A HEAD FOR BUSINESS REGULATION – THE CORPORATIONS POWER AND THE FEDERAL GOVERNMENT’S WORKPLACE RELATIONS REFORMS*

Introduction

On 2 December 2005, after months of discussions about proposed changes to the industrial relations regime in Australia, the Senate finally agreed to an amended version of the changes. Even before the legislation had been passed, several State Premiers had foreshadowed their intention to challenge the legislation on constitutional grounds. It is not surprising, since the Australian Labor Party is in government in each Australian State and Territory, and many would argue that industrial relations policy is the fundamental policy difference between the Coalition parties and the Australian Labor Party, the other party likely to be in a position to form a government in Australia for the foreseeable future.

This article considers whether the legislation as enacted is likely to withstand constitutional scrutiny by the High Court when the challenge is eventually heard.

Outline of Legislation

It is first necessary to outline the main features of the legislation in order to assess whether the Act is likely to be valid constitutionally. Of course, when legislation almost 700 pages in length is being considered, it is not possible to consider each individual section. Accordingly, the article focuses on major changes.

The legislation, actually an amendment to the existing Workplace Relations Act 1996 (Cth), is the Workplace Relations Amendment (Work Choices) Act 2005 (Cth). The changes are said to be designed to encourage high employment, improved living standards, low inflation and international competitiveness through higher productivity and a more flexible labour market. The changes will lead to a simplified national system of workplace relations, while providing a safety net for workers. At the heart of the changes is the encouragement given to individual employer and employee bargaining, and the further decentralisation of employee relations decision-making.  

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1 Section 3 of the Act sets out the main objects. They include also ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of employee entitlements, and the rights and obligations of employers, employees and their organisations, ensuring awards provide minimum safety net entitlements for award-reliant employees consistent with Australian Fair Pay Commission decisions and which avoid creating disincentives to bargain at the workplace level,
The Act contains important definitions of employer and employee. An employee is someone employed by an ‘employer’ as defined in s4AB. This definition, crucial to the question of the constitutionality of the provisions, will be considered in more detail later, but clearly relies largely on the corporations power. An employer includes a business entity that is a constitutional corporation. This will cover the vast majority of workers, since according to the Federal Government’s estimates in 2000, corporations employ at least 85% of non-farm labour in Australia.

It is evident that the intention is to override most of the existing State industrial relations jurisdiction. This is evidenced in section 7C of the amending Act which states that the law excludes State or Territory industrial law, State laws regarding employment generally, State laws dealing with all leave (excluding long service leave), State laws providing for a court or tribunal to deal with remuneration, State laws providing for the variation of an employment agreement on the grounds of fairness, and State laws governing rights of entry to the workplace to unions (excluding entry on the ground of occupational health and safety). In effect, State laws dealing with any of the above matters will no longer apply.

However, State laws relating to other work-related matters, including discrimination, superannuation, workers’ compensation, occupational health and safety, child labour laws, long service leave, public holiday (observance, not pay rates), method and frequency of payment of wages or salaries, deductions from wages and salaries, apprenticeship matters (not pay rates), industrial action, jury service, and union provisions, can continue to apply. Notably, state laws (including state awards) will no longer be able to include provisions about pay rates. Generally, an award of workplace agreement prevails over a valid State law in the event of inconsistency.

The Act establishes the Australian Fair Pay Commission (AFPC), which will take over many of the previous functions of the Australian Industrial Relations Commission. In particular, the AFPC is responsible for the setting of minimum wage levels in Australia.

The legislation provides some safety net of wage entitlements through the Australian Fair Pay and Conditions Standard (AFPCS). These are guaranteed supporting harmonious and productive workplace relations, balancing the right to take industrial action for the purposes of collective bargaining at the workplace level with the need to protect the public interest, ensuring freedom of association, protecting the competitive position of young people in the labour market, assisting employees to balance their work and family responsibilities, preventing and eliminating discrimination in the workplace, and assisting in giving effect to Australia’s international obligations regarding labour standards.

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2 S51(20) of the Constitution
4 S7D, subject to exceptions dealing with occupational health and safety, workers’ compensation, apprenticeships, or other prescribed matters
5 S7I
minimum entitlements, and any workplace agreement that provides for lesser entitlements for employees will be invalid. The AFPCS applies to five conditions of employment:

(a) basic rates of pay and casual loadings
(b) maximum ordinary hours of work
(c) annual leave
(d) personal leave
(e) parental leave

The Act encourages the making of an individual employment agreement between an employer and employee, called an Australian Workplace Agreement (AWA). Collective agreements may be made between employees collectively (with or without union involvement) and an employer. The Act provides for an expedited ‘approval process’ for an AWA – an agreement must be signed and dated by both parties, and the signatures must be witnessed. The agreement is then lodged with the Employment Advocate but, unlike the previous system, there is no vetting of agreements. In the past, an AWA has had to be approved by the Employment Advocate, who would make sure the agreement passed the ‘No Disadvantage’ test. In other words, in the past the Employment Advocate would check to make sure that the agreement did not, on balance, make the worker worse off than the worker would have been under the relevant award. The No Disadvantage test does not appear in the new regime, and the Employment Advocate will no longer be able to reject an agreement that in his or her opinion in fact makes the worker worse off, on balance, than the award entitlement. Mandatory and prohibited content of an AWA is prescribed. Collective agreements, made between an employer and groups of employees (with or without union representation), remain available.

The amendments make it a serious offence, punishable by a maximum of 60 penalty units, to engage in or organise, or threaten to engage in or organise, any industrial action, take or threaten to take other action, or refrain or threaten to refrain from taking any action, intending to coerce another person to agree, or not to agree, to make, approve, lodge, vary or terminate a collective agreement. Similar provisions apply to AWAs.

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6 S89A(2)
7 Called the Australian Pay and Classification Scales (APCs)
8 Stated as 38, plus ‘reasonable additional hours’. The average number of weekly hours can be averaged over a 12 month period (s91C(3))
9 Generally four weeks, with an ability for the employee to ‘cash out’ up to half of this (s92E)
10 S93E
11 S89(2)
12 S96. Employees must be given appropriate information about the agreement before being asked to sign it (s98)
13 S96A, s96B
14 A parent or guardian will be involved if the employee is under 18 (s98C).
15 S101, s101A-C
16 S101D-F
17 S104
The amendments recognise some existing rules regarding industrial action, but also make some changes. Industrial action is defined broadly in s106A to include refusal to attend for work, refusal to work, bans or limits on work, or performing work in a manner different from how that work is usually conducted, with the effect of delaying performance of the work. It includes an employer locking employees out. Industrial action may either be ‘protected’ action or ‘unprotected’ action. It is beneficial that industrial action be protected because during this time, no action may be brought against those involved in such action (apart from personal injury, or theft or destruction of property), and an employer cannot dismiss an employee for engaging in protected action.

In order to make action ‘protected’, it must occur during a bargaining period. The bargaining period is initiated by one party giving the other written notice to the other, and to the Commission, stating their wish to try to make a collective agreement with the other party. The bargaining period commences seven days after such notice is given. It must be after the expiry of the existing agreement. The bargaining period ends once an agreement has been reached, when one party tells the other they no longer wish to make a collective agreement, or if the period is terminated. The Commission can terminate a bargaining period on various grounds, including that it is satisfied either party is not genuinely trying to reach an agreement, that the industrial action is endangering life, that the action is adversely affecting the parties to the dispute and third parties.

The new laws also give the Minister power to terminate a bargaining period. Section 112 allows this to occur upon the Minister being satisfied that industrial action is being taken, or is threatened or probable, and such action is or would adversely affect the negotiating parties, provided the action would endanger the life or safety of some Australians, or cause significant damage to the Australian economy. The declaration is effective immediately. The effect is if workers continue to engage in industrial action after such a declaration, they are then engaged in unprotected industrial action, and can be sued and/or dismissed as a result.

Part VI of the Act makes provision for awards, focusing on their simplification and rationalisation. The amendments seek to reduce the number of awards, which currently total more than 4000 (Federal and State). Awards will be restricted in their content to 13 matters, a reduction from the current 20. Some topics are specifically excluded from awards. These changes will allow a

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18 Subject to exceptions involving reasonable concerns about health and safety
19 S108L
20 S108M
21 S107C
22 S107E
23 S107G, s107J
24 Including ordinary hours of work (including rest breaks), incentive-based payments and bonuses, annual leave loadings, ceremonial leave, public holidays, allowances for employment-related expenses, further skill requirements or site conditions, overtime or shift loadings, penalty rates, redundancy pay, stand-down provisions, dispute resolution procedures, types of employment, and conditions of outworkers (s116).
25 Including union rights to be involved in dispute resolution procedures, the number or proportion of employees that an employer may employ in a particular type of employment (eg casual), prohibitions on an employer employing workers in a particular type of employment (eg casual), maximum or minimum hours of work for regular part-time employees, restrictions on
further increase in the number of employees employed on part-time and casual arrangements. Australia already has one of the highest percentages of casualised workforce in the world. Awards must not in future refer to State or Territory boundaries in their terms and conditions.

The amending legislation places restrictions on the right of a union representative to enter a workplace. Such a person will need to have a permit to do so, which is good for three years. In order to obtain a permit, the Registrar must be satisfied the applicant is a fit and proper person. The Act allows the permit holder to enter business premises if satisfied on reasonable grounds that a breach of the Act, an AWA, or an award or collective agreement is occurring on the premises.

An employer has the right under the new laws to request an employee to work on a particular public holiday. The employee will no longer be guaranteed penalty rates for so doing, but these may be negotiated. The Act (as amended by the Senate) allows the employee to refuse the request, and take the day off, if they have reasonable grounds for so doing.

In terms of transitional provisions, the Act lays down special rules for workers who were, at the time the amendments were passed, subject to an individual State employment agreement or a collective State employment agreement. These workers are able to take advantage of any State law conferring rights regarding annual leave, leave loadings, parental or carer’s leave, termination notice, redundancy pay, overtime or shift loadings, penalty rates, or rest breaks for either the duration of the agreement, a maximum of three years after the agreement was made, when the agreement is terminated or when a new one is negotiated, whichever is earliest. Similar protections have been extended to those subject to a State award.

As amended, the amendments exclude small businesses, defined as those with fewer than 15 employees, of the need to pay redundancy pay. Further, the Act limits the application of unfair dismissal rules, by restricting them only to employers of more than 100 staff. Further, the maximum acceptable probationary period (during which time the unfair dismissal rules do not apply) at the commencement of an employee’s employment has been increased from three to six months.
Constitutionality of Provisions

One of the key sections affecting the constitutionality of the amendments is s4AB, which defines the meaning of ‘employer’ for the purposes of the amendments. The Act is built on the meaning of employer and employee so the definition is crucial.

Employer is defined to mean:
(a) a constitutional corporation, so far as it employs, or usually employs, an individual;
(b) the Commonwealth, so far as it employs, or usually employs, an individual;
(c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or
(d) a person or entity so far as the person or entity, in connection with constitutional trade or commerce, employs, or usually employs, an individual as a flight crew officer, maritime worker or waterside worker;
(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
(f) a person or entity that carries on an activity in a Territory in Australia, so far as the person or entity employs, or usually employs, an individual in connection with the activity carried on in the Territory.

The definition of ‘employee’ for the purposes of the legislation links with the above definition.

As drafted, the scheme of the amending Act clearly seeks to rely on three heads of Commonwealth power. The main head used (referred to in (a) above) in the definition of employer is the corporations power, and most attention will be paid to this argument in the paper. Other heads of power, namely the Territories power and trade and commerce power, will briefly be considered. Of course, the Commonwealth will not seek to rely on the direct power it has over industrial relations in the Constitution. This power is limited to conciliation and arbitration of industrial disputes, which implies the involvement of a third party in the prevention and settlement of disputes. This does not easily with the intention behind these changes, which is to encourage workplace bargaining at the enterprise level. The likelihood that each of these powers will support the new laws will now be considered.

(a) Territories Power
Clearly, subsections (e) and (f) of the definition of employer in the amended act seek to rely on the territories power. Dicta in various cases suggests that s122 could be used to validate the above provisions, at least so far as they apply to either bodies corporate incorporated in a Territory, or those carrying on an activity in a Territory. Section 122 has been held to be an extremely broad power, certainly not constrained by subject matter and perhaps not constrained by other sections of the Constitution. For example, in Davis v Commonwealth, the High Court found that s122 could extend to the incorporation of a corporation in the Australian Capital Territory, and to the

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35 S4AA defines an employee as a person usually employed by an employer as defined in s4AB. Further, ‘employment’ is defined in s4AC to mean the employment of an employee (as defined) by an employer (as defined).
36 s51(35) is the conciliation and arbitration power
37 Spratt v Hermes (1965) 114 CLR 226 (Barwick CJ 241-242)
38 (1988) 166 CLR 79
protection of its corporate name and symbols. It is submitted that if the Commonwealth can control incorporation within the Territory, it could control things the Territory-incorporated body might do once incorporated (such as employ staff). Similarly, if the Commonwealth can rely on s122 to protect a corporation’s name and symbols, surely it can control activities a corporation (or any business) might carry on, at least within the Territory.

In other contexts involving s122, members of the High Court have spoken of the need for ‘sufficient nexus’ between the law and the territory.

Perhaps the only difficulty confronting the Act’s application to the Territories would occur if the law was not held to be supported by the other heads of power, namely s51(1) and (20). For in that case, an issue would arise as to whether it was intended that the Act apply to the territories only if it applied elsewhere in Australia, or whether it was intended to apply to the territories regardless. Arguably, given that parts of the employer definition dealing with territories apply to corporations, other entities and individuals alike, it was intended that the territories provisions were intended to stand alone, and not be read only with the other provisions. There is authority for the proposition that the s122 power should not be subject to limits imposed on s51 heads of power.

(b) Corporations Power
Given the definition of employer and employee, the Act has clearly been written in reliance largely on the s51(20) corporations power. This is not surprising, since it has been estimated by the Federal Government that corporations employ between 85-90% of non-farm labour in Australia. It could thus support application of the law to the vast majority of employment relationships in Australia – on the proviso that the corporations power extends to making laws about the working conditions of corporations, and that the organisation in

39 Mason CJ Deane and Gaudron JJ (97), Brennan Toohey (117)

40 Eg Brennan J in Newcrest Mining (WA) Limited v Commonwealth of Australia (1997) 190 CLR 513 (Newcrest Mining): “the nexus which is sufficient to attract the support of s122 to a law providing for the compulsory acquisition of property is that the property be situated within the Territory … if the territories power could be exercised to acquire property in a State, it could distort or affect the operation of those provisions of the Constitution which express the federal compact and protect the constitutional interests of those living under it”; to like effect Dawson J “all that need to be shown to support an exercise of the power under s122 is that there is a sufficient nexus or connection between the resultant law and any territory”

41 Spratt v Hermes (1965) 114 CLR 226,278 – Windeyer J considered this matter, concluding that if s51 did not support the non-territorial aspects of the law, s122 would not support the territorial aspects unless there was a clear indication that the law should nevertheless apply in the territories.

42 If precedent is required, the court in the Australian National Airlines Commission (ANAC) case declared the law invalid, except as it was supported by s122: Attorney-General (WA) v ANAC (1976) 138 CLR 492

43 Brennan CJ, Dawson Toohey McHugh JJ in Newcrest Mining: Attorney-General (WA) v ANAC, n39, p513 (Stephen J) and p525 (Mason J)

44 Breaking the Gridlock: Towards a Simpler National Workplace Relations System Discussion Paper 1: The Case for Change (Canberra October 2000, then Minister for Employment, Workplace Relations and Small Business Peter Reith)

45 Or more precisely, constitutional corporations (ie trading or financial corporations)
issue fits the definition of being a trading or financial corporation.\textsuperscript{46} To the extent that the new laws punish the conduct of individuals, there is precedent allowing for laws operating on individuals to be supported by the corporations power.\textsuperscript{47}

In more than 100 years of jurisprudence, the High Court has never answered this question ie whether the Commonwealth can regulate the working conditions of employees of constitutional corporations, definitively, hence uncertainty remains. The issue was mentioned in \textit{Victoria v Commonwealth (Industrial Relations Act Case)},\textsuperscript{48} but did not arise for determination, because the plaintiff conceded that s51(20) could be used to regulate working conditions of employees of corporations. The High Court did not decide the matter:

If, as is conceded, the Parliament can legislate pursuant to s51(20) … as to the industrial rights and obligations of employees and employer corporations of the kind specified in s51(20) … it can also legislate … as to the conditions to attach to those rights and obligations.\textsuperscript{49}

Dicta in some High Court decisions indicates support for the view that the Commonwealth may use its corporations head in the industrial relations arena. In the early case of \textit{Huddart Parker and Co Pty Ltd v Moorehead}\textsuperscript{50} concerning anti-competitive regulation of corporations, Griffith CJ commented that

The Commonwealth Parliament can make any laws it thinks fit with regard to the operation of the corporation, 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.\textsuperscript{51}

In \textit{Re Dingjan ex parte Wagner},\textsuperscript{52} the Court considered a law giving the Australian Industrial Relations Commission power to review employment contracts of employees. Importantly, the power was not confined only to contracts involving a constitutional corporation.\textsuperscript{53} The High Court found 4-3 that the legislation was invalid. Yet even here can be found broad expressions of support for the Commonwealth’s ability to regulate working conditions under s51(20). In the majority, Brennan J agreed that ‘a law conferring power to vary

\textsuperscript{46} This issue is largely settled law and is not explored further in the article – case examples include \textit{R v Trade Practices Tribunal; ex parte St George County Council} (1974) 130 CLR 533 and \textit{R v Federal Court of Australia; Ex Parte WA National Football League (Inc)} (1979) 143 CLR 190
\textsuperscript{47} Eg \textit{R v Australian Industrial Court; ex parte CLM Holdings Pty Ltd} (1977) 136 CLR 235; \textit{Actors’ Equity v Fontana Films Ltd} (1982) 150 CLR 169
\textsuperscript{48} (1996) 187 CLR 416
\textsuperscript{49} 539 (per Brennan CJ Toohey Gaudron McHugh and Gummow JJ)
\textsuperscript{50} (1909) 8 CLR 330 (\textit{Huddart Parker})
\textsuperscript{51} 348. The High Court found the legislation to be invalid as not supported by s51(20), but the actual decision reached can be largely ignored given the court was clearly influenced at the time by the reserved powers heresy eventually rejected by the Court in the \textit{Engineers case}
\textsuperscript{52} (1985) 183 CLR 323 (\textit{Re Dingjan})
\textsuperscript{53} Section 127A(2)(1) of the \textit{Industrial Relations Act 1988} (Cth) gave the Industrial Relations Commission power to review a contract on the grounds that it was unfair, harsh or against the public interest. The power of review was expressed to apply only to (a) in relation to a contract to which a constitutional corporation is a party (b) in relation to a contract relating to the business of a constitutional corporation (c) in relation to a contract entered into by a constitutional corporation for the purposes of its business, as well as others.
... a contract between a constitutional corporation and an independent contractor for work to be done for the purposes of the corporation’s business, would be supported by the corporations power. It is submitted that in this context there is no relevant difference between a contract of engagement of an independent contractor, and a contract of employment. In both cases, the person is engaged for the purposes of the corporation’s business.

Brennan J’s reference here to the fact that corporations employ workers for the purposes of their trading activities reflects a previous debate about the extent of the corporations power, and whether it extends only to regulating trading activities of the corporation, or would include non-trading activities also. Differences of opinion emerged on the High Court on this issue in the 1980s in the Actors Equity and Tasmanian Dam Case. Though various views were canvassed by the judges, there emerged from the Tasmanian Dams case a majority view that the Commonwealth can regulate both trading activities and non-trading activities carried out for the purposes of trade.

It would be hard to argue with the statement that a trading corporation employs staff for the purposes of trade – of course it must do so as corporations can only act through individuals. The author could not support an approach which asks which employees’ functions are directly related to trading activities and which are more indirect – he considers this would be an unproductive exercise requiring the drawing of fine and quite arbitrary lines. Broadly, it is suggested that a trading corporation employs all of its staff for the purposes of trade, and so the working conditions of all of that corporation’s staff are the legitimate concern of the Commonwealth under s51(20).

There appears to be a majority of the High Court in Dingjan prepared to accept the ability of the Commonwealth, to regulate, at least, the employment conditions of those employed by constitutional corporations. The dissenters clearly would, as they concluded the Commonwealth could also regulate the working conditions of sub-contractors to constitutional corporations under the corporations power. In addition, of the majority in that case, McHugh J clearly believed the Commonwealth could rely on s51(20) to regulate the

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54 Re Dingjan (339), similarly McHugh J ‘where a law seeks to regulate the conduct of persons other than s51(20) corporations or the employees, officers or shareholders of those corporations, the law will generally not be authorised by s51(20)’ – or in other words, if the law did seek to regulate the conduct of s51(20) corporations or their employees, it seems the law would be valid.

55 Actors’ and Announcers Equity Association v Fontana Films Pty Ltd (1982) 150 CLR 169

56 Commonwealth v Tasmania (1983) 158 CLR 1

57 Mason Murphy Brennan and Deane JJ. Mason Murphy and Deane JJ would go further, finding that the Commonwealth could under its corporations power regulate all non-trading activities of a constitutional corporation. However, at present this is not a majority view. (In the interests of clarity, the author notes the view that the Commonwealth can only regulate trading activities of a constitutional corporation is also a minority view). See for further discussion Anthony Gray ‘Precedent and Policy: Australian Industrial Relations Reform in the 21st Century Using the Corporations Power’ (2005) 10 (2) Deakin Law Review 440, George Williams ‘The Constitution and a National Industrial Relations Regime’ (2005) 10 (2) Deakin Law Review 498; and Ron McCallum ‘The Australian Constitution and the Shaping of Our Federal and State Labour Laws’ (2005) 10 (2) Deakin Law Review 460

58 Mason CJ, Deane and Gaudron JJ
employment conditions of those working for a corporation, as did Brennan J. Thus, five of the seven judges in Dingjan expressly confirmed the Commonwealth’s ability to legislate regarding working conditions of those who work for a corporation. Again, it is not submitted to be material constitutionally whether those persons are engaged under an employment contract or as an independent contractor.

The author considers that those who seek to challenge the validity of the legislation arguing that the corporations power does not support the law have two main grounds of attack:
(a) the internal/external distinction
(b) the law does not sufficiently discriminate/not sufficient connection with corporations

These arguments will now be canvassed.

**Argument 1 Historical Internal/External Distinction**

This argument is rooted in the very first High Court decision dealing with the corporations power, *Huddart Parker*. In that case, Isaacs J rejected the suggestion that the Commonwealth might regulate industrial relations of corporations. He viewed the power narrowly to include only the outward exercise of a corporation’s faculties and capacities. What he considered to be inward or internal matters concerning a company were, in his view, a matter for the States and not the Commonwealth to regulate. He specifically rejected the argument that the Commonwealth could prescribe a schedule of wages and hours for these corporations for the reason that

(it) is purely internal management and equipment, and in no way directly affects the exercise of their capacities of trading and their financial operations or other public capacities, nor is it incidental to the control of their activities

Consistently, Isaacs J held that the incorporation of corporations, being an ‘internal matter’, was also a matter for the States. His decision in *Huddart Parker* is worth considering because at least to the extent of the argument in the previous sentence, his views were upheld by the High Court in the *Incorporation Case* where the High Court scuttled the Commonwealth’s original Corporations Act on the basis s51(20) did not support laws for the incorporation of a company. This came as a surprise to the Commonwealth, and those wishing to challenge the 2005 amendments will no doubt ask the court to adopt more of the reasoning of Isaacs J in *Huddart*, specifically to

59 ‘if, by reference to the activities or functions of s51(20) corporations, a law regulates the conduct of those who control, work for (emphasis added), or hold shares or office in those corporations, it is unlikely that any further fact will be needed to bring the law within the reach of s51(20)” (369)
60 ‘a law conferring power to vary or set aside a contract between a constitutional corporation and an independent contractor for work to be done for the purposes of the corporation’s business where the contract is unfair or harsh or contrary to the public interest would be a law supported by s51(20)” (339).
61 396. More recently, the High Court has viewed a company’s relations with its employees as an act in trade and commerce rather than a purely internal act: *Concrete Constructions v Nelson* (1990) 169 CLR 595
62 *New South Wales v Commonwealth* (1990) 169 CLR 482
recognise the distinction between internal matters of a corporation (which they would argue are reserved to the States) and a corporation’s relations with outsiders (which are conceded to be a proper role for the Commonwealth).\textsuperscript{63}

However, there are strong reasons for believing the High Court will not adopt the view of Isaacs J to this extent. Firstly, there is a lack of historical evidence to support the position of Isaacs J.\textsuperscript{64} The actual decision in \textit{Huddart Parker} has been expressly overruled by the High Court\textsuperscript{65}, and is now recognised as being unacceptably tainted by the reserved powers heresy that characterised the first twenty years of the High Court’s interpretation of the \textit{Constitution}.

Further, there is ample support for the High Court’s view in the \textit{Incorporation Act} case that the Commonwealth did not have power over the incorporation process. First, s51(20) refers to the ability of the Commonwealth to make laws in respect of trading corporations \textit{formed} within the Commonwealth. A plain reading of the words\textsuperscript{66} would give most readers the impression that the Commonwealth could only legislate in respect of already formed corporations. However, a plain reading of the section does not disclose any distinction intended or implied between matters internal to a corporation and the external transactions to which the corporation is a party. The High Court has made it clear that the Constitution is to read free of unexpressed assumptions – it discarded the reserved powers and implied immunities assumptions as not being supported by the written words of the \textit{Constitution} (in an industrial relations case); it would seem at the very least bizarre to re-introduce different assumptions plainly again not supported by anything actually written in the \textit{Constitution}, presumably with the same (discredited) intention of preserving an area of regulation to the States.\textsuperscript{67} It is thus considered unlikely that the States seeking to challenge the legislation on this basis would be successful.

\textsuperscript{63} Zines has also made this link, suggesting that if the States have sole authority to create trading and financial corporations, it is not unreasonable to argue that those ‘matters which are part and parcel of creating a corporation and without which the corporation would be an empty shell, incapable of functioning as a juristic person at all, are similarly outside Commonwealth power’: \textit{The High Court and the Constitution} (4\textsuperscript{th} ed, 1997) p106

\textsuperscript{64} What is now s51(20) is based on s15(i) of the \textit{Federal Council of Australasia Act} 1885 (Imp), included in cl 52 of the \textit{Constitution} presented to the 1891 Convention. The provision referred to a power to legislate in respect of the status of foreign corporations and corporations formed in any State or part of the Commonwealth. The word trading was added at the 1891 Convention: S Corcoran Corporate Law and the Australian Corporation: A History of s51(20) of the \textit{Australian Constitution} (1994) 15 \textit{Journal of Legal History} 131

\textsuperscript{65} \textit{Strickland v Rocla Concrete Pipes Ltd} (1971) 124 CLR 468

\textsuperscript{66} The correct approach to interpretation of the \textit{Constitution}: \textit{Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case)} (1920) 28 CLR 129

\textsuperscript{67} Gaudron J (with whom Deane J agreed) in \textit{Re Dingjan} cautioned that s51(20) must be approached on the basis that it is construed according to its terms and not by reference to ‘unnecessary implications and limitations’ (364); similarly Zines ‘It is difficult to see how the concept of the federal balance can assist the construction of the power. There is nothing in the concept of federalism itself from which one can derive the view that certain activities of 51(20) corporations are required to be within the exclusive power of the States. That conclusion can only be reached if one assumes that certain areas should remain outside Commonwealth control – an assumption which does not derive from anything in the Constitution. It must ultimately rest on .. a doctrine of State reserved powers which in the end ultimately leaves the matter to the judge’s intuitions or predilections: ‘The State of Constitutional Interpretation’ (1984) 17 \textit{Federal Law Review} 277,280
Argument 2: Law is not Sufficiently Connected With Corporations

Another possible basis for challenging the new law is that it is not sufficiently connected with corporations. Past High Court Justices Gibbs and Dawson made comments in *Dingjan* broadly supportive of such a view of s51(20).

The argument might start with the accepted proposition that the mere fact that a law is addressed to constitutional corporations does not mean that the law is automatically supported by s51(20). The argument might continue with the proposition that the fact the corporation is a trading corporation must be significant in the way in which the law relates to it, (in order for the law to be supported by s51(20)), or in other words the nature of a corporation must be significant as an element in the conduct the law seeks to regulate. In declaring invalid the law challenged in *Re Dingjan*, Dawson J for example found that

The nature, indeed the existence, of a corporation is not in these circumstances significant as an element in the conduct which the law is attempting to regulate.

The required relationship is adopted merely as a means of introducing constitutional corporations as a peg upon which to hang legislation, not upon the subject of constitutional corporations, but upon an entirely different subject.

So the argument may be that the law is about the industrial conditions of workers, and the relations between employer and employee. Thus the law should be characterised as being one about industrial relations rather than corporations. Arguably, the Commonwealth has attempted to recite itself into power by introducing constitutional corporations as the ‘peg’ upon which to hang the legislation, a process to which Dawson J alluded in *Re Dingjan*. The nature of a corporation is not, the argument runs, inherently significant in the way the law works or what it intends to achieve. Absent the *Constitution*, the law would apply to the working conditions of all workers, regardless of whether their employer was corporatised or not.

This gives the argument its due but it is obvious to the author that this line of reasoning is deficient in many respects. Firstly, it seems to the author (with respect) that the assumption underlying the above is that a law can be

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68 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 per Barwick CJ (489-490), Menzies J at 502-503 and Walsh J at 519

69 Per Gibbs CJ in *Actors and Announcers’ Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, 182-183 (Wilson J agreed)

70 *Dingjan* per Dawson J at 347. However, Toohey J in that case rejected the test as being too narrow (352) and it was not applied by the majority of the court. Brennan J noted that while he did not disagree with the formulation, he preferred to express it in terms of discrimination (336) ie does the law discriminate between constitutional corporations and other persons, by reference to the rights it confers or duties it imposes. His Honour concluded that a validating connection could consist in the differential operation the law has on constitutional corporations (336).

71 347

72 This principle derives some support from the *Huddart Parker* case where Higgins J, for example, constrained s51(20) to laws about corporations ‘as corporations’, including status, capacity and the conditions on which business was permitted’. He would leave contracts a corporation might enter into (including employment contracts?) to the States (412-414). Similarly, O’Connor J found s51(20) could not support a law aimed at the domestic trade of a corporation (373-374). Again, however, the decision has been expressly overruled and is based on unacceptable reserved powers reasoning.
characterised in only one way. If the essence of a law is industrial relations, it
cannot be a law about corporations, or supported by the corporations power.
This assumption is clearly untenable; the High Court has accepted the principle
of multiple characterisation.\(^\text{73}\) Secondly, when the High Court has declared the
motive behind legislation as being irrelevant to its characterisation,\(^\text{74}\) it is
thought to unwise to dismiss legislation because it was written in particular
terms so as to meet questions about its constitutionality.\(^\text{75}\)

Thirdly, as indicated, five justices of the High Court in Dingjan (excluding
Gibbs and Dawson JJ) concluded that the Commonwealth could in fact regulate
the working conditions of workers of constitutional corporations under s51(20).
Brennan J, for example, who did not disagree with the above narrow test but
preferred his own test of whether the law ‘discriminated’ between constitutional
corporations and others, held this view, as did McHugh J. Implicitly then, five
of seven High Court judges have rejected the argument that regulating the
working conditions of a constitutional corporation’s workers is impossible
under s51(20) because the law is about industrial relations rather than
corporations, or that the nature of a corporation in such a case would not be
relevant in the way the law relates to that organisation, or there is not sufficient
connection/discrimination between a corporation and other entity. Clearly,
there is majority support for the reverse proposition, that a law regulating the
industrial conditions of employees of constitutional corporations does
sufficiently relate to the nature of the corporation, and is sufficiently connected
with a constitutional corporation to be justified by s51(20).\(^\text{76}\)

\(\text{(c) Trade and Commerce Power s51(1)}\)
Surprisingly,\(^\text{77}\) there is only minor reliance on the trade and commerce power to
justify this legislation. The section 4AB definition of ‘employers’ to whom the

\(^{73}\) Murphyores Inc Pty Ltd v Commonwealth (1976) 136 CLR 1. As an example in the industrial
relations context, McHugh J was emphatic in Re Dingjan ‘a law that penalises persons who
impose secondary boycotts that are designed to and likely to cause substantial damage to the
business of corporations is a law with respect to those corporations, notwithstanding that its
principal purpose is to outlaw secondary boycotts (368)(the Actors’ Equity situation); as was
Menzies J in Strickland that a law can be one with respect to corporations even though it is also
with respect to trade (510).

\(^{74}\) Eg Fairfax v Federal Commissioner of Taxation (1965) 114 CLR 1

\(^{75}\) Gibbs CJ in the Tasmanian Dams case upheld parts of the law based on s51(20)
‘notwithstanding some doubts as to whether the connection made by (the section) with trading
corporations by the use of those words ‘for the purposes of its trading activity’ is merely
contrived (119). However, the author with respect agrees with the reply by Zines that
‘whenever the Commonwealth is forced to limit the operation of an Act to the field covered by
the subject of a power, the total effect may be seen as contrived’ (The High Court and the
Constitution)(4\(^{\text{th}}\) ed, 1997) p94

\(^{76}\) This article will not consider the old argument that laws under s51(20) are confined to
regulating the trading activities of corporations ONLY because it is considered the argument
was rejected by a majority of the High Court in the Tasmanian Dams Case (Commonwealth v
Tasmania (1983) 158 CLR 1 per Mason Brennan Deane and Murphy JJ, Gibbs CJ Wilson
Dawson JJ dissenting), with no sign since of majority support on the High Court for such a
view. Such a narrow view is clearly not supported by anything express in the Constitution, nor
do the Convention Debates assist.

\(^{77}\) It is perhaps explained by historical reasons, given that particular industrial relations issues
have arisen in the past in the context of airline and maritime employees. It is also much easier
to make the overseas or interstate link with such workers.
Act applies includes a reference in subsection (d) to constitutional trade and commerce, but only in relation to flight crew and maritime workers. Hence the discussion of s51(1) will be short.

It seems that the Federal Government will be able to rely on the High Court’s decision in *Re Maritime Union of Australia; ex parte CSL Pacific Shipping Inc* to support this sub-section. There the High Court was in no doubt that

A ship journeying for reward is in commerce; those who co-operate in the journeying of the ship are in commerce and the wages of those persons and the conditions of their employment relate to that commerce.

There is other authority confirming the ability of the Commonwealth to regulate the working conditions of employees engaged in constitutional trade and commerce.

The author believes the Commonwealth could have relied on s51(1) to a greater extent than it has in passing these laws, but the Commonwealth would no doubt have been aware of the strict distinction that in the past has been upheld in s51(1) cases regarding, on the one hand, interstate and overseas trade and commerce, and on the other, intrastate trade and commerce. This explains why the definition of employer is as it is in the new law; there could be no argument that flight crew (at least, those involved in interstate or overseas flights) and maritime workers (presuming their activities relate, or relate largely, to ships travelling overseas and/or interstate) are involved in constitutional trade and commerce. There continues to be controversy, where a business is involved in a combination of constitutional and non-constitutional trade and commerce, about the extent to which the Commonwealth can regulate the business’s activities, which would include its employee relations. No doubt s51(1) might well be expanded in future to allow the Commonwealth greater regulation over economic affairs, but at present the Commonwealth clearly believes its corporations power gives it the best opportunity to effect the kinds of workplace changes it wishes.

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78 [2003] HCA 43  
79 For example *Australian Steamships Limited v Malcolm* (1914) 19 CLR 298; *R v Foster; ex parte Commonwealth Life (Amalgamated) Insurances Ltd* (1952) 85 CLR 138. A similar result has been reached in the United States – see for example *National Labor Relations Board v Jones and Laughlin Steel Corp* (1937) 301 US 1; *Wickard v Filburn* (1942) 317 US 111  
80 Hereafter ‘constitutional trade and commerce’  
81 Hereafter ‘non-constitutional trade and commerce’  
82 *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54  
83 *Eg Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54; *Wragg v New South Wales* (1953) 385-386 (Dixon CJ, with whom McTiernan Williams Fullagar and Kitto JJ agreed); *Redfern v Dunlop Rubber Australian Ltd* (1964) 110 CLR 194; *Swift Australian Co Pty Ltd v Boyd-Parkinson* (1962) 108 CLR 189. This issue is further discussed in David McCann ‘First Head Revisited: A Single Industrial Relations System Under the Trade and Commerce Power’ (2004) 26 Sydney Law Review 75  
Likely Economic Impacts of Legislation and its Relevance to the Constitutional Question

Legal principles do not operate in a vacuum. It is submitted to be naïve for a court to consider the question of the constitutionality of the amending legislation by considering merely past legal decisions on the scope of the corporations and other powers. The proposed legislation clearly has broad consequences for society and as a result, the desirability from a policy point of view, if not the desirability of the particular provisions, of having federal regulation of workplace relations matters is submitted to be a relevant factor in assessing the question of its constitutionality. Policy arguments are of course relevant in the High Court. Arguably, this is even more so where there is ambiguity.

The High Court has in the past shown an awareness of economic issues as being relevant to interpretation of the Constitution,85 (at least on some occasions),86 and perhaps an awareness that most Australians look to the Commonwealth in relation to economic management. It is of course worth remembering that the Constitution gives the Commonwealth no direct powers over the ‘economy’, so

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85 The best examples of this occur in cases involving ss 90 and 92 of the Constitution. In relation to s90 for example, one notes the decision in Parton v Milk Board (Vic) (1949) 80 CLR 229,260 in making the power of the (Commonwealth Parliament) to impose duties of customs and of excise exclusive it may be assumed that it was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy is adopted should not be hampered or defeated by State action’. This implicit recognition by Dixon J of economic arguments in formulating a broad approach to s90 was accepted by the High Court in that case, but directly challenged (unsuccessfully) by the States in cases such as Capital Duplicators Pty Ltd v ACT (No 2) (1993) 178 CLR 561 (Mason CJ Brennan Deane and McHugh JJ, Dawson Toohey and Gaudron JJ dissenting) specifically endorsing Dixon J’s view of the purpose of s90 (589); and see also Ha v New South Wales (1997) 189 CLR 465 where a majority of the High Court (Brennan CJ McHugh Gummow and Kirby JJ; Dawson Toohey and Gaudron JJ dissenting) rejected a direct challenge to the judgment of Dixon J and other members of the High Court in Parton.

Some examples of references to economic arguments in s92 jurisprudence include the Privy Council in Commonwealth v Bank of New South Wales (1949) 79 CLR 497 who, in referring to s92, concluded that the ‘problem to be solved will often be no so much legal as political, social or economic’ (639), as well as judgments in Uebergang v Australian Wheat Board (1949) 140 CLR 120, Australian National Airways Pty Ltd v Commonwealth (1945) 71 CLR 29, Clark King and Co Pty Ltd v Australian Wheat Board (1978) 140 CLR 120 (particularly Barwick CJ at 154, Stephen J at 174-176, and Mason and Jacobs JJ at 191-192); and SOS (Mowbray) Pty Ltd v Mead (1972) 124 CLR 529 (particularly Barwick CJ at 550-551). Dixon CJ accepted economic arguments as valid in interpreting s51(1) in Wragge v State of New South Wales (1953) 88 CLR 353; 386. Leslie Zines is in favour of considering economic factors, at least in relation to s51(1): see The High Court and the Constitution (4th ed, 1997) p78-79. The United States Supreme Court has been prepared to accept economic arguments as assisting in interpretation of the Constitution in Wickard v Filburn (1942) 317 US 111 (concluding the appellee’s activity could be regulated by Congress if ‘it exerts a substantial economic effect on interstate commerce’) (124-125)(a commerce clause case), and National Labour Relations Board v Jones and Laughlin Steel Corporation (1937) 298 US 1.

86 The High Court has not been so keen on using economic arguments to reach a view of the s51(1) trade and commerce power: see for example Attorney-General (WA) v Australian National Airlines Commission (1976) 138 CLR 492
the Commonwealth’s management of the economy must be indirectly through other heads of power.\textsuperscript{87}

The point to be noted in the following discussion is the extent to which management of industrial relations is a useful tool for the Commonwealth in regulation of the economy, whatever we think of the merits of the actual law.

At the heart of these reforms is the continued movement away from collective bargaining to individual workplace bargaining. Some studies have considered the economic effects of such a move, including the experience with Australian Workplace Agreements (AWAs) since their inception in 1996, and State-equivalents.

One study surveyed 2000 employers who had offered an AWA to at least one staff member, with almost 700 responses. Respondents were asked why they introduced AWAs. High numbers mentioned flexibility (45%), to simplify employment opportunities (42%), to obtain better organisational outcomes (40%), to implement management strategy (39%) and to improve employee-management relations (36%). Only 18% mentioned containment of labour costs.\textsuperscript{88} Two third of respondents planned to introduce more AWAs within the next two years.

Assessing the likely impact of the move to individual workplace bargaining on wage levels has proven more contentious. It is clearly misleading to simply compare the wage levels of those on AWAs with those not on individual agreements, since many of those employees currently on individual workplace agreements are at the managerial or professional level. One survey found employees covered by awards secured an average wage rise of 1.3% while those on individual agreements received between 0 and 8%.\textsuperscript{89} Others have found that employees covered by union-negotiated collective agreements have received higher wage increases than those on non-union negotiated or individual contracts,\textsuperscript{90} or that pay rises within the life of an AWA tend to be lower than what the worker would have received under a collective bargaining agreement.\textsuperscript{91} Some have linked increased workplace deregulation with an increase in working hours, increasing stress and negatively affecting work-

\textsuperscript{87} Hopefully also, through co-operation with the States, though this has been more of a challenge!

\textsuperscript{88} Paul Gollan `Trends in Processes in the Making of Australian Workplace Agreements: Information and Findings from a Survey into Processes in Making and Outcomes of Australian Workplace Agreements’, November 2000


\textsuperscript{91} Kristin Van Barneveld and Betty Arsovksa `AWAs: Changing the Structure of Wages?’, citing a 80% incidence of provision for quantifiable wage increases during the life of a union-agreement, 63% incidence during the life of a non-union agreement, and 26% incidence during the life of an AWA. (However, the same survey found a much larger incidence of a loaded rate for workers, to compensate for the lack of penalty rates, overtime etc in AWAs (27%) compared with union agreements (7%) or non-union agreements (6%). On the same topic, see Amanda Roan, Tom Bramble and George Lafferty `Australian Workplace Agreements in Practice: The Hard and Soft Dimensions’ (2001) 43 (4) Journal of Industrial Relations 487 (December)
family balance. Others have argued that labour market deregulation has increased ‘wage dispersion’ in the economy, with high wage earners (higher skilled?) enjoying higher relative wage increases than lower wage earners.

Some commentators have claimed a strong link between flexibility in labour markets and productivity. Ryan, for example, concluded that during the 1990s in Australia those sectors with the most flexible workforce arrangements saw the fastest productivity gains. Australia also has relatively low participation rates – in 2003, Australia had 69% of its working age population in employment, compared with 71% in the United States and 73% in the United Kingdom. If our participation rate had been that of the United Kingdom, it is said that the numbers employed would have increased by 400,000 (about 2/3 of those currently unemployed).

Moore blames Australia’s relatively low participation rate on, among other things, an overly regulated labour market.

It has also been noted that Australia’s minimum wage rates are relatively high on a worldwide scale. Of 13 OECD countries surveyed in 2004 by the United Kingdom Low Pay Commission, Australia had the highest adult minimum wage relative to full-time earnings. Australia’s minimum wage to median earnings ratio of almost 60% is said to price many of the unemployed out of the labour market. As previously mentioned, one of the main objects of the new legislation is to transfer power to set minimum wages from the Australian Industrial Relations Commission (AIRC) to the new Australian Fair Pay Commission.

Reflecting on the AIRC’s past record in wage setting, Wooden concluded

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94 Others, while noting increases in Australian worker productivity occurred during the 1990s at a time of labour market reform, argue that there were many factors causing the increase in productivity, such that the link between labour market reform and increased productivity is not clear: see Stegman and Stegman ‘Labour Market Reform and the Macroeconomic Efficiency of the Labour Market in Australia’ (2004) 28 Cambridge Journal of Economics 743
95 Matthew Ryan, ‘Workplace Relations Reform, Prosperity and Fairness’ (2005) 38 (2) Australian Economic Review 201, 203. Refer also to Mark Wooden The Transformation of Australian Industrial Relations (2000) pp151-154, though it is difficult to prove that productivity increases were caused by any individual factor, and to what extent, given the issue of productivity is a complex one with a myriad of factors affecting it.
96 Organisation for Economic Co-Operation and Development OECD Employment Outlook, OECD, Paris
98 UK Low Pay Commission 2005 National Minimum Wage: Low Pay Commission Report, London (other countries surveyed were France, New Zealand, Ireland, Belgium, Greece, Netherlands, United Kingdom, Canada, Portugal, Japan, United States and Spain)
99 S7J(a) and (b). Des Moore suggested that the AIRC, given its past track record, was not the appropriate body to set minimum wage levels: ‘Why Labour Market Players Should Have Freedom to Contract’ (2005) 38 (2) Australian Economic Review 192, 198
The actions of the AIRC, however, in persistently raising the federal minimum wage over time indicate that either it does not care about the jobless or that it believes there is no relation between the price of labour and the quantity demanded.\textsuperscript{100}

Obviously, this affects the ability of Australian business to compete globally. It has been estimated that if Australia’s minimum wage were lowered to match that of the United States and United Kingdom, an extra 100 000 Australians would be employed.\textsuperscript{101} Some have noted it is dangerous to attempt to improve social equality by increasing the minimum wage, since many on the minimum wage in fact live in high income households.\textsuperscript{102} It may be better to address social equality through the welfare system than through the industrial relations system.

Others argue that the changes simply reflect changes in labour market reality in recent years. For example, given that the number of skill-based and knowledge-based jobs has grown exponentially at the expense of jobs requiring minimal skills, this arguably explains why there is lesser need for union activity than previous models allowed. As Mark Wooden concludes

> These more skilled workers can be expected to exhibit less interest in the protections offered by award regulation and third-party arbitration; the possession of valued work skills is all the protection many of these workers need. . . . The rising skill premium increases the incentive for employers to recruit the best person for the job and thus creates a greater need for differentiation of pay across both individuals and enterprises.\textsuperscript{103}

The changes clearly aim to increase flexibility in employment by encouraging employers to hire part-time and casual employees, as well as increasing the

\textsuperscript{100} Mark Wooden ‘Workplace Relations Reform: Where to Now?’ (2005) 38 (2) \textit{Australian Economic Review} 176,178-179. Wooden then claims that the AIRC has little or no expertise that would enable it to take account of the economic effects of minimum wage increases; Des Moore accuses the AIRC of a failure over 100 years to deliver wage justice (‘Why Labour Market Players Should Have Freedom of Contract’ (2005) 38 (2) Australian Economic Review 192, ‘a serious problem exists when many of those who sit on cases involving workplace relations are wont to interpret regulatory laws according to their own views of what constitutes social justice and with little regard to the economic implications, let alone the intent of the legislation (194), and suggests that Australia’s minimum wage needs to fall (196); cf Chris Briggs and John Buchanan ‘Work, Commerce and the Law: A New Australian Model’ (2005) 38 (2) \textit{Australian Economic Review} 182,188

\textsuperscript{101} Tulip ‘Do minimum wages raise the NAIRU?’, Finance and Economics Discussion Series 2000-38, Federal Reserve Board, Washington DC; Matthew Ryan ‘Workplace Relations Reform, Prosperity and Fairness’ (2005) 38 (2) \textit{Australian Economic Review} 201,209. Borland and Woodbridge also found a statistically significant negative reaction between minimum wage levels and employment of the low-skilled: Jeff Borland and Graeme Woodbridge ‘Wage Regulation, Low-Wage Workers and Employment’ in Sue Richardson ed \textit{Reshaping the Labour Market: Regulation, Efficiency and Equality in Australia} (1999) p113. They found that the differential between Australia’s minimum wage and that of the United States reduced employment of low-wage workers by 12% (p114).

\textsuperscript{102} Moore claims that more than half of low wage earners are in the top half of household incomes (presumably their spouse is in a well paid position)(197)

\textsuperscript{103} Mark Wooden ‘The Changing Labour Market and its Impact on Work and Employment Relations’, Melbourne Institute of Applied Economic and Social Research, University of Melbourne
number of hours during which it is possible to work. It has been well documented that Australia has seen a drastic reduction in the number of permanent full-time jobs, and a corresponding large increase in the number of part-time and casual jobs, in recent years. For example, between 1971 and 1999, the number of permanent full-time positions dropped from 76% to 54% of the workforce, while casual employees increased from 6% to 22%. Given the exclusion now of minimum and maximum weekly hours of work for part-time workers contained in the new regime, this kind of workplace flexibility is only likely to increase.

Conclusion
This paper concludes that the Commonwealth has the constitutional power to enact its changes to workplace relations which took effect on 1 January 2006. The corporations power, as well as the trade and commerce and territories power, are likely to support the law, given the High Court’s past interpretation of those heads. The author would also suggest with respect that the economic outcomes sought to be achieved by the legislation are a relevant consideration in defining the constitutionality of the amendments, given the lack of direct constitutional power over the ‘economy’, something that most citizens would expect to be primarily a concern for a central government in a federation. It is submitted that a central government in a federation has a legitimate concern with issues such as (a) productivity (b) Australia’s minimum wage level and how it compares with other countries (c) working hours (d) categories of employment; and (e) the circumstances in which an employer may legally

104 A trend to increased working hours is not new in Australia – from 1970 to 2000, the number of employees working a standard 40 hour week dropped from 51% of the workforce to 31%: Australian Bureau of Statistics The Labour Force Cat No 6203, balanced by a rise in the percentage of workers working more than 45 hours per week (23 to 28%) and in those working 1-29 hours per week (10 to 25%): Mark Wooden The Transformation of the Australian Industrial Relations System (2000), Federation Press, Sydney and Mark Wooden and Andrew Hawke ‘Factors Associated with Casual Employment: Evidence from the AWIRS’ (1998) 9 Economics and Labour Relations Review 82. Considering data from all OECD countries, the ILO concluded Australia is now in the top echelon in terms of working hours: Lee, S ‘Working Hour Gaps: Trends and Issues’ in Messenger, J ed Working Time and Workers’ Preferences in Industrialised Countries: Finding the Balance’ (2004) London, Routledge, 29, and Iain Campbell Long Working Hours in Australia: Working-Time Regulation and Employer Pressures (2005) July Centre for Applied Social Research, Working Papers 2005-2


dismiss an employee. The working world has changed radically in Australia in recent years. The Commonwealth Government is submitted to be entitled to reform the legal regulation of work in Australia to take account of past changes, and to prepare Australia for the challenges that lie ahead.