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## WORKPLACE RELATIONS REFORM: SUMMARY AND CONSTITUTIONALITY

### *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. It has already been announced that the changes will be the subject of a High Court challenge as to their constitutionality. Several State Governments have committed to asking the High Court to strike out the laws. This article outlines the main features of the new laws, and considers the question of their constitutional validity. The main head of power the Commonwealth relies on is the corporations power, so the laws will primarily apply to 'trading corporations'.

Of course, given the move to incorporated legal practices (ILPs), which at the time of writing are due to be available to Queensland practitioners on 1 July 2006,<sup>1</sup> this is of particular practical importance for Queensland's lawyers. An ILP will likely be a trading corporation, and thus able to take advantage of the new federal legislation in its employee relations. Thus the article will explore

- (a) what the new laws provide
- (b) whether the law is likely to be held valid by the High Court
- (c) to what extent the law might apply to law firms (incorporated or not) and their relations with staff
- (d) to what extent the law applies to other kinds of organisations

The article will not consider whether the changes are thought to be good ones or not. Of course, that question is entirely irrelevant to the issue of whether they are legally valid.<sup>2</sup>

### *Outline of Legislation<sup>3</sup>*

The legislation, actually an amendment to the existing *Workplace Relations Act 1996* (Cth), is the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). The Act is said to have been passed 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.<sup>4</sup>

<sup>1</sup> Of course, incorporation is already allowed in some other States.

<sup>2</sup> For the record, the author has some personal reservations about some changes, in particular the raising of the threshold at which unfair dismissal protections apply. He has not seen any justification for a policy of exempting employers of fewer than 100 staff from unfair dismissal laws, while maintaining that other employers must comply with those laws.

<sup>3</sup> The main aspects of the new laws are set out below. Given the new law is more than 700 pages in length, it obviously won't be possible to discuss all changes, so the article will focus on the most important.

<sup>4</sup> 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, 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.

<sup>5</sup> These definitions are crucial to the question of the constitutionality of the new laws, an issue to be discussed later.

<sup>6</sup> *Breaking the Gridlock: Towards a Simpler National Workplace Relations System – Discussion Paper 1: The*

*Case for Change* (then Minister for Employment, Workplace Relations and Small Business Peter Reith)

<sup>7</sup> This includes State employment laws generally, the ability of State bodies (such as the Queensland Industrial Relations Commission)(QIRC) to set wage levels and working conditions, the ability of the QIRC to review employment contracts on grounds of fairness, State leave provisions (except long service leave which stays), and rights of union entry to the workplace (excepting rights relating to occupational health and safety issues, in effect reserving this area for State enforcement).

<sup>8</sup> Including for example discrimination, superannuation, workers' compensation, occupational health and safety, public holiday observance, frequency of payment of wages

<sup>9</sup> It is not surprising, thus, that States have sought to challenge the changes.

<sup>10</sup> 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).

<sup>11</sup> 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 the engagement of independent contractors, and restrictions on the engagement of labour hire workers.

<sup>12</sup> S118A, reflecting a clear attempt to 'nationalise' working conditions in Australia.

<sup>13</sup> S89A(2)

<sup>14</sup> Called the Australian Pay and Classification Scales (APCs)(this includes setting the minimum wage in Australia (s7I), currently a function undertaken by the Australian Industrial Relations Commission)

<sup>15</sup> Stated as 38, plus 'reasonable additional hours'. The average number of weekly hours can be averaged over a 12 month period (s91C(3))

<sup>16</sup> Generally four weeks, with an ability for the employee to 'cash out' up to half of this (s92E)

<sup>17</sup> S93E

<sup>18</sup> S89(2)

<sup>19</sup> S96. Employees must be given appropriate information about the agreement before being asked to sign it (s98)

<sup>20</sup> S96A, s96B

<sup>21</sup> S104

<sup>22</sup> Subject to exceptions involving reasonable concerns about health and safety

<sup>23</sup> S108L

<sup>24</sup> S108M

<sup>25</sup> S107C

<sup>26</sup> S107E

<sup>27</sup> S107G, s107J

<sup>28</sup> S170AE; the employer cannot prejudice the employee for so doing (s170AI)

<sup>29</sup> s

<sup>30</sup> Part VIAAA

<sup>31</sup> 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).

<sup>32</sup> The Commonwealth is also apparently attempting, in a minor way, to rely on the 51(1) power and the territories power under s122.

<sup>33</sup> *R v Trade Practices Tribunal; ex parte St George County Council* (1974) 130 CLR 533 (*St George*) per Stephen J

<sup>34</sup> Mason J, *St George*, p235-236)

<sup>35</sup> (1987) 71 ALR 615

<sup>36</sup> In *Argy v Blunts and Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112; 94 ALR 719, the court found a firm

that had annexed an incomplete zoning certificate to a contract of sale had breached the *Trade Practices Act* 1974 (Cth); and in *Nixon v Slater and Gordon* (2000) ATPR 41-765 advertising literature produced by a law firm was considered to be misleading and deceptive, contrary to s52 of the TPA.

<sup>37</sup> *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)

<sup>38</sup> Or more precisely, constitutional corporations (ie trading or financial corporations)

<sup>39</sup> This issue is largely settled law and is not explored further in the article – case examples include *R v Trade Practices Tribunal; ex parte St George County Council* (1974) 130 CLR 533 and *R v Federal Court of Australia; Ex Parte WA National Football League (Inc)* (1979) 143 CLR 190

<sup>40</sup> Eg *R v Australian Industrial Court; ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235; *Actors' Equity v Fontana Films Ltd* (1982) 150 CLR 169

<sup>41</sup> *Actors and Announcers' Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, per Gibbs CJ and Wilson J dissenting (*Actors Equity*); *Commonwealth v Tasmania (Tasmanian Dam Case)*(1983) 158 CLR 1 (per Gibbs CJ Wilson and Dawson JJ dissenting)

<sup>42</sup> *Actors Equity* per Mason Murphy Aickin JJ, Stephen and Brennan JJ not deciding; *Tasmanian Dams Case* per Mason Murphy and Deane JJ

<sup>43</sup> *Re Dingjan; Ex Parte Wagner* (1995) 183 CLR 323, 339

<sup>44</sup> As does a more traditionally structured law firm, but the new laws do not apply to employers who are not corporations.

<sup>45</sup> During the author's time with a Brisbane law firm in the early 1990s, a tea lady and word processing operators were engaged by the firm, and it could be argued that those positions too (on the unlikely assumption that they still exist in many firms in the 21<sup>st</sup> century) were created to facilitate (the former more indirectly than the latter!) the provision of advice.

<sup>46</sup> (1909) 8 CLR 330 (*Huddart Parker*)

<sup>47</sup> 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 *Engineers* case

<sup>48</sup> (1985) 183 CLR 323 (*Re Dingjan*)

<sup>49</sup> Section 127A(2)(1) of the *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.

<sup>50</sup> 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 21<sup>st</sup> 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

<sup>51</sup> (1996) 187 CLR 416, 539 (Brennan CJ Toohey Gaudron McHugh Gummow JJ). Thus the issue was not directly decided. The High Court left the matter open: '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' (*Victoria v Commonwealth (Industrial Relations Act Case)*).

<sup>52</sup> Mason CJ, Deane and Gaudron JJ

<sup>53</sup> 'if, by reference to the activities or functions of s51(20) corporations, a law regulates the conduct of those who control, work for, 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)

<sup>54</sup> '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).

<sup>55</sup> 396

<sup>56</sup> *New South Wales v Commonwealth* (1990) 169 CLR 482

<sup>57</sup> 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': *The High Court and the Constitution* (4<sup>th</sup> ed, 1997) p106

<sup>58</sup> What is now s51(20) is based on s15(i) of the *Federal Council of Australasia Act* 1885 (Imp), included in cl 52 of the *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 Australian Constitution* (1994) 15 *Journal of Legal History* 131

<sup>59</sup> *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468

<sup>60</sup> The correct approach to interpretation of the *Constitution: Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case)*(1920) 28 CLR 129

<sup>61</sup> Gaudron J (with whom Deane J agreed) in *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 *Federal Law Review* 277,280

<sup>62</sup> *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

<sup>63</sup> Per Gibbs CJ in *Actors and Announcers' Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, 182-183 (Wilson J agreed)

<sup>64</sup> *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).

<sup>65</sup> 347

<sup>66</sup> 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.

<sup>67</sup> *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).

<sup>68</sup> Eg *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1

<sup>69</sup> 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<sup>th</sup> ed, 1997) p94

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.

**The Act will apply to most workers, because of its definitions of employer and employee.**<sup>5</sup> An employee is someone employed by an 'employer' as defined in s4AB. An employer includes an organisation that is a constitutional corporation. According to figures compiled by the Federal Government in 2000, corporations employ at least 85% of non-farm labour in Australia.<sup>6</sup>

As stated, one of the main aims of the legislation is to simplify the industrial relations system in Australia, where there are currently more than 4000 awards at State and Federal level. An employer employing workers in more than one State or Territory may be faced with a number of different awards (themselves often difficult to decipher), as well as laws at federal and State level. In an effort to simplify the position, the law provides that much of State industrial relations laws will no longer apply.<sup>7</sup> It is clear that the Federal Government was particularly determined to reserve to its newly-created body the power to set wage levels, given that it has allowed matters that don't affect wage levels to continue to be regulated by State law.<sup>8</sup>

So from now on there will continue to be industrial relations laws at both Federal and State level, but there will be proportionately more influence of Federal law compared with State law.<sup>9</sup>

The newly-established Australian Fair Pay Commission (AFPC) will carry out a major review of current awards, with a view to greatly reducing this number, and simplifying the content of awards where possible. Awards will be restricted in their content to 13 matters,<sup>10</sup> a reduction from the current 20. Some topics are specifically excluded from awards.<sup>11</sup> These changes will allow a 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, and this trend is certainly encouraged by the changes. One thing that can no longer appear in awards is a minimum or maximum restriction on the number of hours that a part-time or casual worker can work, meaning that an employer has more freedom in engaging staff. Further, awards must not in future refer to State or Territory boundaries in their terms and conditions,<sup>12</sup> reflecting the Federal Government's desire for a more national industrial relations system.

The legislation provides some safety net of wage entitlements through the Australian Fair Pay and Conditions Standard (AFPCS). These are guaranteed minimum entitlements, and any workplace agreement that provides for lesser entitlements for employees will be invalid.<sup>13</sup> The AFPCS applies to five conditions of employment:

- (a) basic rates of pay and casual loadings<sup>14</sup>
- (b) maximum ordinary hours of work<sup>15</sup>
- (c) annual leave<sup>16</sup>
- (d) personal leave<sup>17</sup>
- (e) parental leave<sup>18</sup>

The Act encourages the making of an individual employment agreement between an employer and employee, called an Australian Workplace Agreement (AWA).<sup>19</sup> These had been possible under the previous law, but there has been a relatively low takeup of this option, with some not liking the bureaucracy surrounding the making of such agreements. This included in the past the approval of AWAs by the independent Employment Advocate. Previously, the Employment Advocate had to be satisfied that the AWA satisfied the No Disadvantage Test – in other words, the individual agreement, on balance, had to make the worker better off than they would have been had they entered into an applicable enterprise-wide agreement or any relevant award applied. An AWA that did not pass this test would be rejected by the Employment Advocate. This limitation no longer applies, which is expected to lead to an increase in individual agreement-making. Collective agreements may still be made between employees collectively (with or without union involvement) and an employer.<sup>20</sup>

An individual or collective organisation (such as a union) is strongly discouraged by the legislation from attempting to influence a person in relation to agreeing to their working conditions. 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.<sup>21</sup>

This is potentially a very far-reaching provision. For example, a union official who tells an employee what they might lose by signing an individual agreement compared with an enterprise-wide agreement could be accused of breaching the above section – the person is taking some action intending to coerce a person to not agree to an AWA. Clearly, a union who attempts to pressure an employer not to offer AWAs or enterprise agreements could find itself in difficulty if the employer complains.

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.<sup>22</sup> 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),<sup>23</sup> and an employer cannot dismiss an employee for engaging in protected action.<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup> 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, or that the action is adversely affecting the parties to the dispute and third parties.<sup>27</sup>

Interestingly, 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.

An employer has the right under the new laws to request an employee to work on a particular public holiday. An employee will no longer be guaranteed penalty rates for so doing. 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.<sup>28</sup>

Regarding 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 earlier.<sup>29</sup> 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.<sup>30</sup> 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. The Federal Government has wished for some time to limit the application of unfair dismissal laws to small business, but until recently has been frustrated in its efforts by a hostile Senate. Its victory in October 2004, including an unexpected Senate majority, have clearly given it a once in a generation opportunity to make such changes, which go further than previous proposals from the Coalition.

#### *Constitutionality of Provisions*

Of course, the Federal Government must point to a head of power to sustain its amendments. Key here is s4AB, which defines the meaning of 'employer' for the purposes of the amendments. The application of the entire Act depends on these terms.

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.<sup>31</sup>

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) is the corporations power, and the discussion will be confined to that head.<sup>32</sup> Of course, the Commonwealth cannot rely on the direct power it has over industrial relations in the *Constitution*, because this power is confined to conciliation and arbitration of disputes. These terms imply the involvement of a third party in settling a workplace dispute about conditions. The whole tenor of the Federal Government's changes is towards the decentralisation and deregulation of the setting of working conditions down to the employer-employee level (or employer-collective employees level); it does not wish to use a third party to set working conditions.

#### *Application of the Definition to New ILPs*

The definition of 'employer' above is an unusual one, and clearly the main application to Queensland law firms will be to those who decide to incorporate – clearly subsection (a) of the definition applies to employers who are corporations, provided they meet the requirement of being a 'trading corporation'. Interestingly, the Commonwealth has chosen not to rely to a large extent on its 51(1) power, which would have allowed it to regulate interstate and overseas trade and commerce, and to some extent at least, intrastate trade and commerce. This section could have allowed firms which operate in more than one state to take advantage of the new laws.

The question remains whether an incorporated legal practice will fit the definition of a trading corporation and thus be subject to the new regime. Although some view buying and selling as the heart of trade,<sup>33</sup> others have concluded that trading refers to

business activities carried on with a view to earning revenue<sup>34</sup>

There is precedent for the view that the provision of professional advice is within 'trade and commerce'. In *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd*<sup>35</sup> the court found that professional advice by an engineer was in trade and commerce. Specifically, law firms have been found to have breached certain sections of the *Trade Practices Act 1974* (Cth) which apply to conduct in trade and commerce,<sup>36</sup> so clearly the implication is that a law firm's activities can be seen as being 'trading' in nature. In terms of the test espoused by Mason J, clearly law firms carry on the business of giving advice with a view to earning revenue. As a result, it seems that ILPs will be able to rely on the new laws, presuming they are constitutional, an issue to which we now turn.

#### *Constitutional Arguments*

It is not surprising the Commonwealth seeks to rely largely on its corporations power to make these changes, since it has been estimated by the Federal Government that corporations employ between 85-90% of non-farm labour in Australia.<sup>37</sup> The only real question is whether the corporations power extends to making laws about the workplace relations of corporations,<sup>38</sup> and that the organisation in issue fits the definition of being a trading or financial corporation.<sup>39</sup> Reference was made earlier in the article to parts of the new law which prohibit actions of individuals. There is precedent to the effect that the corporations power can be used to regulate the conduct of individuals.<sup>40</sup>

What is surprising is that this issue (whether the corporations power supports a national industrial relations regime) has never been definitively decided by the High Court. This is presumably what is encouraging State Governments in a High Court challenge to the legislation – to argue that it is beyond the scope of the corporations power to enact a comprehensive national industrial relations scheme. This article will focus on the arguments in favour of and against the validity of the legislation.

*(a) Arguments in Favour of Validity*

While the High Court has not definitively considered this issue, it has in other s51(20) cases considered issues the resolution of which is submitted to affect indirectly the issue currently being considered. For example, in the early 1980s there was intense debate and clear division of opinion on the High Court bench as to the true scope of the corporations power. In particular, some judges adopted a narrow view of the corporations power, that it was confined to regulating the trading activities of trading corporations.<sup>41</sup> However, other judges adopted a broad view of the corporations power, holding that it could justify a broad range of laws impacting on a trading corporation, including those affecting its non-trading activities.<sup>42</sup>

This divide was never completely resolved by the High Court as there have not been many decisions on the corporations power since where this mattered. However, in *Tasmanian Dams*, Brennan J proposed a middle view, that s51(20) could authorise laws regulating trading activities as well as activities themselves non-trading but done for the purposes of trade. Of course, those judges who advocated a broad view were willing to accept this intermediate position, so a majority emerged in the *Tasmanian Dams* case of 4 justices willing to accept that s51(20) laws could regulate activities done for the purposes of trade. This majority view has not been questioned since that time. In fact in the later *Re Dingjan* case,<sup>43</sup> Brennan J confirmed his earlier view, concluding that ‘a law conferring power to vary ... a contract between a constitutional corporation and an independent contractor for work to be done *for the purposes of the corporation’s business*’ (italics added) would be supported by the corporations power. Clearly then, the orthodox view of s51(20) supports the validity of this legislation. A corporation cannot of course do anything on its own – it must act through employees. The author would argue that a trading corporation engages all of its staff in order, directly or indirectly, to engage in trading activities. The engagement of staff is thus something that a corporation does ‘for the purposes of trade’ so would be supported at least by the majority in *Tasmanian Dams*.

Could it be argued that a trading corporation does not employ at least some staff for trading purposes? There may be an argument that only some staff are employed for trade purposes; on this view of course s51(20) would support regulation of the industrial conditions of only those workers. Let us consider an example of a retail supermarket organisation which employs many different kinds of staff. Those who carry out checkout operations are clearly involved in the trading activities of the corporation. What of those who stack the shelves? They are not engaged in trading activities per se, but their activity is not for nothing – it is carried out for the purposes of trade, so that customers may make their selections. Similarly, those who fetch the supermarket trolleys from the car park are engaged in an activity carried out for the purposes of trade. If the corporation were not trading, it would have no need for trolleys.

What of managerial or supervisory staff? While not usually directly engaged in trade, again they are employed for the purposes of facilitating trade. They look after staff who are involved in trade, to make sure trade functions are carried out smoothly and safely. They choose staff who will be involved in trade. Again, if the organisation were not trading, it would have no need for these managerial and supervisory positions, so it is also argued those staff are engaged for ‘the purposes of trade’. If the corporation were not trading, it would have no need for managerial staff.

What of the back office staff, those carrying on the accounting function of the organisation? It is submitted that their activities, though not trading in themselves, are similarly carried on for the purposes of trade. An organisation could not trade (or not trade long-term) if it were not profitable, and certainly the accountant’s figures allow management to determine this. The accountant’s figures also help determine whether trading volumes are adequate or not, so are required for the purposes of trade. And financial statements are also legal requirements, and legal requirements are met in order that, among other things, the corporation may continue to trade.

Similarly, an incorporated law firm may be said to engage staff for the purposes of trade.<sup>44</sup> The firm engages a lawyer for the purposes of its trading functions. That person’s time will be charged to clients – that is the essence of the corporation’s trading activity. Clearly, that lawyer is engaged for the purposes of trade. Clearly also, legal assistants and library staff are engaged for the purposes of facilitating this trading exercise.<sup>45</sup>

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 *Huddart Parker and Co Pty Ltd v Moorehead*<sup>46</sup> 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<sup>47</sup>.

In *Re Dingjan ex parte Wagner*,<sup>48</sup> 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.<sup>49</sup> 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).<sup>50</sup> In a case the following year, it was conceded (without argument) that the Commonwealth could under s51(20) regulate the working conditions of employees.<sup>51</sup>

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.<sup>52</sup> In addition, of the majority in that case, McHugh J clearly believed the Commonwealth could rely on s51(20) to regulate the

employment conditions of those working for a corporation,<sup>53</sup> as did Brennan J.<sup>54</sup> Thus, five of the seven judges in *Dingjan* expressly confirmed the Commonwealth's ability to legislate regarding working conditions of employees of corporations.

*(b) Arguments Against Validity*

It is suggested that challenges to 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

*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<sup>55</sup>

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.<sup>56</sup> 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 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).<sup>57</sup>

However, it is thought 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.<sup>58</sup> The actual decision in *Huddart Parker* has been expressly overruled by the High Court<sup>59</sup>, and is now recognised as being unacceptably tainted by the reserved powers doctrine that characterised the first twenty years of the High Court's interpretation of the *Constitution*.

Given that we look first and foremost to the words of the *Constitution* in interpreting it, there is clear evidence in s51(20) itself to justify the decision in the *Incorporation Act* case. That sub-section refers to the ability of the Commonwealth to make laws in respect of trading corporations *formed* within the Commonwealth. A plain reading of the words<sup>60</sup> would give most readers the impression that the Commonwealth could only legislate in respect of already formed corporations.

This underlying rationale for the *Incorporations Act* decision cannot be readily transported to support the other part of the reasoning of Isaacs J in *Huddart Parker*. The section does not express 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 *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 *Constitution*, presumably with the same (discredited) intention of preserving an area of regulation to the States.<sup>61</sup> It is thus considered unlikely that the States seeking to challenge the legislation on this basis would be successful.

*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 JJ 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).<sup>62</sup> 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,<sup>63</sup> (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.<sup>64</sup> 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.<sup>65</sup>

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.<sup>66</sup> Absent the *Constitution*, the law (presumably) 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 characterised in only one way; in other words 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.<sup>67</sup> Similarly, when the High Court has declared the motive behind legislation as being irrelevant to its characterisation,<sup>68</sup> it is thought to be unwise to dismiss legislation because it was written in particular terms so as to meet questions about its constitutionality.<sup>69</sup>

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).<sup>70</sup>

#### *Conclusion*

This article has considered the major aspects of the Federal Government’s new industrial relations laws. It is thought that the legislation is likely to survive a constitutional challenge given the corporations power in the *Constitution*. Given its constitutional basis, the new laws will apply to ILPs but largely not to employers who are not corporations. This will be one further relevant factor for lawyers to consider in terms of the benefits of incorporation. The laws provide further flexibility in the labour market in Australia.