POLITICS, THE CONSTITUTION, AND AUSTRALIAN INDUSTRIAL RELATIONS: PURSUING A UNIFIED NATIONAL SYSTEM

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A unitary system of industrial relations for Australia is not a novel idea, but until about a decade ago it was generally thought by most commentators and practitioners to be little more than an idle speculation, a pipe dream taken seriously by only a handful of unworldly theoreticians, usually economists, and a somewhat larger group of political cranks, eccentrics, and doctrinaire centralists. In a quite remarkable turn of events, however, the conventional wisdom now threatens to be demolished by recent political developments, which have seen the present federal government embark upon a concerted campaign to restructure the long-established foundations of this country's labor laws. On the evidence to date, the seriousness of the government's proposal to refashion the existing legislative arrangements can hardly be doubted. The Prime Minister himself has unequivocally committed the coalition to the cause of fundamental industrial relations reform. Indeed, as recently as April 11, 2005, in a carefully drafted speech delivered to the Menzies Research Centre, he declared that the government was intent upon introducing initiatives aimed at achieving a streamlined and efficient national industrial relations system even if this meant open conflict with the states—all of which at present have labor governments. Whilst assuring his audience that the coalition had not "discarded its political inheritance in a rush towards centralism," the Prime Minister indicated that in his view industrial relations was one area where "the existing structure of federal-state responsibilities has run its course" and major changes had become essential in order "to future consolidate the transformation" of the Australian economy:

> I believe that a single set of national laws on industrial relations is an idea whose time has come. It is the next logical step towards a workplace relations system that supports greater freedom,

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> flexibility and individual choice. Again, this is not about empowering Canberra. It is about liberating workplaces from Colac to Cooktown . . . in an age when our productivity must match that of global competitors, forcing Australian firms to comply with six different workplace relations system is an anachronism that we can no longer afford. The current system . . . is too complex, costly and inefficient. Employers and employees frequently face a patchwork of regulation, having to accommodate overlapping state and federal regulations within the same workplace . . . Small businesses in particular struggle to cope with that complex system. Our preference is for a single system to be agreed between the Commonwealth and the States . . . But, in the absence of referrals by the States, the Government will do what it reasonably can to move towards a more streamlined, unified and efficient system. We are considering a package of reforms based on the corporations power that will bring roughly 85-90 per cent of employees into a national workplace relations system.[1]

A comprehensive account of the current debate about the strengths and weaknesses of these proposed reforms would have to explore a range of economic, political, and legal issues.[2] Central to it though are the widely recognized deficiencies of the federal conciliation and arbitration power as the principal constitutional foundation for the regulation of industrial relations. The limitations of, and artificialities associated with, reliance on that power—section 51 (xxxv) of the Commonwealth Constitution—are well understood and warrant no detailed exposition in this context. For present purposes it suffices to point to the constraints section 51 (xxxv) imposes in terms of its requirements of a dispute between employers and workers that is both industrial in nature and interstate in extent, and its insistence that the only means available to settle or prevent such disputes when they arise or threaten to arise are those of conciliation and/or arbitration. And, although that particular power has been given an increasingly generous interpretation by the High Court over the years since Federation, in the end there is no escaping the inconveniently confining conditions its language necessarily imposes. Moreover the tide of opinion has now turned decisively against so-called third party sectoral regulation using awards in favor of agreement making between employers and unions (or preferably

1. Prime Minister John Howard, Address to the Menzies Research Centre, Melbourne, Reflections on Australian Federalism (Apr. 11, 2005), *available at* http://www.pm.gov.au/news/speeches/speech_1320.html.

2. See the brief but valuable discussion in B. CREIGHTON & A. STEWART, LABOUR LAW 1–64 (4th ed. 2005). Although its treatment of underlying issues is now of course somewhat dated. BRAHAM DABSCHECK, THE STRUGGLE FOR AUSTRALIAN INDUSTRIAL RELATIONS (1995) remains useful.

employees) at the level of the single workplace.[3] This trend has inexorably led the federal government toward ever greater resort to other more "exotic" heads of constitutional power, including in particular its previously somewhat neglected authority to make laws with respect to certain designated classes of corporations.

The accelerating and exaggeratedly adversarial contemporary policy debate about industrial relations has now reached a point where the present federal government's view appears to be that Australia's continued economic growth and prosperity is being hindered, if not imperiled, by the excessive complexity and rigidity of the existing overlapping state and federal systems. Major reform is needed, so the argument runs, and the solution proposed is the creation of a single unified national system, preferably through inter-governmental agreement and cooperation, but, failing that, through unilateral Commonwealth legislative action made feasible by the fact the federal government is about to command, albeit unexpectedly, control of the Senate as well as the House of Representatives.[4]

The critical question then is whether, and how, a single national system of industrial relations could be realized given the federal structure of the Constitution and the apparently limited powers that the Commonwealth enjoys under the Constitution's existing terms (which have to date proved highly resistant to contested amendment[5]). That question is explored below. I begin—contrary to the expressed preference of the federal government for achieving reform through consensus—with a consideration of the potential use of the corporations' power to effect change by unilateral legislative action on the part of the Commonwealth. I then turn to a (necessarily) summary examination of two other available options, both of which would require a cooperative approach to be taken by all the governments concerned, state and federal.

I. USING THE CORPORATIONS' POWER

It is a truism that the only legislative powers available to the Commonwealth Parliament are those contained in the Constitution. Although the conciliation and arbitration power has traditionally been relied upon by successive federal governments as the principal source

3. The legal aspects of these changes are explained in some detail in CREIGHTON & STEWART, *supra* note 2, at chs. 2, 6–10.

4. *See* Howard, *supra* note 1.

5. *See* Gould v. Brown (1998) 193 C.L.R. 346 ¶ 276 (per Kirby, J.); *see also* R. v. Hughes (2000) 202 C.L.R. 535, ¶ 59. The relevant provision of the Constitution dealing with the process of formal amendment is section 128. AUSTL. CONST. ch. VII, § 128.

of constitutional authority to enact legislation regulating Australian industrial relations, there is certainly nothing new in the use of the corporations' power, namely section 51 (xx) of the Constitution, for the same general purpose. Thus far, however, this particular power has played only a supplementary, if increasingly important, role in this connection. It has already been employed of course to support important aspects of, *inter alia,* Part VIB and Part VID of the present federal statute, the Workplace Relations Act 1996.[6] But does section 51 (xx) have the potential to become the *principal* source of authority for a new regulatory framework for industrial relations in this country, and, if so, would that be a desirable course to adopt?[7] The first is a question of (constitutional) law, while the second is a question of policy involving a range of contentious and inter-related economic, social, and political considerations. In these circumstances look to the lawyers for the answer to the first but to other experts and the wider community for guidance on the second.

Legislation enacted in reliance on section 51 (xx) must be capable of properly being characterized as a law "with respect to" Constitutional corporations. The characterization of a law—the process whereby a court determines whether or not the subject matter of a statute is supported by and referable to one of the Commonwealth's express legislative powers—is tested and determined according to its actual operation and effect. Any law, however, may deal with more than one subject, and most complex modern legislation does—including, of course, the present Workplace Relations Act 1996. It is important to appreciate that it is entirely possible for a statute or statutory provision to be a law with respect to several different topics, some of which have no foundation in the Constitution, and nonetheless still be a valid enactment. So, for example, a statute may deal with intrastate secondary boycotts involving sole traders or partnerships and yet in a constitutional sense be regarded as a law with respect to corporations so long as it is concerned with, in the sense of being directed to, the activities of corporations as corporations. By the same token, because the grants of legislative power contained in the Constitution are no longer seen as having mutually exclusive areas of operation there is nothing to

6. The extent of even the present federal statute's reliance on section 51 (xx), which is now quite considerable, has been widely (and correctly) seen as marking a very significant shift in policy and practice in the area of federal industrial relations. Workplace Relations Act, 1996, pt. VI-B, -D (Austl.); AUSTL. CONST. ch. I, pt. V, § 51 (xx).

7. For an excellent earlier discussion of this general issue, see A. Stewart, *Federal Labor Law and New Uses for the Corporations Power*, 14 AUSTL. J. LAB. L. 145 (2001); *see also* W. Ford, *Using the Corporations Power to Regulate Industrial Relations*, 6 EMP. L. BULL. 70 (2001).

prevent a particular statute from being characterized as a law ''with respect to" more than one head of power, for example, conciliation and arbitration (section 51 (xxxv)) as well as Constitutional corporations (section 51 (xx)) and also trade and commerce (section 51(1)). These now accepted features of the process of characterization[8] have made possible over the years a very substantial expansion of Commonwealth legislative authority without the need for securing formal amendment of the Constitution itself.[9]

For present purposes there are two major contemporary views about the "true" scope of the federal corporations power that warrant discussion. According to the first, which I will term the broad view, section 51 (xx) gives the Commonwealth Parliament a near plenary—that is to say untrammeled—authority to make laws dealing with any and all aspects of constitutional corporations.[10] The other view of the power ascribes a somewhat narrower though still very substantial ambit to it, regarding the Commonwealth's authority as sufficiently extensive to validate any measure directed to the business activities of relevant classes of corporation.[11]

Notwithstanding these differences of view about the proper scope and meaning of the corporations' power, all the recent decisions of the High Court concerning that power hold that it can be used to legislate, to enhance, and protect, or to constrain or prohibit, various aspects of the activities and functions of constitutional corporations.[12] So, for example, a trading corporation may validly be protected from secondary boycotts[13] as well as prohibited from entering into contracts that are intended to control "to the detriment of the public the supply

8. As Kirby, J., put it in Gould, 193 C.L.R. 346 ¶ 276: "Conformably with the constitutional text and authoritative holdings as to its meaning, this court has approached new problems with fresh constitutional insights which have ensured the adaptation of the Constitution to the needs of each succeeding generation of the Australian people."

9. *See*, *e.g.*, Actors and Announcers Equity Ass'n v. Fontana Films Pty. Ltd. (1982) 150 C.L.R. 169.

10. In modern Australian constitutional jurisprudence, Justice Murphy has been the strongest and most consistent proponent of this view of section 51(xx).

11. On the basis that, as Justice McHugh explained it in Re Dingjan; Ex parte Wagner (1995) 183 C.L.R. 323, "the activities, functions, relationships and business of s.51 (xx) corporations are not the Constitutional switches that throw open the stream of power" permitting the Commonwealth to regulate such corporations in whatever manner it sees fit. According to this view, the Constitutional grant, extensive though it is, cannot be used by the Parliament simply as a peg on which to hang any law mentioning or referring to foreign, financial, or trading corporations. And if a provision so drafted is, in its actual application to and effect on such corporations, arbitrary, adventitious, tenuous, or remote it is invalid unless possessing a sufficient connection with some *other* head of constitutional power.

12. That is to say foreign, trading, and financial corporations.

13. Actors and Announcers' Equity Ass'n (1982) 150 C.L.R. 169.

or price of any service, merchandise or commodity."[14] What is of particular importance, though, is the fact that in protecting or constraining aspects of the activities and functions of constitutional corporations a law may also, perhaps even primarily, be seeking to achieve some other and quite different ultimate objective and yet this will not, in and of itself, render that law invalid.[15]

As Gibbs, C.J., explained it in *Actors and Announcers Equity Association* in the course of discussing the scope of section 51 (xx) and the validity of secondary boycott provisions of what was at that time the Conciliation and Arbitration Act

> In deciding whether a law is within Commonwealth power it is not permissible to attempt to discuss the motives with which the law was enacted. It is necessary to consider what legal operation the law will have, if valid, and if the law has an actual and immediate operation within a field of Commonwealth power, it will be valid notwithstanding that it has another purpose which could not be achieved directly by the exercise of the Commonwealth power.[16]

In other words, in the process of characterization the actual motives that may have inspired or actuated the legislature to enact a statute or provision are "not to the point."[17] The constitutional character of a law has to be determined without reference to such considerations much less to the "*indirect consequences* which it seeks to achieve."[18] Nor is it a serious, much less a fatal, objection to the validity of a law purportedly enacted under section 51 (xx) that it secures the protection or regulation of the activities of corporations by apparently addressing the measures with which it deals—the rights, duties, powers, and privileges it confers or imposes—to third parties, such as the suppliers or customers of corporations, rather than to corporations themselves.[19] Indeed, as the *Actors and Announcers Equity* case itself shows, a law does not even have to expressly refer to corporations as such so long as it otherwise operates in such a way to affect them directly in sufficient degree or to a sufficient extent.[20] The

14. *Id.* at 204 (Mason, J.) (describing what he saw as the central issue in Strickland v Rocla Concrete Pipes Ltd. (1971) 124 C.L.R. 468).

15. *Id.* at 202 (Mason, J.); *see also* Re Dingjan, Ex parte Wagner (1995) 183 C.L.R. 323, 335–36 (Mason, C.J.).

16. Actors and Announcers Equity Ass'n, 150 C.L.R. 169 at 184.

17. Fairfax v. Fed. Comm'r of Taxation (1965) 114 C.L.R. 1, 16, (Taylor, J.).

18. Actors and Announcers' Equity Ass'n v Fontana Films Pty. Ltd. (1982) 150 C.L.R. 169, 201 (emphasis added). The case itself provides a good illustration of this point.

19. *Id.* at 195 (Stephen, J.), 199–200 (Mason, J.).

20. *Id.*; *see also* Re Dingjan, Ex parte Wagner 183 C.L.R. at 334–35 (Mason, C.J.), 337–38, (Brennan, J.), 352–53 (Toohey, J.), 367 (Gaudron, J.), and, 368 (McHugh, J.); the requirement of "sufficient connection" and "reasonable connection" with the head of power are used interchangeably, both connoting substantial connection in the sense that the relationship must be

fact, for example, that various of the provisions of the WR Act 1996 concerning employee actions and remedies for unjust termination of employment at the initiative of the employer are expressed in language ostensibly directed to a special category of *employees*[21] rather than to employer corporations as such does not prevent those provisions from being, in virtue of their actual operation and effect on corporations, laws with respect to paragraph (XX).[22]

II. SCOPE OF THE CORPORATIONS' POWER

Champions of the broader interpretation of the power portray it as different in nature to, and therefore quite distinct from, most other grants of legislative power contained in the Constitution in that it is a power expressed by reference to *persons* rather than (as is the case with almost all other section 51 powers) functions of government, fields of activity, or classes of relationships.[23] According to this particular view, the grant of legislative authority section 51 (xx) confers on the Commonwealth Parliament is special in the sense that its reach extends to each and every facet of constitutional corporations, including of course all aspects of the commercial conduct in which they engage.[24] The basis of the argument in support of this interpretation is the disarmingly straightforward proposition that "the subject of the power is corporations of the kind described; the power is not expressed as one with respect to the activities of corporations, let alone activities of a particular kind or kinds."[25] Therefore, construed as it must be, "with all the generality which the words of s.51 (xx) admit," the constitutional grant "enables Parliament to make laws covering all internal and external relations of all or any foreign corporations and trading or financial corporations: to enact a civil and criminal code dealing with the property *and affairs* of such corporations, or a law dealing with *any aspect of the affairs* of any such corporation or corporations."[26]

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other than "tenuous" or "remote"! *See also* Commonwealth v. Tasmania (1983) 158 C.L.R. 1, 152 (Mason, J.); Leask v. Commonwealth (1996) 140 C.L.R. 1.

21. Workplace Relations act, 1996, § 170CB(3) (Austl.), referring to "federal award employees" (as defined in § 170CD(1) of constitutional corporations).

22. Section 170CB(1)(c) provides that Division 3 of Part VIA applies to an employee if the employee concerned was, before the termination, *inter alia,* a federal award employee who was employed by a constitutional corporation, while section 170CD(1) defines a federal award employee to mean "an employee *any* of whose terms and conditions of employment are governed by an award, a certified agreement [or] an AWA."

23. Actors and Announcers' Equity Ass'n, 150 C.L.R. 207 (Mason, J.), 216 (Brennan, J.).

24. *Id.* at 212 (Murphy, J.).

25. *Id.* at 207 (Mason, J.).

26. Commonwealth v. Tasmania (1983) 158 C.L.R. 1, 179 (Murphy, J.).

On this particular view of the scope of the corporations' power it is unquestionably the case that under it the legislature can validly make laws dealing with industrial relations so that in relation to trading, financial, and foreign corporations "*Parliament, uninhibited by limitations expressed in s.51(xxxv)* [the conciliation and arbitration power], *may legislate directly about the wages and conditions of employees and other industrial matters*."[27] Not only would this power therefore authorize the making of a law establishing schemes for the approval and/or certification of collective or individual employment agreements, its reach would also extend to the validation of statutory provisions dealing with *any* aspect at all of the employment relations between a constitutional corporation and its employees (or even its independent contractors), including of course the setting of minimum conditions of employment and matters concerning termination of the employment relationship.[28]

It is, however, the second and slightly narrower view of section 51 (xx), that appears to have emerged as the preferred view in the High Court. According to this interpretation, the corporations' power certainly authorizes the making of laws regulating the trading and financial activities of foreign, trading, and financial corporations, although its ambit is not limited to this. The scope of the grant extends to authorizing the federal parliament to enact measures regulating their *business* functions, activities, and relationships. After all, as Justice Mason observed in the *Actors and Announcers Equity* case:

> Nowhere in the Constitution is there to be found a secure footing for an implication that the [corporations'] power is to be read down so that it relates to 'the trading activities of the trading corporation and . . . correspondingly to the financial activities of financial and perhaps to the foreign aspects of foreign corporations. Even if it be thought that it was concern as to the trading activities of trading corporations and financial activities of financial corporations that led to the singling out in s.51 (xx) of *these* domestic corporations from other corporations, it would be mere speculation to say that it was intended to confine the legislative power so given to these activities.'[29]

27. Actors and Announcers' Equity Ass'n, 150 C.L.R. at 212 (Murphy, J.); *see also* Re Dingjan, Ex parte Wagner (1995) 183 C.L.R. 323, 334 (Mason, C.J.).

28. *See*, *e.g.*, Slonim v Fellows (1984) 154 C.L.R. 505; Re Cram, Ex parte NSW Colliery Proprietors Ass'n Ltd. (1987) 163 C.L.R. 117; Re Cram, Ex parte Wallsend Coal Co. Pty. Ltd. (1987) 163 C.L.R. 140; Re Ranger Uranium Mines, Ex parte FMWU (1987) 163 C.L.R. 653.

29. Actors and Announcers' Equity Ass'n 150 C.L.R. at 207; *see also* Commonwealth 158 C.L.R. at 149, per Mason, J.

Further support for this view of section 51 (xx) may be found in the High Court's important and relatively recent decision on the scope of the power, *Re Dingjan; Ex parte Wagner*,[30] where it seems that all but one of the five sitting Justices were prepared to recognize the validity of a law that regulates—in the sense of protects, enhances, or constrains—not just the trading (or financial) aspects of constitutional corporations but also their general *business* activities.[31] The case itself concerned a challenge to the validity of sections 127A, 127B, and 127C of the then Industrial Relations Act 1988. Those provisions of the statute conferred upon the AIRC the power to review the operation of any contract for services "relating to" the business of a constitutional corporation to determine whether the contract in question was harsh, unfair, or otherwise against the public interest. Although in the event the Court (by majority) held the challenged sections of the Act to be unconstitutional, not being able properly to be characterized as laws with respect to the corporations,[32] that conclusion was based on the drafting of the relevant provisions that required that the contract under review merely "relate to," rather than affect in some *direct* and material way, the business of constitutional corporations.[33]

Notwithstanding the ultimate outcome of the case, there are strong grounds for reading the judgments in *Re Dingjan* as endorsing the view that section 51 (xx) supports the validity of laws dealing with rather more than simply the trading or financial activities of Constitutional corporations, so that "if a law regulates the activities, functions, relationships or business of a s.51 (xx) corporation, no more

30. Re Dingjan, Ex parte Wagner, 183 C.L.R. 323.

31. Moreover, in explaining this more generous approach to the scope of the corporations' power, members of the Court offered observations strongly suggesting, consistently with the conclusions since drawn from the decision in Victoria v Commonwealth (1996) 187 C.L.R. 416 that statutory provisions of the nature and effect now constituting various key elements of the Workplace Relations Act are able to be supported by reference to paragraph (xx). Prior to the court's decision in those two cases the distinction drawn in some of the earlier authorities between the "public" or "external" activities of a corporation—"the activities in which it is engaged as a corporation"—on the one hand and its "internal" or "domestic" concerns "matters internal to the entity"—on the other, still appeared to be broadly indicative of one important dimension of the proper limits of the power.

32. On the particular facts of the case, in contrast to applicable general principles, the court divided 4:3 against the validity of the provisions *as they were then drafted.*

33. The provisions in question failed to ensure that the exercise of the power so conferred would affect constitutional corporations in some direct or material way. *See* Re Dingjan, Ex parte Wagner 183 C.L.R. at 340 (Brennan, J.); 347 (Dawson, J.); 354 (Toohey, J.); 371 (McHugh, J.). ("Although laws that regulate the activities, functions, relationships or business of corporations are clearly laws with respect to corporations, the power conferred s.51 (xx) also extends to any subject that *affects* the corporation.")

is needed to bring the law within s.51 (XX)."[34] Or, as Justice Gaudron expressed it in her reasons for judgment in that case:

> When s.51 (xx) is approach on the basis that it is to be construed according to its terms and not be reference to unnecessary implications and limitations, it is clear that, at the very least, a law which is expressed to operation on or by reference to the business functions, activities relationships of constitutional Corporations is a law with respect to those corporations. In this regard it is sufficient to note that, although the business activities of trading and financial corporations may be more extensive than their trading or financial activities, those corporations, nonetheless, take their character from their business activities. As was pointed out by Chief Justice Gibbs in *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd,* '[I]t is the business of a trading corporation to trade, and its business is its trading'. So too, it is the business of a financial corporation to engage in financial transactions and its business consists of the transactions in which it engages. And a foreign corporation is simply a corporation formed outside Australia that carries on business in Australia.
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> As their business activities signify whether or not corporations are trading or financial corporations and the main purpose of the power to legislate with respect to foreign corporations must be directed to their business activities in Australia, it follows that the power conferred by s.51 (xx) extends, at the very least to the business functions and activities of Constitutional Corporations and to their business relationships. And those functions, activities and relationships will, in the ordinary course, involve individuals, 'and not merely individuals through whom the corporation acts. . . .'
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> Once it is accepted that s.51 (xx) extends to the business functions, activities and relationships of Constitutional Corporations, *it follows that it also extends to the persons* by *and through whom they carry out those functions and activities and with whom they enter into those relationships*. . . .[35]

Although the composition of the High Court has changed significantly since the discussion in *Re Dingjan*,[36] nothing else has occurred to suggest that the Court's general approach to the scope of section 51 (xx) is likely to be any different. Indeed all the indications are that the majority views expressed in that case continue to apply. So, for example, in the recent case of *Re Pacific Coal Ex parte*

34. *Id.* at 33.

35. *Id.* at 364–66.

36. See the caustic comments of Kirby, J., in Re Wakim; Ex parte McNally (1999) 198 C.L.R. 511 ¶¶ 179–85, on the impact of the changed composition of the Court in that case (which concerned the "negative implications" contained in Chapter III of the Constitution dealing with federal judicial power).

CFMEU, Justice Gaudron took the opportunity in considering the validity of the WRA's award simplification provisions to reiterate, with even greater emphasis, the opinion she had earlier expressed in *Re Dingjan,* concluding that:

> the power conferred by s.51 (xx) of the Constitution extends to the regulation of the activities, functions, relationships of the business of a corporation . . ., the creation of rights and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business . . . I have no doubt that it extends to laws *prescribing the industrial rights and obligations of [Constitutional] Corporations and their employees and the means* by *which they are to conduct their industrial relations*.[37]

This interpretation certainly seems to have been faithfully followed and applied by judges of the Federal Court in decisions involving scope of the corporations' power.[38]

If, as I am suggesting, one or other of the two views outlined above represents the presently accepted ambit of section 51 (xx), it is clear that the federal government has available to it a very powerful regulatory alternative, or supplement, to section 51 (xxxv). This being the situation, what limitations does that power impose on using it to create a national unified system of industrial relations? Two fairly obvious constraints suggest themselves.

First, self-evidently the corporations' power covers only constitutional *corporations*. Employers who are not incorporated, particularly partnerships and sole traders, fall outside its reach save perhaps to the extent that their business dealings with constitutional corporations might provide a foundation for the regulation of their relations with those whom they employ.[39] This means that reliance on the power would leave a substantial number of employees (perhaps between 10–20% of the workforce) to be regulated by some other means—the States for example, and no doubt the conciliation and arbitration power.

Second, the scope of section 51 (xx) is explicitly defined by reference to designated *categories* of corporations, namely foreign,

37. Re Pacific Coal, Ex parte Constr., Forestry, Mining & Energy Union (2000) 172 A.L.R. 257, 275.

38. *See*, *e.g.*, Quickenden v. O'Connor (1999) 166 A.L.R. 385; Rowe v TWU (1998) 160 A.L.R. 66.

39. Actors and Announcers' Equity Ass'n v Fontana Films Pty. Ltd (1982) 150 C.L.R. 169 (including quite possibly independent engaged under contracts for services).

trading, and financial corporations. The nature of these particular entities is therefore of critical importance. The broader the meaning that is given to the adjectival descriptors (especially "trading" and "financial"), the more expansive the ambit of the power. Here again judicial interpretation has been crucial. In this regard it is clear that the approach the courts have taken to the issue—the nature of the designated entities—in the last two or three decades has unquestionably added further significance to Commonwealth legislative authority. They have shown themselves quite prepared to adopt a very generous interpretation both of what constitute trading and/or financial activities and also the extent of such activities necessary to classify a corporation as a trading or financial corporation for constitutional purposes and relevant legislation enacted pursuant to that particular head of power. So, for example, public universities and hospitals have been held to be engaged in trade, as also have sporting clubs, state power and water authorities, private schools, municipal councils, and even charitable organizations such as the Red Cross Society.[40]

Although it is clear that many of the issues germane to classifying corporations as trading or financial are matters of "fact and degree" and so ultimately turn on the interpretation of relevant evidence, little imagination is required to see at least some of the important implications those decisions have for the regulation of Australian industrial relations by means of section 51 (xx) of the Constitution. A number of these implications have been discussed and explored in various ministerial discussion papers.[41] In the face of this evidence it can hardly be doubted that appropriately drafted legislation based on the corporations' power could substantially reshape the existing arrangements for establishing and enforcing the terms and conditions of employment of a very large proportion—indeed the great majority—of Australian workers.[42] Moreover it is equally clear that such legislation could dramatically reduce the role and significance of state-based systems of industrial regulation in virtue of the paramountancy provision of the Constitution (section 109) that

40. *See*, *e.g.*, Quickenden 166 A.L.R. 385; E v. Australian Red Cross Society (1991) 99 A.L.R. 601. Several of these cases are discussed in more detail in Ford, *supra* note above note 7.

41. *See*, *e.g.*, Breaking the Gridlock: Towards a Simpler National Workplace Relations System, Discussion Paper No. 1 (Canberra 2000). This and other ministerial discussion papers prepared under former Minister Peter Reith are cited and considered in CREIGHTON & STEWART, *supra* note 2.

42. Irrespective of whether they be, technically speaking, employees or independent contractors.

permits valid federal legislation to override inconsistent state laws.[43] Whether the exercise of legislative power under section 51 (xx) *could* (as distinct from should) in the event almost entirely displace existing State systems would depend upon the federal government's preparedness to utilize other heads of constitutional power—such as external affairs and/or conciliation and arbitration—to supplement any new arrangements.[44] Under the corporations' power, the institutional structures and processes of regulation could certainly be markedly simplified, and in that sense made more efficient than the present machinery.

It seems then that the fundamental question is not so much whether a new corporations-based unitary system is constitutionally feasible—it very likely is—as what would be done to ensure that it could lay justifiable claim to being fair as well as efficient for regulating general conditions of employment. This is not a legal question. Answering it adequately though will require a rather more balanced, dispassionate, and informed debate than we have become accustomed to in recent times.

If, contrary to the views expressed above and also what has already been enacted by the Commonwealth in central parts of the existing Workplace Relations Act 1996 substantially in reliance upon the assumed scope of section 51 (xx), the federal government is not constitutionally able to use the corporations' power (either alone or in combination with one or more of its other powers)[45] then, short of a successful constitutional amendment, only two other options would appear to be open. The first is for it to persuade, cajole, or entice the States to refer some or all of their residual powers to the Commonwealth so as to permit the Federal Parliament to make comprehensive laws with respect to industrial relations.[46] The second is a cooperative arrangement between the Commonwealth and the States whereby each agreed to enact complementary legislation jointly establishing a unified (and simpler) national system of industrial

43. See the brief discussion of section 109 of the Constitution and statutory expressions of intention to (or not to) "cover the [relevant] field" in Re Wakim, Ex parte McNally (1999) 198 C.L.R. 511, *and* Australian Sec. & Investments Comm'n v. Edensor Nominees Pty. Ltd. (2001) 204 C.L.R. 559.

44. *See* Stewart, *supra* note 7, for a very good discussion of this general point.

45. Such as, for example, the trade and commerce power (section 51 (i)), the conciliation and arbitration power (section 51(xx)), and the external affairs power (section 51(xxix)).

46. Or perhaps, very much a second best, to regulate the general activities and functions of corporations—including their employment arrangements.

relations.[47] The balance of this paper deals briefly with the prospects and likely problems of attempting to pursue either of these two options.

III. REFERRAL OF STATE CONSTITUTIONAL POWERS

The Constitution authorizes the voluntary referral to the Commonwealth by a State or States of any of their residual powers, including of course the power to regulate industrial relations.[48] Such a referral could be partial, in the sense of restricted to a certain portion or aspect of the powers of one or more of the States, and either permanent or for a limited period of time. In other words a referral is able to be conditioned to reference to either or both subject matter and duration. This is the basis, for example, on which the present corporations law has been enacted by the Federal Parliament. In that particular case, following unsuccessful attempts to implement a single uniform regime governing corporations in Australia through other cooperative devices, all of which came to grief as a result of constitutional challenges in the High Court, the Commonwealth and the States reached agreement on a limited ceding of relevant State power to the Federal Parliament.[49] The scheme now in operation relies upon the Commonwealth in effect confining itself to legislative arrangements whose provisions have the general concurrence of the governments of all States and self-governing Territories.[50] Importantly, the conditions that apply to that referral include not only specific qualifications limiting the Commonwealth to making only agreed amendments, but also stipulations that the referred powers are not to be used to regulate matters beyond the original purpose of the referral (including a prohibition on utilizing these powers to regulate industrial relations).[51] Were the federal government to attempt to renege on these particular conditions and try to use its new powers to legislate outside the spirit if not the text of the referral it would be

47. A very useful discussion of the background to the present corporations legislation is contained in R. v. Hughes (2000) 202 C.L.R. 535; *see also*, *e.g.*, H. FORD, R. AUSTIN & I. RAMSAY, FORD'S PRINCIPLES OF CORPORATIONS LAW ch. 3 (11th ed. 2003).

48. The relevant provision in section 51 (xxxvii); *see also* AUSTL. CONST. ch. I, pt. V, § 51 (xxxviii).

49. A brief outline of the history of the various attempts by the Commonwealth and the States to rationalize the corporations law can be found in FORD, AUSTIN, & RAMSAY, *supra* note 47, at ch. 2.

50. The relevant statute is the Corporations Act, 2001 (Austl.). The State legislation enacted for the purposing of referring certain matters relating to corporations is in each jurisdiction entitled Corporations (Commonwealth Powers) Act, 2001 (Austl.).

51. *Id.* at 57.

open to all or any of the States to immediately repeal their enabling legislation.

There is of course powerful and even more directly apposite contemporary precedent available concerning referral of state constitutional power. In 1996 the Kennett coalition government in Victoria agreed to surrender much of its industrial relations powers to the Commonwealth after a substantial part of the workforce in that State had in effect transferred from the state jurisdiction to the federal jurisdiction in response to the introduction by the Victorian government of new industrial legislation that the union movement had strongly opposed.[52]

The prospects of the present state labor governments being prepared voluntarily to refer their industrial power, in whole or in part, to the Commonwealth seem most unlikely.[53] The obstacles, however, are not so much constitutional as political. Given the current differences between the States and the Commonwealth on policies concerning industrial relations, the chances of agreement being reached on the terms of any such referral (along the lines for example of the arrangements that support the present federal corporations legislation) appear very slim indeed. It is difficult enough to envisage the States being persuaded to agree even to a referral couched strictly in terms of the existing provisions of the Workplace Relations Act 1996 much less the kind of statutory scheme the federal government (judging by recent pronouncements) has in mind. Further diminution of the authority of the AIRC, quite apart from proposed changes to the existing provisions governing protected industrial action, right of union entry, the National Wage Case, and unfair dismissal would surely be an utterly unacceptable foundation for State labor governments to agree to any transfer of their powers, even for a limited period of time. Such a proposal would also meet with the strongest possible resistance from the union movement, whose influence within the councils of the labor party continues to be very strong. The only circumstance in which even a limited referral is

52. Victoria retained its constitutional power to regulate the employment of public servants and its authority to repeal the referring legislation at any time in the future. Notwithstanding the subsequent election of the labor government in that State, the arrangement has been continued in force apparently to the general satisfaction of both governments. *See* CREIGHTON & STEWART *supra* note 3, ¶ 4.50.

53. It appears that John Brogden, the Leader of the Opposition in New South Wales, has indicated his preparedness to do so. Andrew West, *Brogden Would Surrender IR*, THE AUSTRALIAN, Apr. 12, 2005, at 2. Such promises are much more easily made while not in government. Contrast this with the reported decision of the Opposition in Western Australia. Robert Taylor, *WA Libs Wary of PM's IR Laws*, THE WEST AUSTRALIAN, Apr. 19, 2005, at 4.

remotely conceivable would be if the federal government successfully managed to enact reasonably comprehensive (valid) industrial legislation under the corporations' power, leaving the States with control over no more than a small fraction of the workforce. The States might then perhaps be persuaded to surrender their residual industrial authority either because they saw little value in continuing to maintain a system for so few employees, or because they were able to use the referral as a bargaining chip for securing some more attractive concession from the Commonwealth. Again, however, the political realities suggest that this is most unlikely.

IV. COMPLEMENTARY LEGISLATION

The only other option open to the Commonwealth, absent successful invocation of the corporations' power or a referral of industrial power by the States, is the pursuit of a cooperative solution to the problem of fragmented coverage through complementary state and federal legislation. This would require all the participating governments to enact legislation creating a single national tribunal along the lines of the now defunct Joint Coal Industry Tribunal. The system and structure thus created could, in theory, draw upon and have available to it the entirety of the industrial powers of the Commonwealth as well as the States. The result would be a unified arrangement for the regulation of industrial relations in Australia, able to be applied throughout the country without regard to state or federal jurisdictional impediments and boundaries.[54]

In order to create a system on this particular basis the States would have to agree to pass uniform laws to complement (agreed) federal legislation. Subject to the express and implied prohibitions and limitations contained in the Federal Constitution, and to the relevant powers of the Federal Parliament, the States continue at present to have complete authority within their own jurisdictions to regulate all aspects of industrial relations. By contrast, as explained above, the powers of the Federal Parliament are confined to those set out in the Constitution, particularly, for present purposes, the conciliation and arbitration power, the corporations power, the trade and commerce power, the external affairs power, and the (express) incidental power. In reliance on these powers, separately or in combination, the federal government would in turn have to enact

54. *See* R. v. Duncan; Ex parte Austr. Iron & Steel (1983) 158 C.L.R. 535; *see also* Re Cram, Ex parte NSW Colliery Proprietors' Ass'n Ltd. (1987) 163 C.L.R. 117.

appropriately framed federal legislation to complement the uniform state legislation. Taken together the package of federal legislation and state legislation would then constitute a complete and integrated (in the sense of consistent) legislative structure for the proper and effective regulation of Australian industrial relations.

The constitutionality and operational practicability of central aspects of such a system have already been established before the High Court some time ago.[55] As indicated above, this arrangement was in essential respects the model utilized by the Commonwealth and New South Wales governments to jointly regulate industrial relations in the coal industry in New South Wales. Both legislatures sponsored legislation creating the joint Coal Industry Tribunal and equipping it with appropriate powers and duties. That tribunal was then able to exercise the totality of those powers that had been conferred on it by the two parliaments, state and federal, without differentiating according to the source of the particular statutory power or powers being exercised.[56] This coordinated approach to legislation enabled each parliament to in effect remedy the deficiencies in the constitutional competency of the other legislature and thereby to overcome the jurisdictional problems that a tribunal relying solely on either New South Wales or federal law would inevitably have encountered.

When the validity of this "ingenious legislative device" involving the two legislatures acting together to set up a joint or combined authority "by the concurrent exercise of their respective constitutional powers"[57] was challenged before the High Court, that challenge was unanimously rejected. In the course of his judgment in that case, *R. v. Duncan; Ex parte Australian Iron and Steel Pty. Ltd.* the then Chief Justice, Sir Harry Gibbs, in a passage that has subsequently been regularly cited with approval wrote:

> The Constitution effects a division of powers between the Commonwealth and the States but it nowhere forbids the Commonwealth and the States to exercise their respective powers in such a way that each is complementary to the other. There is no express provision in the Constitution, and no principle of constitutional law, that would prevent the Commonwealth and States from acting in cooperation, so that each, acting in its own field, supplies the deficiencies in the power of the other, and so that together they may achieve, subject to such limitations as those provided by s.92 of the Constitution, a uniform and complete

55. The two most important cases are those referred to above at *supra* note 54.
56. Again, see the cases referred to above at *supra* note 54.
57. *See* Re Cram 163 C.L.R. 117.

> legislative scheme. . . . Further, no reason is provided by constitutional enactment or constitutional principle why the Commonwealth and the State or States should not simultaneously confer powers on one person [or tribunal] and empower that person [or tribunal] to exercise any or all of those powers alone or in conjunction.[58]

The repeated reaffirmations by the High Court of the correctness of its decision in the *Duncan* case,[59] together with frequent endorsements of the proposition that the Constitution contemplates and is in no way antithetical to cooperative arrangements between the Commonwealth and the States[60] conclusively establish that appropriately drafted complementary legislation is one desirable and readily available means whereby matters of national importance can be made the subject of comprehensive regulation otherwise beyond the capacity of any single government acting alone or in isolation.

Unfortunately, since the *Duncan* case, other decisions of the High Court have highlighted a particular problem associated with a crucial aspect of most such legislative arrangements that, political difficulties aside, are almost bound to render them operationally flawed. That problem concerns not the administrative elements of schemes created on the basis of complementary legislation but rather their enforcement provisions. Although the various regulatory powers of any tribunal or authority created by the passage of complementary state and federal legislation do not have to be exercised in isolation from each other, this is not true when it comes to enforcing any resultant orders directed to, or agreements made between, parties wishing to rely on those orders and agreements.[61] At the heart of the matter is the unconstitutionality of attempts to confer state judicial power on federal courts—even where invalidity of this aspect of a scheme causes very serious inconvenience and/or frustrates the clearly enunciated will of the parliaments concerned.[62] It was this particular problem that prompted the abandonment of a similar model of uniform complementary state and federal legislation enacted to regulate corporations in Australia and that ultimately led to the establishment of the current national scheme based on a limited referral to the Commonwealth of state constitutional powers over

58. *See* R. v. Duncan(1983) 158 C.L.R. 535, 552 (Deane, J.).

59. *See*, *e.g.*, Re Wakim, Ex parte McNally (1999) 198 C.L.R. 511, and Gould v. Brown (1998) 193 C.L.R. 346.

60. *See*, *e.g.*, the case above at *supra* note 58; *see also* R. v. Hughes (2000) 202 C.L.R. 535.

61. This problem is alluded to but not explored in R. v. Duncan 158 C.L.R. 535.

62. *See*, *e.g.*, Re Wakim, 198 C.L.R. 511, and R v Hughes (2000) 202 C.L.R. 535. Neither convenience nor public interest are constitutionally relevant criteria for determining the validity of legislation. The same is true of the political slogan "cooperative federalism."

corporations.[63] The complications involved in circumventing the difficulties of drafting and then implementing valid enforcement procedures cross-vesting state and federal judicial power are likely to rule out any attempt to create a cooperative national scheme based on inter-locking complementary legislation designed to regulate industrial relations.

Quite apart from these enforcement problems, however, the political issues arising out of apparently irreconcilable industrial relations policies that would have to be resolved before legislative cooperation between the Commonwealth and the States could occur suggest that the prospect of a unified national scheme involving the enactment of complementary legislation is no more likely than the chances of the States agreeing to a referral of some or all of their relevant constitutional powers.

V. CONCLUSION

It is beyond question that a strong case can be made for rationalizing and simplifying existing overlapping, artificial, and complicated state and federal arrangements by which Australian industrial relations are presently regulated. This certainly is not to say, however, that some of the criticisms of the current position are not greatly exaggerated and unnecessarily alarmist, or clearly voiced for political or transparently ideological reasons. If we are to move toward, much less actually bring about, a simpler and more efficient unified national system, it seems evident to me that this will only be achieved in one of two ways. The first would involve a "hostile takeover" by the federal government of the bulk of the state systems through a successful exercise of the corporations' power. Such a strategy, if it were constitutionally endorsed, would bring most, but by no means all, of Australian industrial relations under the federal jurisdiction.[64] The rump would continue to be regulated by state-based arrangements unless (which seems rather unlikely) some or all of the States were then persuaded to surrender their relevant constitutional powers to the Commonwealth. The second option is a referral by the States to the Commonwealth, on agreed terms, of relevant constitutional powers (in sufficient degree) to enable the federal parliament to enact comprehensive legislation for the regulation of terms and conditions of employment by means of

63. See the discussion by the High Court in R. v. Hughes (2000) 202 C.L.R. 535, and Australian Sec. & Investments Comm'n v. Edensor Nominees Pty. Ltd. (2001) 204 C.L.R. 559.

64. See the articles by Stewart, *supra* note 7, and also by Ford, *supra* note 7.

awards, orders, or agreements (collective and individual). Whereas the impediments to the first option are primarily constitutional, those faced by the second are entirely political. A third, and in certain respects to committed federalists at least, most appealing option—cooperative arrangements involving the passage of complementary state and federal legislation—faces both constitutional and political obstacles that, taken together, seem almost insuperable.

A phony war (of rhetoric rather than ideas[65]) is presently underway. In the meantime, the contending forces are no doubt preparing for the real battle to commence.

65. *See* Howard, *supra* note 1.