HIGH COURT VALIDATES FEDERAL GOVERNMENT’S IR REFORMS

Introduction
In the first edition of the Commercial Law Journal, I wrote that the High Court was likely to validate the Federal Government’s controversial industrial relations reforms. On 14 November, by a majority of 5-2, the High Court found the WorkChoices legislation to be a valid exercise of the Commonwealth’s powers, in particular s51(20) of the Constitution (the corporations power). In this follow up article, I explore the High Court’s lengthy consideration of the challenge to the laws, what it found and why, and what this means for the future of the Constitution and the States.

Background
Before considering the High Court’s verdict on the industrial relations reforms, it will be necessary to outline briefly the main contents of the WorkChoices legislation. Given space restrictions, I will focus on the most important of the changes.

Section 3 of the Act sets out the main object of the legislation, which is to provide a framework for cooperative workplace relations between employers and employees in such a way that promotes the economic prosperity and welfare of the Australian people. The Act sets out to do this by, among other things, encouraging the pursuit of low unemployment, low inflation and international competitiveness through a flexible labour market, establishing a national industrial relations system, encouraging agreement making about workplace conditions between an employer and an individual employee, and providing a minimum safety net of terms and conditions for workers.

Constitutionally, as indicated, the Act is premised largely on s51(20), the corporations power. This is evident by the definition of ‘employer’ in section 4 of the Act, defined largely in terms of constitutional corporations. The Federal Government has estimated that 85-90 percent of Australian workers are employed by corporations, so the reach of the Act is significant.

Chief among the aims of the Act are to encourage individual workplace agreement making between an individual and employer through the making of Australian workplace agreements (AWAs). Although AWAs have been possible since the 1996 industrial relations laws were introduced, there has been a relatively low take-up of this option. The Government has committed itself to at least a doubling of the number of registered AWAs by the time of the next election. One of the reasons that AWAs have not been popular in the past is that proposed agreements needed to go through a vetting process with the Employment Advocate, and had to pass the no-disadvantage test. In other words, the AWA had to make the worker better off, on balance, than the relevant award or enterprise agreement that would have otherwise applied to the worker. While it could sometimes be a matter for debate whether an AWA made a worker better off than the alternative, the requirement existed. One of the important changes made by the new laws is the removal of the no disadvantage test. This is expected to increase the percentage of the workforce covered by AWAs. No longer does the Employment Advocate check that an agreement meets the no disadvantage test, or in other words makes the worker better off, on balance, compared with the relevant award. The option of collective agreements remains, as do awards. However, an extensive review and simplification of awards has commenced, with their number to be

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2 Further, now all agreements are to go to the Employment Advocate, whereas previously many agreements would be registered with the Australian Industrial Relations Commission.
reduced from 4000 to 400, and their content reduced from the previous 20 allowable matters to a list of 13 allowable matters.

The changes also introduced a new body to deal with industrial relations matters, the Australian Fair Pay Commission (AFPC). The AFPC has taken over many of the functions formerly carried on by the Industrial Relations Commissions (at Federal and State level), in particular the setting of the minimum wage, and reviews of minimum working entitlements. The AFPC does not have the status of a court as the Industrial Relations Commissions do. It is headed by an economist rather than a judge/lawyer. The AFPC was set up to ensure compliance with the new Australian Fair Pay and Conditions Standard, which set out minimum guarantees of working conditions in the areas of minimum pay rates, maximum ordinary hours of work, and minimum entitlement to paid annual leave, carer’s leave and sick leave. The AFPC sets and reviews minimum rates of pay for particular kinds of occupation. It uses as a baseline the minimum rate of pay that existed under the ‘old’ system.

The Act also places further restrictions on the ability of workers to legally withdraw labour, in that a secret ballot, conducted by the Australian Electoral Commission, must first be held. A majority of workers entitled to vote must vote in favour of the strike before it can legally occur. The Minister has the power under the Act to unilaterally declare a strike is illegal, if he or she believes the strike is contrary to the national interest or dangerous to national safety or security. The right of employees to access unfair dismissal laws is reduced, because such laws do not apply to those who employ fewer than 100 employees (State discrimination laws continue to apply to all employees, so employees dismissed or otherwise discriminated against for these reasons will continue to have redress). Union entry into the workplace is further restricted.

The Act is clearly intended to provide for a national regime of industrial relations, with State laws in various areas of employment deemed to be invalid. These include those applying to employment generally, those intending to regulate working conditions, providing for agreement making in relation to the terms and conditions of employment, and providing for rights and remedies regarding termination of employment.

**Challenge to Laws**

Several states, together with union groups, challenged the validity of the legislation. They argued particularly with the use by the Commonwealth of the corporations power to legislate a comprehensive industrial relations regime. By a majority of 5-2, the High Court confirmed the validity of the Act. The reasoning of the majority (joint judgment) and that of the dissentients will now be considered.

**Joint Judgment**

Gleason CJ, Gummow Hayne, Heydon and Crennan JJ participated in a joint judgment, considering a variety of arguments to suggest the law was invalid.

(a) **External/Internal Distinction**

The States had sought to resurrect a distinction suggested by Isaacs J in *Huddart, Parker and Co Pty Ltd v Moorehead* in relation to matters that were external to a corporation. According to his Honour, the reach of s51(20) was confined to regulating the conduct of corporations in their transactions with or as affecting the public. Isaacs J thought this was necessary given that the *Constitution* allowed the States

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3 S112
4 The Act contains transitional provisions, and makes special mention of the position of Victoria, which had previously referred its industrial relations powers to the Commonwealth.
5 *New South Wales v Commonwealth; Western Australia v Cth; South Australia v Cth; Queensland v Cth; Australian Workers’ Union v Cth; Unions NSW v Cth; Victoria v Cth* [2006] HCA 52 (14 November 2006)(New South Wales v Commonwealth)
6 (1909) 8 CLR 330
8 396
power over the incorporation process. In order to make this power effectual, States must also have
power over all matters of internal administration necessary to produce a corporation as a completely
equipped body ready to exercise its functions. This included employment terms and conditions.9

The joint reasons noted that the decision in Huddart Parker had been overruled in 1971,10 and was
unacceptably tainted by long-discredited reserved powers doctrine. A variety of views had been
expressed by members of the Court as to the true scope of the s51(20) power, such that it was in any
event of very weak precedent value.

The joint reasons noted some telling weaknesses in the suggested distinction. Firstly, they questioned
the reason for assigning relationships between the corporation and its employees to the class of internal
relationships. Isaacs’ touchstone of laws necessary to provide a completely equipped body ready to
exercise its faculties and capacities would mean that the States would regulate the initial employment of
employees, but not any subsequent solicitation of staff. The raising of funds would be a difficult matter
– if it were the issue of shares to an existing shareholder, it would be an internal matter, but borrowing
from a bank would be an external matter. It was unclear how a public offering of shares would be
classified. There was little rationale for treating the raising of funds differentially, as Isaacs’ approach
would imply. The distinction between the internal and the external was useful in the context of the
conflict of laws, from whence it came, but was of questionable value in interpreting a Constitution
which did not express such a distinction. The joint judgment noted that

To draw the line between what is internal and what is external … necessarily reflects a conclusion about the content of
federal legislative power which stems not from the terms in which the power is granted, but from a priori assumptions about
division of power … Adopting a distinction which is derived from choice of law rules and distinguishes between matters
internal and external to a corporation approaches the question in a way that distracts attention from the issues that must be
considered.11

(b) History
The States had argued that a narrow interpretation of the s51(20) corporations power was justified
having regard to the intention of the founding fathers, and the history of failed attempts to enlarge the
Commonwealth’s constitutional power over corporations and industrial relations.

The joint reasons noted that the initial draft of what would become s51(20) referred to the
Commonwealth’s ability to establish uniform laws throughout the Commonwealth concerning the status
in the Commonwealth of foreign and locally-created corporations. They noted that by the time the
Constitutional Convention met again in 1897, there had been a number of bank failures in Victoria,
resulting in many investors losing money. At the 1897 convention the clause was re-drafted to its
present form. Barton said the change had been made so that the Commonwealth could legislate on the
general subject of corporations, including regulating their operations.12 The court accepted this as some
evidence that the some of the founding fathers had realised that a broad corporations power was
necessary to achieve control over the activities of corporations, accepting that there had been little
discussion of the scope of the power, and that even if the subjective intentions of the founding fathers
could be gleaned, their relevance in interpreting the Constitution more than a century later was a matter
of conjecture.13

The joint reasons quickly rejected any suggestion that the failure of several referenda to enlarge the
Commonwealth’s powers over industrial relations and corporations were in any way relevant to the
questions it faced in this case. It was for the High Court, not the Australian people, to interpret the

9 396
10 Strickland v Rocla Concrete Pipes Ltd (1971) 124 CLR 468
11 Para 120-121
12 Official Record of the Debates of the Australasian Federal Convention, Adelaide, 12 April 1897 (439)
13 Para 145-147
Constitution. The success or otherwise of referenda proposal may depend on how the question was phrased, or on whether the proposal enjoyed bi-partisan support or not.  

(c) Ambit of s51(20) Power

The joint reasons considered the main cases involving the corporations power, expressing their agreement with the broad view of Gaudron J in *Re Pacific Coal Ltd*  

that the power extended to regulation of the activities, functions, relationships and business of the corporation, including the creation of rights and privileges of a corporation, the imposition of obligations on it, the regulation of the conduct of those through whom it acts, its employees and shareholders, as well as the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business. The test espoused in *Re Dingjan* of discrimination — that the law must, to be valid under s51(20), single out the corporation for special treatment, or in other words, the fact that the organisation is a corporation must be significant in the way the law applies to it (ie the law applies to corporations but not other entities), did not assist the States here. As the joint reasons point out, there is no evident basis on which a law which imposes a duty or liability or confers a right or privilege only on a constitutional corporation should not be characterised as a law with respect to constitutional corporations. (The legislation challenged here did single out constitutional corporations for special treatment, with the definition of employer referring to constitutional corporations.)

(d) The Federal Balance

The States had argued that a narrow interpretation of s51(20) was justified by resorting to oft-tried and oft-failed arguments about federal balance. The joint reasons squarely rejected such arguments:

References to the federal balance carry a misleading implication of static equilibrium, an equilibrium that is disturbed by changes in constitutional doctrine such as occurred in the *Engineers* case, and changes in circumstances as a result of First World War. The error in implications has long been recognised.

The difficulty for those who have advocated some notion of a federal balance has always been to identify where it is that the line should be drawn. The joint judgment referred to this difficulty:

When it is said that there is a point at which the legislative powers of the Federal Parliament and the legislative powers of the States are to be divided lest the federal balance be disturbed, how is that point to be identified? It cannot be identified from any of the considerations mentioned thus far in these reasons, and no other basis for its identification was advanced in argument … But to be valuable, the proposition, that a particular construction of s51(20) would or would not impermissibly alter the federal balance, must have content, and the plaintiffs made no attempt to define that content.

(e) Should the Wide Terms of s51(20) be Read Subject to Other Heads of Power?

The plaintiffs also claimed that the apparently wide words of s51(20) should be confined in their application to the regulation of working conditions, given that another head of power, namely s51(35), is clearly designed to regulate working conditions.

14 Para 159-162
16 *Re Dingjan; Ex Parte Wagner* (1995) 183 CLR 323
17 Para 211
18 Para 77, referring to the judgment of Windeyer J in *Victoria v The Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353, 395-396 to the effect that ‘that the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the States was from an early date seen as likely to occur… The position of the Commonwealth .. has waxed, and that of the States has waned … that is a result of the paramount position of the Commonwealth Parliament in matters of concurrent power. And this legal supremacy has been reinforced in fact by financial dominance.’
19 Para 227. The joint reasons asked (rhetorically) about the content of the proposition that a particular construction of s51(20) would or would not alter the federal balance. It could not mean that if the suggestion were not accepted, States could no longer operate as separate governments exercising independent functions. It could only be advanced by proposing particular limits to the connection which must be established to demonstrate that a law was with respect to a constitutional corporation, on the basis that the result was seen to be desirable, or necessary.
Again, the joint judgment found little of substance in this argument. The High Court had long accepted the principle of dual characterisation, that a law could be characterised in more than one way. The acceptance of this view makes it difficult to suggest that s51(35) is the only head of power the Commonwealth might use to regulate working conditions, and was squarely inconsistent with the recent High Court decision in *Re Maritime Union of Australia; ex parte CSL Pacific Shipping Inc* validating the use of s51(1) to regulate the working conditions of some workers. While in the late nineteenth century it was thought that conciliation and arbitration was essential to resolve industrial issues, this is clearly not the only means to decide on industrial conditions. The Commonwealth should not be forced into a strait jacket in terms of how it provides for industrial matters by being forced to use only one system that was popular more than a century ago.

**Dissenting Judgments**

(a) Kirby J

Kirby J rejected the premise that s51(20) provided a basis for a general industrial relations law. Referring to the multitude of cases since federation on each aspect of s51(35), he said that if the view of the joint reasons be accepted here, those cases had been a complete waste of the Court’s time, since s51(20) had all along provided a basis for general industrial relations legislation, and almost all s51(35) cases had involved employers who were corporations. He wondered why in none of those cases the High Court had not considered the validity of the legislation pursuant to the corporations power.

Kirby J conceded that the meaning of the Constitution could and did change over time, and that what seemed clear to earlier generations may change over time. He defended the previous industrial relations system as one which had contributed to diversity and experimentation in law-making, intergovernmental co-operation within the Commonwealth, and the protection of rights. The independent determination of industrial disputes had the potential to promote and encourage collective agreements between the parties and economic fairness to those involved in industrial disputes. He claimed that such fairness would not necessarily be ensured by an unlimited focus of federal law on the activities of employers as constitutional corporations.

Kirby J accepted that in interpreting the meaning of s51(20) of the Constitution, the fact that the voters had rejected several attempts to enlarge the Commonwealth’s powers in the area of corporations and industrial relations. In doing so, he referred to the concept that the ultimate foundation of the legitimacy of the Constitution was the acceptance by the Australian people, concluding that the continuing refusal of the people to approve the creation of an general industrial relations power was, although not decisive, relevant in construing the meaning of s51(20).

The central question Kirby J had to address was whether the apparently broad terms of s51(20) should be read down given the presence of s51(35) in the Constitution. In the end, he found that it should. Kirby J at one stage seemed to deny the long-established constitutional principle that a law can be characterised in more than one way: he concluded that the rights, duties, powers and privileges which the Act changes, regulates or abolishes ‘properly pertain to the prevention and settlement of industrial disputes inherent in the comprehensive regulation of industrial relations’. He concluded this was the ‘proper characterisation of the new Act’, merely conceding that the new law may have ‘some impact’ on the rights, duties and obligations of corporations and their employees. He later acknowledged that a

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20 Bourke v State of New South Wales (1990) 170 CLR 276. At least where the other topics to which the law applies don’t appear in the Constitution with a positive prohibition. (The joint judgment confirmed this limitation did not apply in this case).
21 (2003) 214 CLR 397
22 Para 474
23 This position will be critiqued later in the paper.
24 Para 486
25 Para 508; Kirby J drew support for this position from the fact that the Court is regularly asked to interpret the intention of the Parliament based on a variety of information; similarly the intention of the voters could be gleaned and should be used.
26 Para 519
law could be characterised in more than one way, and provided it was within one head of power it was valid, as long as in so doing, the law did not avoid a safeguard, restriction or qualification in another head of power. However, he found that s51(35) did contain a safeguard, restriction or qualification, in requiring that the dispute be interstate in nature, and that it be resolved through a third party umpire. The Commonwealth could not circumvent these restrictions by resorting to s51(20) to regulate industrial relations.

Kirby J was concerned with the kinds of industrial relations laws that could be passed pursuant to s51(20). These would likely be focused on the corporation; they would not need to be decided by collective bargaining between the parties most immediately affected by the outcomes, taking into account the interests of those parties, the public interest, the concept of a fair go, due process, transparent negotiations, and where necessary public disposition by an independent decision maker. The requirements of s51(35) obliged those affected to collectively resolve their disputes. Adherence to these requirements would, Kirby J found, maintain an important guarantee of industrial fairness and reasonableness. Kirby J cautioned that the values inherent in s51(35) profoundly influenced the nature and aspirations of Australian society, and should not be swept aside lightly by the court:

Doing so would renounce an important part of the nation’s institutional history and the egalitarian and idealistic values that such history has reinforced in the field of industrial disputes and employment standards because of the constitutional prescription.27

Kirby J noted the large potential of the Commonwealth’s submissions in this case to exclude State law from operation in areas that for more than a century have been acceptable areas of State regulation.28 He suggested that all of the mentioned fields could now potentially be changed from their traditional place as subjects of State law and regulation. Kirby J noted that the Engineers decision was not a carte blanche for the Commonwealth; it did not contemplate the Federal Government using its heads of legislative power to destroy the States and their role in the Constitution. It would be contrary to the text, structure and design of the Constitution for the States to be reduced to service agencies of the Commonwealth.29 Such an approach could not be implemented by a broad view of s51(20) along the lines suggested here:

Such an outcome would be so alien to the place envisaged for the States by the Constitution that the rational mind will reject it as lying outside the true construction of the constitutional provisions, read as a whole, as they were intended to operate in harmony with one another and consistently with a basic law that creates a federal system of government for Australia.30

(b) Callinan J

After considering the Convention Debates concerning s51(35) and s51(20), Callinan J found no evidence that they intended to confer any intrastate industrial power on the Commonwealth.31 He thought that the failure of successive referenda to enlarge the Commonwealth’s power in this area was relevant to this case. He accused those who would ignore the referenda record of ‘subverting the democratic federalism for which the structure and text of the Constitution provide’.32

Callinan J clearly was not impressed with the Engineers precedent, stating that ‘it does not deserve the reverence which has been accorded to it’.33 Claiming that there were no particular established rules of constitutional interpretation, Callinan J elaborated on the principles he favoured – that the views of the founding fathers were important in giving meaning to the Constitution, that the High Court had in the

27 Para 570
28 Kirby J gave examples including education, health, town planning, security, transport, energy, environmental protection, aged and disability services, land and water conservation, agriculture, corrective services, gaming and racing, sport and recreation, fisheries and many Aboriginal activities.
29 Para 589
30 Para 589
31 Para 746
32 Para 772
33 Para 787; later he described it as an ‘unsatisfactory case, an early instance of judicial activism’ (para 925).
past (unacceptably) given the Commonwealth the ‘benefit of the doubt’ in constitutional cases,\textsuperscript{34} that the Constitution should not be interpreted to supplant the people’s voice under s128, nor to confer powers in duplicate. In this vein, Callinan J agreed with the view of Kirby J that powers within s51 had to be interpreted having regard to other powers mentioned in that section, so that none should be construed so as to render absurd the assignment of defined powers to the Commonwealth.

Callinan J completely agreed with arguments about the federal balance:

There is nothing in the text or the structure of the Constitution to suggest that the Commonwealth’s powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society … The Court goes beyond its power if it reshapes the federation. By doing so, it also subverts the sacred and exclusive role of the people to do so under s128.\textsuperscript{35}

He took issue with the view in the joint judgment that the founding fathers intended an extensive national power was required over corporations, and their status within the Commonwealth. He suggested that if there was no doubt about this, the founding fathers could have expressed their desire for such an expansive reading; however they had not.\textsuperscript{36} Callinan J agreed with the view of Kirby J that s51(20) should be read subject to s51(35), an argument with which issue will be taken later in this article.

Commentary on the Decision

(1) The Outcome Was Expected
It is first submitted that the judgment is hardly a quantum leap in constitutional interpretation generally, or in its view of the corporations power specifically. The outcome was expected.\textsuperscript{37} Technically, it is true that the High Court had not until this case had to directly confront the question of reliance on the corporations power to support an industrial relations law. However, there have been numerous dicta in a variety of cases confirming the ability of the corporations power to support such a law. The point was conceded in the Industrial Relations Act Case, so the High Court did not have to decide the issue.\textsuperscript{38} However, comments in the judgment of Griffith CJ in Huddart, Parker and Co support the position that the Commonwealth could regulate the working conditions of those who work for corporations under its s51(20) power.\textsuperscript{39} A majority of the Court in the Tasmania Dams Case agreed that at least the Commonwealth could under s51(20) regulate activities of a corporation conducted for the purposes of trade.\textsuperscript{40} Most importantly, five judges in the Re Dingjan Case support such a position.\textsuperscript{41}

\textsuperscript{34} Para 808
\textsuperscript{35} Para 819; Callinan J claimed part of the Court’s role was to ensure that the functions of the States were not reduced to trivial or subservient ones by a judicial process that made them mere facades of power (para 827).\textsuperscript{36} Para 882
\textsuperscript{38} Victoria v Commonwealth (Industrial Relations Act Case)(1996) 187 CLR 417
\textsuperscript{39} Huddart, Parker and Co Pty Ltd v Moorehead (1909) 8 CLR 330, 348
\textsuperscript{40} Commonwealth v Tasmania (1983) 158 CLR 1, per Mason Murphy Brennan and Deane JJ
\textsuperscript{41} Re Dingjan; Ex Parte Wagner (1985) 183 CLR 323; per Mason CJ Deane and Gaudron JJ (who in dissent supported the legislation’s validity and by implication confirmed the ability of a 51(20) law to regulate the employment relationship), together with majority justices Brennan and McHugh JJ who, while invalidating the law as not being sufficiently connected with corporations, confirmed that a law regulating the employment conditions of employees of a constitutional corporation would be valid (339 and 369 respectively).
In this context, it is difficult to agree with Kirby J’s observations about the ‘extraordinary zenith of the federal constitutional power … under s51(20) which the majority now upholds’.\(^{42}\) It has been clear in judgments from 1909 that some judges saw the corporations power as being wide enough to include industrial relations regulation. It is clear that were either the activities done for the purposes of trading test (as espoused in \textit{Tasmania Dams}) or the fact the organisation must be significant in the way the law relates to it test (as espoused in \textit{Re Dingjan}) applied by the court, the Commonwealth would have the ability to pass general industrial relations legislation under the s51(20) power.

\section{(2) Using Evidence of Failed Referenda to Interpret the Constitution}

One of the surprising features of the dissentients’ reasoning was a reliance on evidence of failed referenda as a basis for interpretation of the Constitution. The author is not aware of any previous cases where the High Court used such evidence, and the joint reasons rejected it. With respect, the author submits the joint reasons are correct on this aspect.

It is one thing to acknowledge, as Kirby and Callinan JJ do, that the ultimate foundation of the legitimacy of the Constitution is derived from acceptance by the Australian people. It is quite another to assert from this that the refusal of Australians to countenance a general industrial relations power for the Commonwealth at a referendum is at all relevant to interpretation of the Constitution.

For one thing, it is the role of the High Court, not the Australian people, to interpret the Constitution. This is one of the two primary roles that the Court has. It is a serious mistake to suggest that in exercising this power, the Court should be influenced by what may have been voted on at a referendum. For one thing, referenda have proven notoriously difficult to pass. The experience in Australia has been that unless both major political parties/groupings support the proposal, it has little prospect of success. The Australian people have shown a great reluctance to depart from the original document, and s128 provides for a very stringent procedure for change to the Constitution, including a majority of people in a majority of states. The success or otherwise of a referendum can depend on how the particular question is asked, who is asking it, general economic and social conditions at the time, and the level of public awareness of the issue.

Would those who advocate results of a referendum being taken into account in interpreting the Constitution also suggest that public opinion evidenced by opinion polls should also be relevant in constitutional interpretation? After all, this is also the expression of the will of the people. Further, as the joint reasons indicate, proponents of this view must argue that there is some kind of equivalence between the law now challenged and the one put to referendum.\(^{43}\) Yet this cannot be the case.\(^{44}\)

\section{(3) Arguments About the Federal Balance}

Perhaps the clearest division of power among the Court occurred on the question of the federal balance.

In the author’s view the joint judgment is clearly correct with respect on arguments about the federal balance. The perennial problem for any judge wishing to read down otherwise broad terms in the list of s51 powers in the interests of preserving some kind of federal balance has been to elucidate where it is that the boundary lies.\(^{45}\) As the joint judgment suggests, those who advocate a federal balance struggle

\(^{42}\) Para 497  
\(^{43}\) Para 159  
\(^{44}\) In terms of the relevance of history, different views emerged in the case as to the importance of the founding fathers’ intentions in interpreting the Constitution. This article will not address this point in any detail, but the author agrees with the joint reasons that ascertaining the founders’ intentions can be similar to pursuing a mirage, in that it may not be possible or useful to work out a single collective view of a particular section of the Constitution, or even if it could, that what some thought words meant more than a century ago should necessarily govern interpretation of the Constitution today.  
\(^{45}\) Perhaps the best example of the futile attempt by some members of the High Court to resort to federal balance arguments occurred in the interpretation of the external affairs power, where dissenting judges advocated a narrow view of the Commonwealth’s ability to legislate on the topic of external affairs, in order to preserve what they saw as the federal balance. They saw in s51(29) the potential to undermine the entire federal system by allowing the Commonwealth to legislate on any topic, provided it had been the subject of a treaty: \textit{Commonwealth v Tasmania (Tasmania Dam Case)}(1983) 158 CLR 1.
to articulate ‘the content of a proposition that a particular construction of s51(20) would or would not impermissibly alter the federal balance’.\(^{46}\) In other words, there is nothing in the wording of s51(20) that would indicate the kinds of limits that those who wish for a stronger role for the States would wish, such as a complete exclusion in the area of employment matters, or a distinction between the internal and the external. These suggestions meet with the difficult to dismiss argument that if the founding fathers had intended such limits to appear, they should have written them into the Constitution. They did not.

As the joint reasons suggest, there is no basis upon which to identify the point at which the federal balance is unconstitutionally altered by a federal law. Each judge and each individual would have their own idea as to an appropriate federal balance, and the risk is that a judge would be guided by their own idiosyncratic subjective view of the ‘correct’ federal balance, leading to great uncertainty and inconsistency. Alternatively, a judge may seek to maintain the same federal balance that the founding fathers created as at 1901, an undesirable and ultimately fruitless task given that the Constitution was designed to be a living, breathing document intended to change as the nation it seeks to serve changes. The Constitution should not and cannot be frozen in time.

The author cannot agree with the comment of Callinan J that the Constitution ‘provides for a federal balance’.\(^{47}\) Of course, there is no mention of a federal balance in the Constitution. The Constitution is based on the idea that Australia is a federal system, but guarantees no particular powers to the States, provided a Commonwealth law is supported by a head of power and is consistent with the Constitution. It provides the Commonwealth with powers, with the residue (which is not defined) belonging to the States. The idea that the Constitution contains any particular federal balance is a throwback to the pre-Engineers days when some wished to read doctrines into the Constitution that were not there. That suggestion was decisively rejected by the Australian High Court 85 years ago. It is far too late to reconsider it now, or to make the same suggestion but cloak it in terms of ‘federal balance’.

The author cannot agree with the comment of Callinan J that the ‘High Court goes beyond power if it reshapes the federation’.\(^{48}\) With great respect, does the High Court not reshape the federation with any new interpretation it provides to the Constitution? Did the High Court not reshape the federation when it validated the Commonwealth’s takeover of income taxation?\(^{49}\) Did the High Court not reshape the federation when it validated the Commonwealth’s prohibition of a Tasmanian dam?\(^{50}\) Did it not reshape the federation when it invalidated a series of State taxes?\(^{51}\) This was part of the reason for the introduction of the GST and the guarantee to the states of a revenue base. It seems hardly believable that a High Court judge should deny the Court’s ability or power to reshape the federation. The Court has reshaped the federation over more than one century. It is given the power under the Constitution to interpret that document.\(^{52}\) The reality is that interpretations have changed over time. It is quite wrong, with respect, to suggest, as Callinan J does, that reshaping the Constitution is the ‘sacred and exclusive role of the people’.\(^{53}\) The people have the power to change the words of the Constitution but it has long been accepted that the meaning of the words does change, and the High Court is the body charged with the interpretation of the words. The Constitution means what the High Court says it means.

\((4)\) **Should the Existence of One Head of Power in the Constitution Affect the Interpretation of Other Heads?**

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Dissentients in this case, Gibbs CJ Wilson and Dawson JJ accepted the federal balance argument but it did not commend itself to the majority of the court.

\(^{46}\) Para 226

\(^{47}\) Para 812

\(^{48}\) Para 819

\(^{49}\) South Australia v Commonwealth (The First Uniform Tax Case)\((1942)\) 65 CLR 373

\(^{50}\) Commonwealth v Tasmania\((1983)\) 158 CLR 1

\(^{51}\) Hemattie Petroleum Pty Ltd v Victoria\((1983)\) 151 CLR 599; Ha v New South Wales\((1997)\) 189 CLR 465

\(^{52}\) S76(1) Commonwealth Constitution

\(^{53}\) Para 819
Dissentients Kirby and Callinan JJ sought to limit the apparently clear wording in s51(20) by claiming that they should be read down to take into account other heads of power, in particular s51(35).

This is submitted also to be a very difficult argument to run. The High Court re-affirmed most recently in 2003 that the Commonwealth could rely on s51(1) to regulate the industrial conditions of workers. It made no mention of this power being limited by the contents of s51(35).

Let us consider for a moment the suggestion that one head of power should not be read so widely as to disturb the distribution of powers elsewhere in s51. This suggestion was made and rejected during the Tasmanian Dams Case. A broad reading of the external affairs power in that case has not destroyed the legislative competence of the States, as some alarmist views claimed at the time. Acceptance of this proposition would mean that, for example:

(a) the power over the trading activities of trading corporations in s51(20) would be confined to only apply to trading activities involving an interstate or overseas element, lest the distinction made in s51(1) between intrastate trade and others be lost;
(b) the power over postal, telegraphic and other like services be confined to things corporations do, lest the distinction between regulating corporations and non-corporations be lost; and
(c) the Commonwealth’s ability to legislate for the introduction of treaties into Australia would be confined to topics on which the Commonwealth already had power by virtue of another head of power.

These suggestions need only be considered to be completely dismissed. The Constitution does not state or require that one head of power be read in light of others, or be limited because of other heads. The fact that s51 powers are subject to this Constitution is taken to mean sections of the Constitution other than s51. It would have been easy for the founding fathers to state that the powers contained in s51 should be read subject to each other – this was not declared to be the position. Each of the heads in s51 received individual attention in the debates. It would soon lead to a confusing mess if each Commonwealth law were scrutinised, not only in terms of whether a positive head of power supported it, but also by whether validating such a law would affect some unexpressed restriction related to another head of power that could also be relevant. Such an approach would be inconsistent with orthodox constitutional doctrine that a law can be characterised in more than one way.

Implications of the Decision and Conclusion

It is true as the dissentients say that the decision potentially opens up other areas to federal regulation. However, it would be naïve to think that the Commonwealth did not already have defacto control over large parts of health and education in Australia, given their clear financial dominance over the States. Of course, the Commonwealth is able indirectly through the use of tied grants to the States to influence areas over which it has no direct constitutional power. In the 2006-2007 year these will total $27 billion. The Prime Minister stated after the decision was handed down that he did not intend to use the decision as a platform for a wholesale takeover of hitherto State functions.

54 Re Maritime Union of Australia: Ex Parte CSL Pacific Shipping Inc (2003) 214 CLR 397
55 In Callinan J’s words, ‘no single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament. Each provision of the Constitution should be regarded, not as operating independently, but as intended to be construed and applied in the light of other provisions of the Constitution’ (para 812)
56 This is, with respect, completely circular because if the Commonwealth had another head of power anyway, it presumably would not require the external affairs power at all.
57 This is expressed as such because s51(35) does not in its terms impose any overall restrictions on heads other than s51(35); it merely confines the s51(35) power to conciliation and arbitration and disputes extending beyond one state. The Constitution does not provide that the only law about industrial relations that can be valid is one consistent with the s51(35) restrictions, yet that is what the dissentients would read into other heads of power. The author then believes that to confine other heads of power by these express limits to the s51(35) power would be to apply unexpressed restrictions on other heads of power.
58 Para 833
59 Budget Paper No 3, 2006 Commonwealth-State Financial Relations
We have been waiting for many years for a definitive statement of the extent of the Commonwealth’s corporations power, and the decision provides certainty as to the broad scope of the section. It reflects a refusal to be bound by what the founding fathers may have considered the section to mean, and an acceptance that what is required of our Constitution in the 21st century may be very different from that envisaged in the last years of the 19th.