional Review Final Report of the Constitutional Committee, Canberra: AGPS, 1988, 770ff.
Commonwealth is responsible for the economy. If the Commonwealth could not regulate all that a corporation does (or at least anything the corporation does for the purpose of trade), it would lose the ability to regulate a key plank of economic activity in Australia.\(^{146}\)

It needs to be pointed out, in this respect, that 85 percent of the workforce are employed in, or working for, corporations.\(^{147}\) The extension of the corporations power, then, to cover the internal industrial relations of corporations would facilitate a greater degree of centralised federal control and intervention of the economy. Because the federal government — as opposed to the various State governments — are better equipped to regulate and to monitor the internal (industrial) activities of corporations then it would seem to be clearly beneficial to allow the Commonwealth — through the mechanism of the corporations power — to regulate the industrial relations of companies. As Gray argues:

> It is asserted that only the national government can exercise the kind of strong control 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 regulates companies. Corporations law is now largely a federal responsibility and the function of the former State Corporate Affairs Commission have been transferred to a federal body. It would be consistent with the overall trend in corporate regulation in Australia since federation to assert that the Commonwealth should also have power over industrial relations relating to corporations.\(^{148}\)

If Parliament is to effectively manage the economy, then some constitutional power clearly needs to be afforded to it in relation to the internal industrial activities of corporations. It is clearly insufficient for the purposes of national economic management (as in the present context) that Parliament has a general legislative power to regulate corporations.\(^{149}\) As Gray again declares:

> Given the growing importance of corporations and that the corporate form is the main means by which business is carried out, one might argue that the Commonwealth requires broad control over corporations as a tool in

\(^{146}\) Gray, above n 117, 452.


\(^{148}\) Gray, above n 117, 451.

\(^{149}\) According to Gray: ‘Given the growing importance of corporations and that the corporate form is the main means by which business is carried out, one might argue that the Commonwealth requires broad control over corporations as a tool in managing the economy, particularly in light of the lack of direct constitutional power the Commonwealth has over the economy’: Gray, above n 117, 451.
managing the economy, particularly in light of the lack of direct constitutional power the Commonwealth has over the economy.150

The potential for the corporations power to support industrial regulation is shown in the fact that substantial elements of the previous industrial relations framework — under the *Workplace Relations Act 1996* (Cth) — were grounded in the corporations power. In particular, the constitutional validity of Division 2 of Part VIB of the Act (which governs the establishment of ‘Certified Agreements’ and ‘Australian Workplace Agreements’) is sourced in the corporations power.151 Moreover, the constitutional validity of the federal *Workplace Relations Amendment (Termination of Employment) Bill 2002* is also based in the corporations power.152 The objective of this proposed enactment is to extend federal unfair dismissal laws to all employees of a corporation and by basing its validity in the corporations power (in preference to the federal arbitration power) it will have the effect of increasing federal industrial regulation or coverage from 49 percent to 85 percent of employees.153 In this context, George Williams observes that:

> If use of the corporations power (supplemented by other powers is needed) was extended to other areas of industrial law, the States or Territories could ultimately lose control over the regulation of such matters. It may not be feasible to run a full regulatory regime for 15 percent of the workplace given the cost and infrastructure involved.154

The Bill emphasises the regulatory possibilities that inhere in the corporations power and the actual manner in which it can be used to support a nearly national or uniform industrial relations framework.155 In light of this, it appears that the constitutionality of the *Workplace Relations Work Choices Amendment Act* would be upheld given that previous federal legislative enactments that have sought to derive their legitimacy from the corporations power have not been invalidated by the Court.

The corporations power also has potential to support a distinctive industrial relations framework where the need for industrial arbitration is

150 Gray, above n 117, 451.
151 *Workplace Relations Act 1996* (Cth), ss 170LI-LL.
154 Ibid, 97.
155 In this respect, it has been estimated that an industrial relations framework based on the corporations power would have the effect of increasing federal award coverage by 2.5 million employees: see Peter Reith ‘A Unitary Industrial Relations System: Unfinished Business of the 20th Century’ Speech Delivered to the Business Council of Australia Workplace Relations Forum, Hotel Sofitel, Melbourne, 2000.
obviated and where arbitration is replaced by direct legislative intervention.\textsuperscript{156} To a certain extent, the \textit{Workplace Relations Amendment (Work Choices) Act 2005} has sought to realise this objective with the downgrading of the Australian Industrial Relations Commission and the establishment of an Australian Fair Pay Commission as an institutional mechanism for the fixing of wages and conditions.\textsuperscript{157} The potential for replacing industrial arbitration with direct government intervention (supported by the corporations power) has tended to be overlooked by scholars. One particular example of this is Andrew Stewart’s proposal for a new industrial relations framework based on the corporations power.\textsuperscript{158}

Stewart is keen to demonstrate the advantages of a system of a ‘corporations based’ arbitral framework — such as the greater simplicity which it promotes — but neglects the possibility of direct federal legislative intervention. He advocates a system which involves the conciliation and arbitration of disputes, but one where the Australian Industrial Relations Commission is authorised to make common rule awards and where the need to identify individual respondents is dispensed with.\textsuperscript{159} Stewart argues that the corporations power is well suited to facilitating an expanding arbitral role because it enables the Commission to hear any dispute which involves a corporation (regardless of whether there is an ‘interstate’ dimension) and because it allows the Commission to make orders settling a dispute by way of a ‘common award.’\textsuperscript{160} A consequence of this ‘corporations based’ arbitral framework is that such a system may be superseded by a model of direct legislative intervention. Andrew Stewart does tend to acknowledge this point when he observes that:

\textit{Without the requirement for interstate disputes to be created and, indeed, with the federal tribunal presumably able to act of its own motion to make}

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\textsuperscript{157} The Australian Fair Pay and Conditions Standard (AFPCS) can stipulate minimum conditions for employees in regard to hours of work; annual leave; parental leave; and personal leave: see \textit{Workplace Relations Work Choices Amendment Act 2005 (Cth)} Part VA, s 89A. In this respect, the scope of the operation of the Commission in making declarations with respect to workplace conditions would seem to be significantly less than that which was exercised by the existing Australian Industrial Relations Commission.

\textsuperscript{158} See Stewart, above n 40, 156.

\textsuperscript{159} \textit{Ibid}, 156.

\textsuperscript{160} \textit{Ibid}, 156.
or vary awards, the scope of the award system would no longer hinge so much on the strategic decisions taken by the unions. 161

This implicates the important point that the corporations power can potentially be utilised to support a system of uniform direct federal laws on industrial regulation. The potential for the corporations power to support a national legislative framework in Australian industrial relations was first highlighted in the recommendations by the former Minister for Workplace Relations, Peter Reith, for the establishment of a set of (corporations-based) federal industrial relations laws.162 Reith, in this respect, emphasised the need for a 'coherent national framework of minimum standards to be established for the conduct of workplace relations'163 and argued that — through the mechanism of the corporations power — federal laws would be capable of operating:

on a common rule basis as opposed to the current respondency basis. They would provide a more secure safety net of conditions to be specified across the workforce and into award free areas, rather than simply be orders made within the ambit of prescribed duties.164

Parts of these recommendations initially crystallised in the Workplace Relations and Other Legislation Amendment Bill 1996 and were then subsequently formalised in the Workplace Relations Work Choices Amendment Bill 2005 which was presented to the House of Representatives on 2 November 2005. In presenting the Bill to Federal Parliament, the Prime Minister promised that it would provide the electorate with a simple, as well as more fair and equitable, legislative framework for employees and that it would transfer the majority of employees who were covered by various State industrial frameworks into a streamlined federal system.165 The Bill was formally enacted into legislation — the Workplace Relations Work Choices Amendment Act — on 2 December 2005.

The Corporations Power and the Constitutional Validity of the Workplace Relations Work Choices Amendment Act

However, as has been emphasised, doubt has been cast on the validity of this federal legislation by the States. In their Submission to the Inquiry of the Senate Employment, Workplace Relations and Education Committee

161 Ibid, 162.
162 See Peter Reith, above n 147.
163 Ibid, 2.
164 Ibid, 2.
165 For the Coalition Government's interpretation of the perceived advantages of this new federal industrial relations framework for Australian employees see the Commonwealth of Australia WorkChoices: A New Workplace Relations System. Canberra: AGPS, 2005.
into the Workplace Relations Amendment (Work Choices) Bill 2005 the States argued that the effect of the proposed legislation was to so dramatically alter, as well as undermine, the federal balance — by transferring State industrial relations systems to the Commonwealth — that this would threaten the entire concept of federalism underpinning the *Australian Constitution*. In this respect, the States declared: 166

That general understanding and acceptance of the respect roles of the two tiers of government is directly challenged by the present Bill. The federal government seeks to legislate an industrial relations system based almost entirely on the corporations head of power, and by doing so, seeks to (a) compulsorily move all constitutional corporations into that new federal system (even if those corporations currently operate under State relations industrial systems and would prefer to stay in those systems) and (b) put an end to the operation of State industrial laws to the extent that they purport to bind any such constitutional corporations. 167

They further claimed in their submission that laws which were enacted in accordance with the corporations power needed to be ones essentially in relation to the activities of corporations and not laws that were with respect to the internal industrial relations of companies. In this respect, the States submitted that the proposed *Work Choices* legislation would be, in essence, unconstitutional. As the States declared:

This is because laws made on the basis of this power would be laws about the object of the power, the corporation, and not, as at present, laws about the industrial relationship between parties (employers and employees and their representatives). They would inevitably tend to focus on the needs and attributes of the corporation, and not upon the nature of the interaction between the parties and a proper consideration of the needs and attributes of each. 168

Ultimately, then, the States submitted that the proposed legislation was fundamentally unconstitutional. What the Commonwealth sought to achieve was to assume control of (and take over) State industrial relations systems. In the past, expansive approaches to the arbitration power had enabled the Commonwealth to encroach on, and partially regulate, State industrial relations systems. However, the proposed Bill was different in this particular respect in that it sought *entirely* to subsume State systems into the federal industrial relations framework. According to the submission put by the States:

166 See the Submission to the Inquiry of the Senate Employment, Workplace Relations and Education Committee into the Workplace Relations Amendment (Work Choices) Bill 2005 on behalf of the Governments of New South Wales, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, 9 November 2005.
In reality, generous interpretation of the constitutional terms by the High Court has seen the expansion of the federal industrial relations system into many areas that might, on the face of it, appear properly to be the domain of intra-State disputation. In general, however, that has to date been acceptable in that the Commonwealth has not sought to compulsorily move persons into its system, nor attempt to put an end to the operation of State laws. 169

Accordingly, the States concluded their submission into the constitutional validity of the proposed legislation in the following terms:

The Joint Governments are of the view that the Bill represents a fundamental misunderstanding of the federal compact and is an inappropriate use of constitutional power. Legal teams have been brought together to analyse the Bill and to identify grounds for constitutional challenge. All State governments party to this submission will be parties (or interveners) in that challenge. 170

These arguments have been further proposed and developed by the States in the initial High Court proceedings in their challenge to the Workplace Relations Work Choices Amendment Act 2005 (Cth). 171 The principal contention of the States up to this point in the litigation has been that laws relating to the industrial matters of corporations are insufficiently connected to, or associated with, the trading activities of corporations. In the context of the Workplace Relations Work Choices Amendment Act, the States contended that while this law touches on the operation of corporations, it cannot be interpreted as a law specifically ‘with respect to’ corporations. In this respect, the States have argued that there is insufficient association between the federal law and the trading activities of corporations. Council for the States, Mr Sofronoff, submitted that:

Our submission your Honours is that the flaw in the case of the Commonwealth is that this is a law that relates to the terms of employment of those who work in any capacity for trading, financial or foreign corporations and, as such, it can fairly be described as a law with respect to a matter that relates to corporations. It can fairly be described as a law with respect to a matter that may concern the business of a corporation in the sense that Chief Justice Latham used, in the terms he used. The law touches and concerns corporations, but it is not a law directly upon the subject matter of the power... 172

This contention was further emphasised when he submitted that the federal law must concern the trading activities of corporations and not (more generally) its ‘business’ activities:

169 Ibid, 5.

170 Ibid, 5.


Your Honours, we submit that subsection (xx) mandates something closer than this law. It must be a law with respect to trading, financial, or foreign corporations themselves, not laws that are merely with respect to matters affecting or concerning or relating to such corporations and, your Honours, we would submit the word ‘business’ does not appear in the subsection. There is no paragraph in s 51 that gives the Commonwealth power to legislate with respect to the business of companies or anyone else and the word ‘business’, in our respectful submission, is not a synonym for ‘trading’ or ‘finance’.173

A similar contention was, indeed, expressed by Mr. Kourakis, who also acted as Council for the applicant States:

It follows, your Honours, that conduct, again including contracts of employment, may or may not be for the purposes of trade or finance although they may be characterised as undertaken in the course of the corporation’s business. Equally, ultimate consumers of goods, whether they are private individuals or charitable organisations purchasing goods or services to be put to a charitable use, are not, although engaged in business and the business of the charitable corporation, necessarily engaged in trading or financial activities.

It follows your Honours, that not all contracts of employment can be said to be contracts of employment entered into for the purposes of trading or finance. Your Honours, if those propositions are accepted, that is, that not all business in the wide sense of a corporation is for the purposes of trade or finance and not all contracts of employment are for that purpose, although it can be accepted that there is a likelihood that employment contracts entered into by trading or financial corporations are for the purposes of trade or finance, it by no means follows that all contracts of employment made by such a corporation are made in its capacity as a trading or financial corporation.174

This submission, however, appears unpersuasive. It is arguable that federal laws that seek to regulate the industrial matters or relations of corporations would, in fact, relate to, and influence, the external trading activities of corporations. Employees and their relations with employers, in this respect, are critical to the effective operation of companies and it is difficult to understand how the industrial relations of corporations do not impact on their external trading activities. This point would seem to have been emphasised by Kirby J when his Honour (in responding to this submission) declared that:

It is pretty hard not to see the employees as being at the core of the existence and personality of the corporation, hence, of its trading activities.


If one is endeavouring to draw a line, it seems difficult to draw a line that cuts the employees off. I could, for example, understand that you would draw a line that would cut off, say, public relations or charitable works or engagement in community involvement and things of that kind, but for trading, virtually always, you need employees.¹⁷⁵

More generally, it would seem that there is no reason to believe that the Court will invalidate the *Workplace Relations Work Choices Amendment Act 2005* (Cth). As indicated above, the Court in *Re Dingjan; Ex parte Wagner*¹⁷⁶ declared that the federal corporations power can sustain laws that are associated with a corporation’s ‘activities, functions, relationships or businesses’¹⁷⁷ and that the term ‘relationships’ could encompass industrial relationships or a corporation’s relationship with its workforce. The decision in *Dignan*, in this respect, does support the capacity for the corporations power to support aspects of the industrial relations of a corporation. As noted above, five of the seven presiding judges in that decision expressly confirmed the Commonwealth’s ability to use the corporations power to regulate (aspects of) the employment relationship in corporations.

Finally, it appears that the contention made by the States in their Submission to the Inquiry of the Senate Employment, Workplace Relations and Education Committee into the Workplace Relations Amendment (Work Choices) Bill 2005 that the ultimate effect of the proposed legislation is unconstitutional since it undermines the federal constitutional balance would also be rejected by the High Court. As previously outlined, the High Court decision in *Re Australian Education Union; Ex parte State of Victoria*¹⁷⁸ emphasised that federal legislation will be invalid where it impairs the capacity for the States to operate as independent political entities. According to the Court, the Commonwealth must not pass laws of general application which operate to destroy or to curtail ‘the continued existence of the States or their capacity to function as governments.’¹⁷⁹ Yet, in this context, the majority judgement of Mason CJ, Brennan, Deane, Toohey, Gaudron, and McHugh JJ emphasised the point that, as a general proposition, the application of federal awards to State employees and (in particular) the prescription of ‘minimum wages


¹⁷⁷ (1995) 183 CLR 323 at 333-34.


¹⁷⁹ *Re AEU; Ex parte Victoria* (1995) 184 CLR 188 at 231. This decision in *AEU* was confirmed in *Austin v Commonwealth* (2003) 195 ALR 321 where it was held that legislative enactments could not impair the powers of the States. See above.
and working conditions' will not destroy the States or prevent them from functioning effectively.\footnote{180}

It is arguable then, on this basis, that the imposition of national and uniform industrial relations laws, which are supported by the federal corporations power, would not prejudice or compromise the independent functioning of the States. If it can be established that the States still have some residual capacity to regulate the industrial conditions of their public servants and coordinate the setting of their wages then it seems likely or probable that the High Court would uphold the WorkChoices Amendment Act.\footnote{181}

This final point implicates the important issue that the corporations power only acts, indeed, as a constitutional basis or foundation for regulation of trading, financial or foreign corporations. It cannot be used to regulate employees from non-corporate organisations. The remaining 15 percent of employees who are employed in non-corporate organisations, then, still need to fall under the control of State industrial award systems.\footnote{182} As David McCann rightly points out, this is (still) a reasonably significant proportion of the workforce that is excluded by a corporations-based legislative framework and additional constitutional powers would need to be used to supplement the corporations power as a basis for regulating those employees who do not fall in the scope of federal regulation that is sourced in the corporations power.\footnote{183}

This problem could, nevertheless, be overcome by utilising alternative federal powers — such as the external affairs, arbitration and trade and commerce powers — as mechanisms through which to regulate those workplaces that fall outside the scope of the corporations power. As has been shown, the arbitration and the external affairs provisions still, indeed, have significant potential to support quite extensive federal involvement in the industrial sphere.

To promote comprehensive national industrial regulation implicates the further issue of, and need for, constitutional amendment and it is this issue on which attention is now briefly focused. As will be shown, the prospects for amending the federal arbitration power to embrace an

\footnote{180}{(1995) 184 CLR 188 at 232. See Breen Creighton and Andrew Stewart, Labour Law (2005) 114. This general proposition was qualified in one important respect — the States ability 'to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds' could not be impaired: (1995) 184 CLR 188 at 232.}

\footnote{181}{In this respect, see \textit{Re Australian Education Union; Ex parte State of Victoria} (1995) 128 CLR 699. See above.}

\footnote{182}{Reith, above n 147, p. 2.}

\footnote{183}{McCann, above n 66, p. 83.}
essentially plenary power in relation to the topic of industrial relations would appear to be remote. This emphasises the need to explore the potential for utilising existing federal powers — and, in particular, the corporations power — as mechanisms for supporting the development of a national and uniform industrial relations framework.

The Feasibility of Constitutional Amendment

The need for constitutional amendment, in general, and the revision or reform of the arbitration power, in particular, has been a central focus of attention for constitutional and political scholars. The perception that constitutional amendment is an essential precondition to implementing a more nation and regulatory industrial framework has also been the subject of keen attention by federal politicians who have, on frequent occasions, sought to initiate referenda amending the Constitution. Since Federation, in particular, there have been 44 attempts to amend the Constitution and the majority of these attempts, it should be noted, have been initiated by the Australian Labor Party. Labor has sponsored 57 percent of constitutional referenda but, interestingly, has only held federal power for one-third of the time since 1901.

The perceived inadequate nature of federal industrial, as well as economic, powers was particularly evident in the years immediately following Federation where 45 Bills for constitutional amendment were proposed and where 13 different referenda were put to the people. The proposals draw attention to the belief (at that time) in the unduly narrow and restrictive nature of the industrial powers provided to the Commonwealth. For example, the Scullen Government’s Constitution Alteration (Legislative Powers) Act 1910 (Cth) sought to remedy the deficiencies relating to national industrial and economic management by attempting to insert powers relating to industrial relations, trade and

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185 An excellent commentary on the history of constitutional reform is provided by Scott Bennett, ‘The Politics of Constitutional Amendment’, Department of the Parliamentary Library, Research Paper No. 11, 2003, 1; see also Crisp, above n 184, 44-47.

186 Bennett, above n 185, 18. The Fisher Labor Government sponsored eight attempts at constitutional amendment, while the Curtin and Chifley Governments submitted five amendment proposals. In more recent times, the Whitlam and Hawke Labor Governments undertook 12 attempts at constitutional amendment.
commerce, and monopolies in the *Constitution*.\(^{187}\) Furthermore, the Curtin Labor Government sought to counter the absence or lack of economic and industrial powers by enacting the *Constitution Alteration (Post-War Reconstruction and Democratic Rights) Act 1944 (Cth)* which sought to incorporate in the federal *Constitution* general powers relating to industrial relations, unemployment, price controls and marketing.

The apparent deficiencies of the federal constitutional framework in relation to industrial relations were also evident in the reports of the two Joint Committees on Constitutional Review which evaluated the efficacy of the substantive powers in these areas from an essentially centralist and interventionist perspective. The 1959 Committee concluded that there were few powers enabling Federal Parliament to regulate comprehensively the industrial and economic sphere, declaring that:

> The Joint Committee's summary of post-war Federal Economic Action demonstrated that the Commonwealth has had to grapple with the broad problem of maintaining [economic] stability and promoting national development from a position of constitutional weakness.\(^{188}\)

Similarly, the later 1988 Joint Committee continued to highlight the inadequate nature of the existing federal industrial and economic powers by advocating the inclusion of a general provision in the federal *Constitution* relating to 'matters affecting the national economy.'\(^{189}\)

In this respect, constitutional amendment has been perceived as being an essential pre-condition for the realisation of centralised and genuinely national industrial and economic regulation. Yet, the important difficulty here is that few referenda (seeking to extend the reach of federal economic and industrial power) have been successful. Specifically, of the 44 proposals submitted to the electorate, only eight have been accepted by a majority of States and an overall majority of the voting public.\(^{190}\)

Furthermore, those proposals that were accepted or passed by the public do not appear to have affected or transformed federal economic and industrial power, relating more to social or human rights topics than economic concerns.\(^{191}\)

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\(^{187}\) Subsequent referenda which failed to pass included the *Constitution Alteration (Trade and Commerce) Act 1912 (Cth)*; the *Constitution Alteration (Corporations) Act 1912 (Cth)*; and the *Constitution Alteration (Industrial Matters) Act 1912 (Cth)*.

\(^{188}\) Joint Committee on Constitutional Review (1959), above n 184, 140.

\(^{189}\) Joint Committee on Constitutional Review, (1988), above n 184, 785. This new power over the economy and industrial relations was to be inserted as s 51(iA).

\(^{190}\) Bennett, above n 185, 6.

\(^{191}\) For example, referenda that have been successfully passed have related to constitutional provisions setting the retirement age of High Court judges at 70 years; to re-establishing State parliamentary conventions in relation to the filling of Senate casual vacancies; to allowing Territory residents to vote; and to providing for maternity allowances and widow pensions. See the *Constitution Alteration (Retirement of
A traditional response to this failure to promote constitutional amendment has been to point to the public’s perceived inability to understand complicated constitutional issues and accordingly to advocate educational or consciousness-raising campaigns as a means of overcoming this deficiency. According to L.F. Crisp, for example, constitutional amendment is an:

abstract and technical business for which the average citizen is usually ill-equipped … while the problems may be so complicated as to be ill-equipped to a simple ‘yes’ and ‘no’ vote. The temptation is, therefore, to play safe and let things be.\(^{192}\)

Similarly, George Williams has stated that:

A key plank in this process [of successful constitutional amendment] is the need to overcome many of the false assumptions Australians hold about the state of the law. Such assumptions are underpinned by the fact that Australians possess a disturbing lack of knowledge about their system of government.\(^{193}\)

Yet, despite this, it should be pointed out that the electorate has been prepared to entertain various amendment proposals. These have included, for example, proposed amendments that seek to provide Aborigines with the constitutional right to vote in federal elections, as well as changes establishing a retiring age of 70 for High Court judges.\(^{194}\) In this respect, it appears that significant sections of the electorate have demonstrated a clear commitment to supporting constitutional amendment where they are convinced of the need for such reform. For example, on nine occasions, more than 49 percent of the Australian public have voted to accept proposals for constitutional amendment.\(^{195}\) This tends to suggest, indeed, that the voting public are not ignorant of the issues raised by constitutional amendment, but are inherently apprehensive or cautious in consenting to economic and industrial change which has potential to affect significantly the federal constitutional balance. As Scott Bennett points out:

The history of Australia’s efforts of constitutional amendment suggest that although millions of people might not have discussed the various constitutional amendments in detail, their voting records have indicated an adequate awareness of the relative issues … Australia’s voters have been

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\(^{192}\) Crisp, above n 184, 49.

\(^{193}\) George Williams *A Bill of Rights for Australia?* (1999) 43.

\(^{194}\) See above n 191.

\(^{195}\) McMillan, Evans and Story, above n 184, 22.
cautious and conservative, but they have shown their willingness to accept change, when such change is sensible and right.\textsuperscript{196}

Clearly, then, the results of constitutional referenda indicate that the public is cautious or sceptical of proposals that seek to accord enhanced industrial and economic powers to Federal Parliament. It, therefore, appears unlikely that the electorate will countenance future proposals for amendment that commit to an expansion (as well as increasing centralisation) of Commonwealth industrial power. In view of this, the primary focus of constitutional and political attention needs to remain on developing more dynamic and creative interpretations of the existing constitutional powers — such as (in particular) the federal corporations provision. As the Howard Government's industrial relations legislative agenda has shown, the constitutional provisions can be used to support federal regulation in areas that could not have been envisaged by the constitutional framers.

Conclusion

In this article we have sought to canvass and explore the potential room to manoeuvre within the constraints of the existing constitutional provisions for greater federal or national involvement in the industrial realm. As has been shown, there would seem to be considerable scope for the implementation of a significantly more centralised — as well as national — industrial relations framework in the present constitutional context. The recent enactment by the Howard Government of the \textit{Workplace Relations Work Choices Amendment Act} clearly indicates the potential for the corporations power, in particular, to support significant federal intervention in the industrial sphere.

As has been shown, the High Court has increasingly embraced creative and dynamic interpretations of, and approaches to, the federal powers — including the corporations and the external affairs powers. The Court has been prepared, indeed, to countenance and promote federal regulation in areas never originally envisaged by the framers. It was shown, in this particular respect, that the Court has extended the operation of the corporations power to regulate, at least, some aspects of the internal industrial relationships of corporations. The decision, in particular, in \textit{Re Dingjan; Ex parte Wagner}\textsuperscript{197} — where five of the seven presiding judges confirmed the ability of Commonwealth to use the corporations power as a basis for industrial regulation — would seem to undermine the States'

\textsuperscript{196} Bennett, above n 185, 24.

\textsuperscript{197} (1995) 183 CLR 323.
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present challenge to the Work Choices Act.\(^{198}\) It should also be noted that portions of previous federal industrial legislation — such as the Workplace Relations Act 1996 (Cth) and the Industrial Relations Act 1988 (Cth) — have also been sourced in the corporations power and the High Court has accepted the validity or constitutionality of this legislation.\(^{199}\) This tends to indicate that the Court will uphold the validity or constitutionality of the Workplace Relations Work Choices Amendment Act. However, as has been noted, a complicating factor here is that none of the judges who presided in Dignan are adjudicating on the present constitutional challenge by the various States to the current federal industrial relations legislation.

It was emphasised, however, that the corporations power alone will not provide a constitutional basis for the implementation of a comprehensive and genuinely uniform legislative industrial relations framework. It will extend federal industrial coverage to 85 percent of the workforce. However, this still leaves 15 percent of the workforce without federal legislative protection sourced or grounded in the corporations power. However — as was shown — there is still significant room to manoeuvre for the Commonwealth in the context of industrial regulation via such other alternate federal powers as the external affairs\(^{200}\) and reference\(^{201}\) powers, as well as (of course) the arbitration power. For example, in regard to the conciliation and arbitration power, potential for supporting additional federal industrial relations regulation may inhere in the ‘prevention’ aspect of industrial disputes of this provision. In this respect, then, comprehensive national industrial regulation could be supported through the use of a combination of different constitutional powers.

A more permanent or enduring solution to the problem of national industrial relations regulation rests in constitutional amendment and the inclusion of a plenary power authorising generalised federal or Commonwealth control over industrial relations. As was shown, however, the difficulty with proposals for amendment is that the history of constitutional reform indicates a significant reluctance on the part of the electorate to countenance the widening of existing industrial and economic powers, as well as the approval of new constitutional powers.

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\(^{198}\) Note from the editor: A majority (of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; Callinan and Kirby JJ in dissent) found that the amendments to the Workplace Relations Act 1996 (Cth) in the Workplace Relations Amendment (Work Choices Act) 2005 (Cth) were a valid exercise of the corporations power conferred by s 51(xx) of the Constitution.

\(^{199}\) See, for example, Victoria v Commonwealth (Industrial Relations Act Case) (1996) 187 CLR 416. See above.

\(^{200}\) Section 51(xxix).

\(^{201}\) Section 51(xxxvii).
Given this, it appears that the most likely method of promoting federal industrial relations reform and federal industrial expansion is through utilising more creative, dynamic and innovative interpretations of the existing federal constitutional powers — particularly the federal corporations provision. As has been shown in this article, there would seem to be considerable room to manoeuvre for labour law practitioners and politicians in promoting a more significant and extensive federal role in the industrial relations arena. Whether the High Court will, indeed, be amenable or susceptible to these creative interpretations of the constitutional text will become more apparent in the course of the present challenge by the States to the *Workplace Relations Work Choices Act*. 