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**Industrial Relations Reforms:
The proposed national system**

by

Lenny Roth

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Lenny Roth

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CONTENTS

EXECUTIVE SUMMARY	1
1. INTRODUCTION	1
The proposed reforms	1
Debate about the reforms.....	2
Outline of this paper	3
2. OVERVIEW OF FEDERAL AND STATE SYSTEMS.....	3
The Federal and State systems	3
Why do we have both Federal and State systems and who do they cover?	3
Interaction between the Federal and State systems	7
3. HISTORY OF PROPOSED NATIONAL SYSTEM	8
Attempts to change the Constitution	8
Hancock Review of industrial relations systems (1985).....	8
Constitutional Commission Report (1988).....	9
National Commission of Audit Report (1996)	10
Victorian Government referral of powers (1996).....	11
Howard Government’s policy: 1999-2005	11
4. THE PROPOSED NATIONAL SYSTEM	15
Prime Minister’s announcement on 26 May 2005	15
The States have rejected the invitation to refer their powers	15
The new national system based primarily on corporations power	17
5. COVERAGE OF PROPOSED NATIONAL SYSTEM.....	17
The system will only apply to trading and financial corporations	17
The new system will not apply to part of State public service.....	18
Other constitutional powers will be relied upon to extend the new system	19

6. CONSTITUTIONAL VALIDITY OF NATIONAL SYSTEM.....	19
Constitutional issues.....	19
To what extent can corporations power be relied on to enact industrial laws? 19	
To what extent can such industrial laws override State industrial laws?	23
7. STATE LEGISLATION TO PROTECT CONDITIONS	24
8. DEBATE ABOUT PROPOSED NATIONAL SYSTEM.....	25
Arguments for proposed national system.....	25
Arguments against proposed national system	27
9. CONCLUSION	31

EXECUTIVE SUMMARY

Introduction

On 26 May 2005 the Prime Minister, John Howard, announced major reforms to the regulation of industrial relations in Australia. One of these reforms is the creation of a national system of industrial relations. The Federal industrial relations system, which presently operates concurrently with each of the State industrial relations systems, will replace the State systems. As the States are unwilling to refer their industrial relations powers, the Federal Government will rely on the corporations power to extend the existing Federal system to cover most corporations and their employees. The Federal Government has also proposed a number of other reforms. It will introduce the new legislation into Parliament on 2 November 2005 with a view to it being passed by 8 December 2005.

Overview of Federal and State systems

The reason that we have both Federal and State industrial relations systems is because the Federal Constitution left the States with the primary responsibility for regulating industrial relations but gave the Federal Parliament a limited power, in section 51(35), to make laws with respect to “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State”. A Federal system based on this power has operated since 1904 and in that time the Federal industrial tribunal has made awards covering 27 percent of employees in NSW (as at 1990). The NSW system has also operated for over 100 years and the NSW industrial tribunal has made awards covering 49 per cent of employees in NSW (as at 1990). In addition, legislation in NSW has set certain minimum conditions of employment (eg annual leave) for all employees. Since the early 1990s, both Federal and State systems have provided for, and placed an emphasis on, the setting of wages and employment conditions through the making of enterprise agreements, in place of awards. The Federal system relies on the corporations power to allow for the making of enterprise agreements between a corporation and a group of employees.

History to proposed national system

Since federation, six unsuccessful attempts have been made to amend the Constitution by referendum to give the Federal Government a general power to legislate with respect to industrial relations. A comprehensive review of Australian industrial relations by the Hancock Committee in 1985 discussed the idea of a national industrial relations system. It believed that it was unlikely that this could be achieved by referendum or by the States referring their powers. It considered whether the Federal Government could rely on the corporations power to greatly extend the coverage of the Federal system but recommended against this option. In 1996, the Victorian Government referred its industrial relations powers to the Federal Government and the Federal system now operates in Victoria. In March 1999, Minister Reith raised the idea of using the corporations power to create a simpler workplace relations system. The Minister released discussion papers in late 2000, which explored this option in more detail. In 2002 the Federal Government attempted to create a national unfair dismissal system but this was blocked by the Senate.

Coverage of proposed national system

The proposed national system will apply to “trading” and “financial” corporations and their employees. A significant proportion of small and medium businesses are not corporations and would therefore not be covered by the new system: In 1997, it was estimated that around 26 per cent of employees in the private sector were not employed by corporations. The terms “trading” and “financial” corporations cover commercial corporations operating for profit as well as a wide range of other corporate bodies such as local councils, public universities, and providers of medical services, but not corporate charities and community service organisations that do not receive fees for services provided. State government corporations will be covered by the new system but the *implied immunity* principle restricts the coverage of federal industrial laws in relation to State public servants.

Constitutional validity of national system

The proposed system will primarily be based on the corporations power, which allows the Federal Parliament to make laws with respect to trading and financial corporations. The main constitutional issue is: to what extent can the Federal Government use this power to enact laws regulating the industrial relations of corporations and their employees? The High Court has not issued clear guidance on this issue and there are varying expert opinions on whether the High Court would uphold comprehensive industrial relations laws that apply to corporations and their employees. Another constitutional issue is whether validly enacted Federal industrial laws can override State industrial laws. Section 109 of the Constitution provides that Federal laws prevail over inconsistent State laws; and the Federal Parliament can create inconsistency by showing a legislative intention to “cover the field”.

State legislation to protect conditions

Queensland has passed legislation to provide protections for workers whose entitlements are eroded or removed under the Federal Government’s reforms. The Tasmanian Government is proposing to introduce similar legislation. It appears, however, that the Federal Government could exclude these new State laws.

Debate about proposed national system

The main arguments in favour of the proposed national system relate to the complexity, cost and inefficiency of having both multiple State systems and dual Federal and State systems. In view of the importance of industrial relations for the economy, it is argued that it should be a matter of Federal Government responsibility. The Howard Government also argues that the proposed national system is important for productivity gains and a strong Australian economy. The main arguments against the proposed national system are that the new system will still be a dual system with some complexity, that a national system should be achieved in consultation with the States rather than by hostile takeover, and that the proposed national system will substantially reduce workers’ entitlements.

1. INTRODUCTION

The proposed reforms

On 26 May 2005 the Prime Minister, John Howard, announced major reforms to the regulation of industrial relations in Australia.¹ One of these reforms is the creation of a national system of industrial relations. The Federal industrial relations system, which presently operates concurrently with each of the State industrial relations systems, will replace the State systems. As the States are unwilling to refer their industrial relations powers to the Federal Government, the Federal Government will rely on the corporations power in section 51(20) of the Constitution to extend the Federal system to cover most corporations and their employees. This will not result in a truly national system (because not all employers are corporations) but it is estimated that the new system will cover up to 85 per cent of the workforce.

As well as creating a national system, the Federal Government proposes to make major changes to the Federal system (which will become the national system) including:

- (1) The establishment of a new body – the Australian Fair Pay Commission - to take over from the Industrial Relations Commission in setting and varying minimum wages.
- (2) The establishment of an Australian Fair Pay and Conditions Standard (AFPC Standard), a safety net comprising minimum wages and minimum conditions relating to annual leave, personal/carer's leave, parental leave and maximum ordinary hours of work.
- (3) Collective agreements and individual agreements (AWAs) will be assessed against the AFPC Standard instead of being assessed against Federal and State awards under the current no-disadvantage test. This means that certain award conditions can be excluded by such agreements (eg overtime loading, penalty rates, rest breaks).
- (4) Changes to unfair dismissal laws including an exemption for businesses with less than 100 employees (this does not affect unlawful dismissal laws).
- (5) Changes to laws relating to industrial action, including requiring secret ballots before protected industrial action can be taken.
- (6) Limiting union rights of entry into workplaces.

The Prime Minister provided a very brief outline of the proposed reforms in his May announcement and the Federal Government released further details in a document published on 9 October 2005, entitled *WorkChoices: A New Workplace Relations System*.² The Government

¹ Prime Minister John Howard, 'Prime Ministerial Statement on Workplace Relations', Parliament of Australia, 26 May 2005.

² See Australian Government's *WorkChoices* website: <https://www.workchoices.gov.au/>

is rewriting the *Workplace Relations Act 1996* and will introduce the new legislation into Parliament on 2 November 2005 with a view to it being passed by 8 December 2005.

The Howard Government has previously attempted to introduce some of the proposed reforms although it has not, until now, moved to create a national system.³ These attempts have been blocked in the Senate.⁴ The Coalition now has a majority of one in the Senate. However, Nationals Senator, Barnaby Joyce, has indicated he may not support elements of the reforms.⁵

The Senate Employment, Workplace Relations and Education References Committee will hold a short inquiry into the bill.⁶ Up to five public hearing days have been scheduled, commencing on 14 November 2005. The Senate will report on 22 November 2005. The Committee will not examine reforms which it has examined in the past.

Debate about the reforms

The proposed reforms have generated heated debate in the media and in the community. Business groups and employer associations have encouraged and supported the reforms, which according to the Prime Minister:

...represent the next logical step towards a flexible, simple and fair system of workplace relations. Australia must take this step if we are to sustain our prosperity, remain competitive in the global economy and meet future challenges such as the ageing of our society.⁷

However, there has been strong opposition from trade unions, the workforce, State governments and some academics.⁸ There are concerns that real minimum wages will fall, and that employers will be able to place workers on individual agreements that take away award entitlements such as overtime and shift loading, weekend penalty rates, and rest breaks. Alarm has also been raised about workers losing unfair dismissal rights. State governments have indicated that they will challenge the hostile takeover of their industrial relations systems in the High Court.

³ As to previous bills, see O'Neill S, *Workplace Relations Legislation: Bills Passed, Rejected or Lapsed, 38-40th Parliaments (1996-2004)*, Australian Parliamentary Library, E-Brief, 8 July 2005

⁴ Ibid.

⁵ See, for example, 'Senator may halt IR reform', *The Australian*, 1/7/05.

⁶ See Senate Committee website:

http://www.aph.gov.au/Senate/committee/eet_ctte/wr_workchoices05/info.htm

⁷ Prime Minister John Howard, 'Prime Ministerial Statement on Workplace Relations', Parliament of Australia, 26 May 2005. p2.

⁸ As to academics see 'The Federal Government's Industrial Relations Policy: Report Card on the Proposed Changes', a series of papers by 17 academics from universities across Australia, accessed at <http://www.econ.usyd.edu.au/wos/IRchangesreportcard/>

Outline of this paper

This is the first of two briefing papers dealing with the federal industrial relations reforms. This paper focuses on the proposal to create a national system. The second paper will discuss the various other reforms, which, by then, will be introduced into Parliament.

This paper begins with a history of the current proposal to create a national system. Next, it outlines the current proposal and looks at the coverage and constitutional validity of a national system based on the corporations power. It then discusses State legislation to protect worker's conditions. Lastly, this paper summarises the debate about the proposed national system.

For convenience, this paper uses the term "industrial relations" although it is recognised that some, including the Federal Government, prefer to refer to it as "workplace relations".

This paper is based on publicly available information as at 31 October 2005.

2. OVERVIEW OF FEDERAL AND STATE SYSTEMS

The Federal and State systems

Since early last century, every State in Australia has had its own industrial relations system and the Federal industrial relations system has operated concurrently with each of these State systems.⁹ The systems operate concurrently in the sense that a proportion of employees in each State have their wages and employment conditions regulated by the State system, while a (lower) proportion of employees have their wages and employment conditions primarily regulated under the Federal system. The reasons why both Federal and State systems exist are discussed below. The NSW industrial relations system currently exists under the Carr Government's *Industrial Relations Act 1996* (NSW), and other legislation. The Federal system exists under the Howard Government's *Workplace Relations Act 1996* (Cth).

Why do we have both Federal and State systems and who do they cover?

The reason that we have both Federal and State industrial relations systems is because the Federal Constitution left the States with the primary responsibility for regulating industrial relations but gave the Federal Parliament a limited power, in section 51(35), to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". The reason for this was:

By the time of Federation, all States had established conciliation and arbitration tribunals or wages boards to deal with industrial disputes. However, it was acknowledged at the Constitutional Conventions of the 1890s that the States were ill-equipped to deal with interstate disputes, such as those that had occurred [in the maritime and pastoral industries] during the 1890s, and the Commonwealth should be able to establish

⁹ In 1996, the Victorian Government referred its industrial relations powers to the Federal Parliament and the Federal system now operates exclusively in Victoria (this is discussed below).

machinery to deal with such matters.¹⁰

In reliance on the conciliation and arbitration power in section 51(35), in 1904 the Federal Parliament legislated to create a Federal industrial tribunal (now known as the Australian Industrial Relations Commission) to resolve interstate disputes via conciliation and arbitration.¹¹ Since that time, in resolution of such interstate disputes, the tribunal has made Federal awards setting minimum wages and employment conditions for a significant proportion of employees across Australia, in various industries and occupations. As at 1990, Federal awards covered 31 percent of employees in Australia and 27 percent of employees in NSW.¹²

The growth in Federal awards has been facilitated by the willingness of some unions to manufacture interstate disputes to bring them within the jurisdiction of the Federal tribunal; a practice that the High Court has accepted. Professor McCallum states:

As [the federal system] is confined to the prevention and settlement of interstate industrial disputes, it might have been thought that it would not often be exercised because of the infrequency of the occurrence of actual interstate disputes. However, ever since the 1914 *Builders Labourers' Case* up until the present day, this [condition] has been relatively easy to satisfy. Provided that a registered trade union with members in more than one state serves a written list of genuine demands relating to terms and conditions of employment in an industry – which is known as a log of claims – on employers engaged in the same industry in more than one state, an interstate dispute will have been created and the jurisdiction of the Australian Industrial Relations Commission will have been invoked.¹³

However, the coverage of Federal awards has been limited by a High Court decision holding that such awards only bind employers that were made a party to the interstate dispute¹⁴ (this is unlike State awards which operate by “common rule” throughout an industry or occupation). Unions have attempted to get around this restriction by serving logs of claims on a large number of employers and employer associations and through subsequent ‘roping in’ awards.¹⁵ Federal award coverage has also been limited by a High Court decision in 1919¹⁶, which gave a narrow interpretation to the term “industrial dispute”, meaning that Federal awards could not be made for some types of employees (eg state teachers). This decision was overturned in 1983.¹⁷

¹⁰ Australian Government, *Breaking the Gridlock: Towards a Simpler National Workplace Relations System: Discussion Paper 1: The Case for Change*, p4.

¹¹ See *Conciliation and Arbitration Act 1904* (Cth).

¹² Australian Bureau of Statistics, *Award Coverage Australia*, ABS Cat No. 6315.0, May 1990.

¹³ McCallum Prof R, introduction to *Industrial Law: Federal*, Butterworths looseleaf service, p1019.

¹⁴ *Australian Boot Trade Employees' Federation v Whybrow & Co* (1910) 11 CLR 311.

¹⁵ A ‘roping in’ award is one made with the express purpose of extending the list of respondents, and thus the coverage, of an existing Federal award.

¹⁶ *Federated Municipal and Shire Employees Union of Australia v Melbourne Corporation* (1919) 26 CLR 508.

¹⁷ *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297.

State industrial relations systems have been free to operate outside the coverage of the Federal system. State industrial tribunals (the tribunal in NSW is now known as the NSW Industrial Relations Commission) have resolved disputes through conciliation and arbitration and have made (State) awards setting minimum wages and employment conditions for employees in many industries and occupations throughout the State. As at 1990, State awards and agreements covered 47 per cent of employees in Australia and 49 percent of employees in NSW.¹⁸

The 1985 Hancock report of review on Australian industrial relations systems commented on the relative haphazard coverage of Federal and State awards and explained that, “by and large, it reflects the wishes of the parties, particularly the trade unions. It is usually the union that serves demands to initiate change”.¹⁹ According to McCallum:

In the main, it has been strong male dominated unions with industrial muscle which have gone down the federal route. Heavy industry, mining, transport, and telecommunications are all largely within the federal sphere. This means that state mechanisms... have a higher level of small employers in areas such as retail, localised service industries, child care and small scale manufacturing. This is not to say that the NSW system does not cover large industrial undertakings; rather, it shows that the balance of the mechanism is with workers in industries where there is a predominance of small employers. Many significant areas of the public sector, like primary and secondary teaching and various categories of health workers also come within the NSW boundaries.²⁰

While section 51(35) of the Constitution has not allowed the Federal Parliament to legislate directly in relation to wages and employment conditions²¹, the State Parliaments have had no such constitutional restrictions. The NSW Parliament has therefore legislated to establish certain minimum employment conditions for *all* employees in NSW²², including minimum entitlements in relation to long service leave²³, parental leave²⁴ and annual holidays²⁵. In addition, State laws have created a system for challenging unfair dismissals²⁶, for regulating occupational health and

¹⁸ Australian Bureau of Statistics, *Award Coverage Australia*, ABS Cat No. 6315.0, May 1990

¹⁹ Hancock K et al, *Australian Industrial Relations Law and Systems: Report of the Committee of Review*, Australian Government Publishing Service, April 1985, p255.

²⁰ McCallum R, introduction to *Industrial Law New South Wales*, Butterworths looseleaf service, p1027.

²¹ Section 51(35) only allows the Federal Parliament to set up a system of conciliation and arbitration, not to legislate directly in relation to wages and employment conditions.

²² For history of legislation granting minimum entitlements see NSW Office of Industrial Relations, *A History of Employment Relations in NSW*, located on website at:<http://www.industrialrelations.nsw.gov.au/action/restools/history.html>

See also Patmore G, ‘Setting the Pace: The NSW jurisdiction before 1981’, Symposium: *The State Systems of Industrial Relations: Past Present and Future*, University of Sydney, 26 August 2005.

²³ *Long Service Leave Act 1955* (NSW).

²⁴ See *Industrial Relations Act 1996* (NSW), Chapter 2, Part 4.

²⁵ *Annual Holidays Act 1944* (NSW).

²⁶ See *Industrial Relations Act 1996* (NSW), Chapter 2, Part 6.

safety²⁷, and for the payment of compensation for workplace injuries.²⁸

In the 1990s, the Federal Government relied on other constitutional powers (the external affairs power and the corporations power) to legislate directly in relation to employment conditions. It enacted Federal unfair dismissal laws²⁹ (that apply to federal award employees if they are employed by a corporation), unlawful dismissal laws³⁰ (which prohibit dismissal on certain discriminatory grounds), and it also legislated for parental leave entitlements.³¹

Since the early 1990s, there have been major reforms to both Federal and State industrial relations systems which have placed an emphasis on the setting of wages and employment conditions through the making of enterprise agreements, rather than via awards.³² In contrast to awards, which set minimum wages and conditions for an industry or occupation, enterprise agreements set wages and employment conditions for employees in a single enterprise.

State laws in relation to enterprise agreements were enacted by the Greiner Government in 1991 and were modified by the Carr Government in 1996. The current laws allow for the making of an enterprise agreement between an employer and either a group of employees or a union representing those employees.³³ On approval by the Industrial Relations Commission, these agreements operate to the exclusion of awards. However, in order to be approved, they must pass the no-detriment test: ie the agreement must not provide a net detriment to the employees when compared to the aggregate package of conditions of employment under an award.

In 1993, the Keating Federal Government enacted similar enterprise agreement provisions.³⁴ Relying on section 51(35) of the Constitution, the provisions allowed enterprise agreements to be made between an employer and a union in settlement of an interstate dispute. In addition, the Government relied on the corporations power in the Constitution to enact provisions allowing for an enterprise agreement between a corporation and a group of its employees.

The Howard Government retained the main elements of these enterprise agreement provisions when it enacted the *Workplace Relations Act 1996*.³⁵ It also introduced Australian Workplace

²⁷ Current laws are contained in *Occupational Health and Safety Act 2000* (NSW).

²⁸ Current laws are contained in *Workplace Injury Management and Workers Compensation Act 1998* (NSW).

²⁹ See *Workplace Relations Act 1996* (Cth), Part VIA, Div 3.

³⁰ See *Workplace Relations Act 1996* (Cth), Part VIA, Div 3, Subdiv C.

³¹ See *Workplace Relations Act 1996* (Cth), Part VIA, Div 5.

³² For a discussion of these reforms see, for example, Ronfeldt P and McCallum R, *Enterprise Bargaining: Trade unions and the law*, The Federation Press, 1995.

³³ See *Industrial Relations Act 1996* (NSW), Chapter 2, Part 2.

³⁴ See *Industrial Relations Reform Act 1993* (Cth).

³⁵ See *Workplace Relations Act 1996* (Cth), Part VIB (certified agreements).

Agreements (AWAs).³⁶ These are individual agreements between an employer and employee that set wages and employment conditions and operate to the exclusion of awards and, with some exceptions, of enterprise agreements. Like enterprise agreements, AWAs must pass a no-disadvantage test but instead of being approved by the Industrial Relations Commission, they are approved by the office of the Employment Advocate. The AWA provisions also rely on the corporations power and therefore only employers that are corporations can use them.

Reliance on the external affairs power to legislate for some minimum entitlements and reliance on the corporations power to enact enterprise agreement and AWA provisions, has allowed the Federal Government to extend the reach of its industrial relations system.

The current relative coverage of Federal and State systems is difficult to determine. An Australian Bureau of Statistics survey, published in May 2004, provides data on how the main part of an employee's pay was set.³⁷ The survey results do not provide data on the proportion of employees covered by Federal and State awards. However, the results show that 18 percent of employees in NSW had the main part of their pay set by a Federal enterprise agreement or AWA, while 19 per cent of employees in NSW had their pay set by a State enterprise agreement. According to a recent statement by the NSW Minister for industrial relations:

New South Wales administers a system used by 2.7 million employees. It is a system that is used by two businesses out of every three in New South Wales and the vast majority of small businesses also use it.³⁸

Interaction between the Federal and State systems

The Federal and State systems overlap. For example, Federal awards may cover employees who are also covered by a State award and Federal enterprise agreements may cover employees who are covered by a State award. The interaction between the two systems is complex but the general rule for resolving conflict between the two systems is contained in section 109 of the Constitution. It provides that Federal laws prevail over inconsistent State laws. Thus, to state the position very broadly, where there is overlap and inconsistency between Federal laws or Federal industrial instruments (ie awards/agreements) and State laws or State industrial instruments (ie awards/agreements), the former prevail over the latter. One exception, for example, is that State enterprise agreements can override Federal awards.³⁹

³⁶ *Workplace Relations Act 1996*, Part VID.

³⁷ Australian Bureau of Statistics, *Employee Earnings and Hours, Australia*, Cat 6306.0, May 2004.

³⁸ Hon John Della Bosca MLC, *NSW Parliamentary Debates*, 26/5/05, p16224.

³⁹ For further information on the interaction between the two systems see C P Mills, *Industrial Relations in NSW 1901-1989*, NSW Parliamentary Library Research Service, Background Paper 1989/4; and Figgis H, *Awards and Enterprise Agreements in the New South Wales and Commonwealth Industrial Relations Systems*, NSW Parliamentary Library Research Service, Briefing Paper No 3/97.

3. HISTORY OF PROPOSED NATIONAL SYSTEM

Attempts to change the Constitution

The Constitution may be amended through a national referendum.⁴⁰ Since federation, proposals to extend the legislative power of the Federal Parliament in relation to industrial relations have been rejected at referendums on six occasions – in 1911, 1913, 1919, 1926, 1944 and 1946.⁴¹ The Constitutional Commission, which undertook a comprehensive review of the Australian Constitution in the mid 1980s, recommended that the Constitution be amended to give the Federal Parliament a general power to legislate with respect to industrial relations.⁴² There has been no subsequent referendum to give effect to this recommendation.

Hancock Review of industrial relations systems (1985)

The 1985 report of the Hancock committee, which undertook a comprehensive review of federal industrial relations laws, discussed the idea of a national industrial relations system.⁴³ It explained that this idea “attracted a good deal of ‘in principle’ support...[but] there was a broad recognition however, that the practical, political and industrial difficulties that would be faced by such a move rendered it an unrealistic option in anything but the long term”.⁴⁴

The Hancock report explained that there were two main options for achieving a national system.

⁴⁰ See section 128 of the Constitution. A referendum proposal must first be passed by an absolute majority of both houses of the Federal Parliament, or by one House twice. The referendum must then be passed by a majority of the people and by a majority of the people in a majority of the States.

⁴¹ Commonwealth of Australia, *Final Report of the Constitutional Commission*, Australian Government Publishing Service, 1988, Vol 2, p796. As outlined on p802, the results were as follows

Year	Percentage in favour	States in favour
1911	39.42	1 (WA)
1913	49.33	3 (Qld, SA, WA)
1919	48.64	3 (Vic, Qld, WA)
1926	43.50	2 (NSW, Qld)
1944	45.99	2 (SA, WA)
1946	50.30	3 (NSW, Vic, WA)

⁴² This is discussed below.

⁴³ Hancock K et al, *Australian Industrial Relations Law and Systems: Report of the Committee of Review*, Australian Government Publishing Service, April 1985.

⁴⁴ *Ibid*, p272.

The first was to change the Constitution by referendum. However, the report noted the discouraging record of previous referendum proposals and it considered that “the necessary degree of consensus is unlikely to emerge on as controversial an issue as the Commonwealth’s ousting the states from the regulation of industrial relations”.⁴⁵ The second option was for the States to refer their powers to the Federal Parliament in accordance with section 51(37) of the Constitution. In relation to this option, the report made the following comment:

The concept of referral of industrial relations power has been raised from time to time in the past (more often on a ‘change of balance’ than on a ‘full transfer’ basis). The states have shown little willingness to grant further powers to the Commonwealth. Attitudes expressed to us by State Governments lead to the clear conclusion that this remains the position. While it may be possible to look at ‘trade-offs’ or bargaining points which might be employed to encourage the states, we do not see the necessary degree of agreement being reached.⁴⁶

The report of review also referred to a possible third option, namely that:

...a virtually exclusive federal industrial jurisdiction could be achieved by the Commonwealth’s drawing on a wider range of its constitutional heads of power [eg the corporations power and the external affairs power]. It would involve the Commonwealth in legislating under these heads of power in such a way as to exclude the states by virtue of section 109 of the Constitution. It is arguable (especially in the light of recent judgments of the High Court) that, by drawing upon the full range of its powers, the Commonwealth Parliament could vest in a federal arbitral tribunal such extensive and general authority that the states’ systems would, in time, have much reduced areas of coverage.⁴⁷

In relation to this possible third option, the report concluded:

We see considerable difficulties in this approach. First, there is some risk of invalidity; secondly, the move would undoubtedly be divisive and strenuously opposed by State Governments and state-based interests; and thirdly, there would be gaps in coverage. In not embracing this option, we do not... say that other heads of constitutional power should not be used (as they have been used in the past) to supplement the conciliation and arbitration power so as to give greater flexibility to the federal tribunal. We do not recommend, however, that the Commonwealth Parliament use these other heads of power for the purpose of extending the federal industrial relations system to the exclusion of the states. There are other means at the disposal of governments to redress the problems of multiple tribunals which are less divisive and speculative.⁴⁸

Constitutional Commission Report (1988)

As noted above, the Constitutional Commission’s Final Report in 1988 recommended that the Constitution be changed to give the Federal Parliament a general power to legislate with respect to industrial relations.⁴⁹ Although noting that some State Governments opposed giving the

⁴⁵ Ibid, p274.

⁴⁶ Ibid, p276.

⁴⁷ Ibid, p276.

⁴⁸ Ibid, p277.

⁴⁹ Commonwealth of Australia, *Final Report of the Constitutional Commission*, Australian Government Publishing Service, 1988, Vol 2, p794.

Federal Parliament a general power over industrial relations, a majority of the Commission said:

It is natural that the State Governments should be unwilling to put at risk their industrial tribunals...

This is, however, one occasion when the majority of us do not feel that we can fall back on the argument that the existing position should not be changed because it gives general satisfaction. In our view, the distribution of powers in industrial relations is, for the reasons given, deeply flawed, whether viewed from the aspect of Parliamentary government, national economic management, a rational federal system or efficiency.⁵⁰

One member of the Commission dissented. The reasons for dissenting included that the problems of the Federal system could be fixed without giving the Federal Parliament this broad power; the States have highly developed systems and no reasons were adduced as to why all these systems should come under the legislative power of the Commonwealth; proposals to increase the Federal Parliament's power have been consistently defeated at referendum; and very few submissions supported an extension of federal power.⁵¹

National Commission of Audit Report (1996)

The National Commission of Audit was established by the Federal Government in March 1996 and was required to report on a number of matters including current service delivery arrangements between the States/Territories and the Commonwealth and their effectiveness and efficiency. With respect to industrial relations, the Commission's 1996 report stated:

The current structure and operation of the dual Commonwealth and State industrial relations arrangements, both legislation and processes, is extremely complex, with extensive duplication and overlap. The objectives of the Federal and State systems would be better served by simplification and harmonisation of Commonwealth and State industrial relations legislation to remove overlaps and distortions and to establish cooperative, integrated processes and administration.⁵²

The report did not recommend the establishment of a national system. Instead, it recommended that the Federal Government "undertake negotiations with the States to develop greater uniformity and simplification in industrial relations regulatory arrangements preferably through complementary, template legislation".⁵³ It also recommended more integrated processes and administration between Federal and State tribunals.⁵⁴

⁵⁰ Ibid, p801.

⁵¹ Ibid, p801.

⁵² National Commission of Audit, *Report to the Commonwealth Government*, June 1996, p82.

⁵³ Ibid, p82.

⁵⁴ Ibid, p82.

Victorian Government referral of powers (1996)

In December 1996, the Kennett Government in Victoria passed legislation referring its powers over industrial relations to the Federal Government.⁵⁵ This reference of powers was subject to various conditions, which among other things, preserved for the State the power to regulate various aspects of public employment.⁵⁶ According to Kollmorgen:

The Victorian Government heralded its decision as reflecting a consensus among industrial relations experts that a unitary national industrial relations system is both desirable and inevitable. The initiative was stated to overcome a significant criticism regarding industrial relations in Australia – that the co-existence of a federal and six state systems causes unnecessary complexity for business and duplicated regulatory systems provided by the taxpayer. The government went so far as to describe the regulation of a workforce of 11 million employees by seven industrial relation's systems as 'ludicrous and economically unsustainable'.⁵⁷

The reference of powers is revocable at any time by the Victorian Government but, in practice, it would be difficult to re-establish a State system.⁵⁸ The Labor Government in Victoria has not revoked the reference of powers but it did threaten a partial re-establishment of the Victorian system in order to persuade the Federal Government to make changes to the system that operated in Victoria; and these changes were made in 2003.⁵⁹

Howard Government's policy: 1999-2005

Minister Reith's speech (March 1999)

In March 1999, the Minister for Employment and Workplace Relations, Hon Peter Reith MP, proposed relying on the corporations power in the Constitution (which allows the Federal Parliament to make laws with respect to corporations) in order to create a simpler workplace relations system; and also as the possible basis for a national workplace relations system. The corporations power would be used in place of the conciliation and arbitration power contained in section 51(35). In a speech to the National Press Club Minister Reith said:

...there is an impressive intellectual case in the modern Australia for abandoning the use of the conciliation and arbitration power in our workplace relations laws and its replacement with the corporations power.

...[This] would have significant practical consequences. It would enable a coherent national framework of minimum standards to be established for the conduct of workplace relations in corporations. In those

⁵⁵ See *Commonwealth Powers (Industrial Relations) Act 1996* (VIC).

⁵⁶ Creighton B and Stewart A, *Labour Law*, The Federation Press, 4th ed, 2005, p113.

⁵⁷ Kollmorgen S, 'Recent legislation: Towards a Unitary System of Industrial Relations?', (1997) 10(1) *Australian Journal of Labour Law* 158.

⁵⁸ Creighton B and Stewart A, *Labour Law*, The Federation Press, 4th ed, 2005, p113.

⁵⁹ *Ibid*, p113.

workplaces, it could end the dual regulation of Federal and State industrial relations systems.⁶⁰

Commenting on the potential impact of this proposal on State systems, Minister Reith said:

There are a number of important consequences for Federal/State workplace relations which would arise under such an approach. The use of the corporations power would not necessarily mean that State laws would have to be impacted upon, although it would be beneficial for States to be part of such foundational changes to the system. A variety of approaches could be adopted, all of which should be assessed against the generally accepted objectives of harmonisation and simplicity of regulation. Indeed, States may gain in some areas, although this could be offset by federal awards binding corporations trading within or across State boundaries. It could even lead over time to greater pressures for the establishment of a single integrated system between Federal and State laws...a desirable objective in its own right.⁶¹

Minister Reith's discussion papers (2000)

In October and November 2000, Minister Reith issued a series of three discussion papers entitled *Breaking the Gridlock: Towards a Simpler National Workplace Relations System*.⁶² These discussion papers considered “options for fundamentally reforming the constitutional framework for workplace relations in Australia to help move towards a simpler national system”.⁶³ It was explained that the discussion papers were not the “policy position of the Federal Government” but that their purpose was “to encourage public debate”.⁶⁴

The first discussion paper referred to the various limits of the conciliation and arbitration power, which have led to “fundamental structural and procedural problems”.⁶⁵ Referring to problems with the Federal system, the discussion paper stated that:

... We have a system that promotes the creation of disputes so that we can settle them. We have a system that forces extreme and artificial demands for pay and conditions to be made on employers and small business – where demands are dictated by the requirements of the system, not the desires of the relevant employees. It is a system that applies in a confusing, patchwork way and adds layers of legalism, complexity and cost. It is a 100-year-old system that has built anomaly upon anomaly. In today's environment it alienates and isolates its main players, the employers and employees. It has made

⁶⁰ Hon Peter Reith MP, Minister for Employment, Workplace Relations and Small Business, *Getting the Outsiders Inside – Towards a National Workplace Relations System in Australia*, Speech at the National Press Club, 24 March 1999, p3.

⁶¹ *Ibid*, p9.

⁶² These papers can be accessed online at: <http://www.simplerwrssystem.gov.au/>

⁶³ Australian Government, *Breaking the Gridlock: Towards a Simpler National Workplace Relations System – Discussion Paper 1: The Case for Change*, October 2000, piii.

⁶⁴ *Ibid* piii. One example of this occurring was that in November 2000, the Business Council of Australia hosted a forum entitled *A Unitary Industrial relations System: Unfinished Business of the 20th Century*. The papers from the conference can be accessed online on the BCA website: <http://www.bca.com.au/content.asp?newsID=87439>.

⁶⁵ Australian Government, *Breaking the Gridlock: Towards a Simpler National Workplace Relations System – Discussion Paper 1: The Case for Change*, October 2000, p16.

workplace relations a game played for third parties at least one step removed from the workplace...⁶⁶

The second discussion paper concluded that:

Our current federal system based on the conciliation and arbitration power struggles to meet the needs of business and employees. It is not a rational basis for a modern workplace relations system. The existing dual system has grown in an ad hoc way and lacks coherence. Despite nearly 100 years of talking about the problems of the dual system, together with inquiries and meetings of State and Territory Ministers, remedies have been few and far between and where they have been successful, they have been limited by their ability to resolve the underlying deficiencies of the dual system...

The benefits of shifting to a workplace relations system based on the corporations power deserve serious consideration. Such a system would be more rational and more coherent. It would be a simpler national system and it could be an exclusive system for those within it...⁶⁷

According to the paper, the proposed new system could cover around 85 per cent of the total population of non-farm employees, including around 800,000 employees who were not covered by a Federal or State award or agreement. This would leave approximately 15 per cent of employees under the remaining State jurisdictions.⁶⁸

Introduction of bill to create a national system of unfair dismissal laws (2002)

In 2002 the Howard Government introduced a bill that relied on the corporations power in the Constitution to create a national system of unfair dismissal regulation for corporations and their employees.⁶⁹ On introducing the bill, Minister Abbott said:

Since my predecessor, Peter Reith, launched a series of discussion papers in late 2000, it has been Government policy to explore options for working towards a simpler, fairer workplace relations system based on a more unified and harmonised set of laws. Maintaining six separate industrial jurisdictions makes as much sense as keeping six separate railway gauges. A national economy needs a national regulatory system and the sooner we can achieve this, the better. A more unified national workplace relations system means less complexity, lower costs and more jobs.

The Government would prefer to proceed by agreement and by referral of powers along the lines pioneered by Premier Kennett in Victoria. In the absence of referrals by other states, the Government proposes to use its existing constitutional powers, where it reasonably can, in a step-by-step progress towards a more unified system. In this case, the Government proposes to ensure that workers and business people operate, as far as is constitutionally possible, under one system of laws governing unfair dismissal.⁷⁰

⁶⁶ Ibid, p25.

⁶⁷ Australian Government, *Breaking the Gridlock: Towards a Simpler National Workplace Relations System – Discussion Paper 2*, October 2000, p22.

⁶⁸ Ibid, p15.

⁶⁹ *Workplace Relations Amendment (Termination of Employment) Bill 2002*.

⁷⁰ Second reading speech, accessed at:

<http://www.workplace.gov.au/workplace/Category/Legislation/WRAct/WorkplaceRelationsAmendmentTerminationofEmploymentBill2002.htm>

The Bill was blocked in the Senate. In the Senate Committee report on the bill, Labor Senators stated that the bill “shows all the signs of failure to deal cooperatively with the states. It also shows that the complexities and confusions that the Government alleges to arise from having conflicting and overlapping jurisdictions would be made even worse if this bill were to pass”.⁷¹ On the other hand, the Democrats supported the creation of a unitary system of industrial relations and on this basis supported a single system of unfair dismissal laws.⁷² The Democrats noted that, although unlikely, the most effective way to get a national industrial relations system would be by the States referring their powers.⁷³

Subsequent developments: 2004-05

In 2004, the current Minister for Workplace Relations, Hon Kevin Andrews MP, reportedly said that he wanted a single national workplace relations system.⁷⁴ However, the Federal Government backed away from this proposal in the lead up to the October 2004 election.⁷⁵ In January 2005, business groups were urging the Federal Government to create a national workplace relations system.⁷⁶ At the time, a spokesman for Minister Andrews said simply that, “the Government was interested in talking to the states about the harmonisation of industrial relations laws”.⁷⁷ However, in February 2005, the Prime Minister, John Howard, said that he would like to introduce a single national workplace relations system.⁷⁸ In April 2005, he revealed his plan to create a national system in an address to the Menzies Research Centre.⁷⁹

⁷¹ Employment, Workplace Relations and Education Legislation Committee, *Provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002*, p20.

⁷² *Ibid*, pp26-28.

⁷³ *Ibid*, pp26-28.

⁷⁴ ‘States seek legal advice on IR challenge’, *Australian Financial Review*, 8/2/05.

⁷⁵ *Ibid*.

⁷⁶ ‘Business calls for single IR system’, *The Australian*, 11/1/05.

⁷⁷ *Ibid*

⁷⁸ ‘One system fits all in the workplace’, *The Australian*, 12/2/05.

⁷⁹ Prime Minister Howard, *Reflections on Australian Federalism*, Address to Menzies Research Centre, Melbourne, 11 April 2005.

4. THE PROPOSED NATIONAL SYSTEM

Prime Minister's announcement on 26 May 2005

On 26 May 2005, the Prime Minister outlined the Government's intention to create a national system of workplace relations as part of its reform package. He said:

Australia currently has six different workplace relations systems with thousands of different Federal and State awards. This system of overlapping Federal and State awards is too complex, costly and inefficient.

The Government believes that a single set of national laws on industrial relations is an idea whose time has come. In an age when our productivity must match that of global competitors, forcing Australian firms to comply with six different workplace relations systems is an anachronism we can no longer afford.

The Government will work towards a unified national system in a cooperative manner with the States. Our preference is for a single system to be agreed between the Commonwealth and the States – as was the case with Victoria's referral of power in 1996.

At the June 2005 Council of Australian Government's meeting, other States will be invited to refer their powers on workplace relations to the Commonwealth. In the absence of referrals by the States, the Government will move towards a national system by relying on the Corporations power in the Constitution.

A national system is the next logical step towards a workplace relations system that supports greater freedom, flexibility and individual choice. It is not about empowering Canberra, but liberating workplaces right across this country.⁸⁰

The States have rejected the invitation to refer their powers

All Labor State Governments, other than Victoria which referred its powers in 1996, have rejected the Federal Government's invitation to refer their powers. The *Communiqué* from the Council of Australian Governments meeting on 3 June 2005 states:

The Commonwealth proposed that COAG agree to work towards achieving a uniform national system of workplace relations through referrals of the necessary constitutional power from the States to the Commonwealth. The States advised that they will not refer their powers.⁸¹

The NSW Government's main reason for not referring its industrial relations powers to the Commonwealth is that the NSW industrial relations system is fairer and better than the federal industrial relations system (both as it is now and particularly as it will be after the reforms). The former NSW Premier, Hon Bob Carr MP, said that:

⁸⁰ Prime Minister John Howard, *Prime Ministerial Statement: Workplace Relations*, Parliament of Australia, 26 May 2005, pp8-9.

⁸¹ Council of Australian Governments website:
<http://www.coag.gov.au/meetings/030605/index.htm#workplace> (accessed 1 August 2005).

See also 'Industrial relations the sticking point for states, *Sydney Morning Herald*, 4/6/05.

The reforms...threaten thousands of New South Wales workers who enjoy the protection of a co-operative, fair, simple, State-based system – a system that works, a system that delivers half the level of disputes we see in Victoria, which relies wholly on the Federal system. The Prime Minister has not made an adequate case for a unitary national system.⁸²

The States have also complained about the Federal Government's lack of consultation with them. While the Prime Minister said that the Federal Government would "work towards a unified national system in a cooperative manner with the States", the NSW Minister for Industrial Relations, Hon John Della Bosca MLC, has commented that:

Despite planning the most radical upturn in industrial relations for more than 100 years, the Commonwealth has not considered it necessary to consult. Even worse, it has avoided any co-operative discussion. The Commonwealth has cancelled – at late notice – the last three meetings of the Workplace Relations Ministers Council. The Prime Minister's request to the States at this late stage to refer their powers co-operatively is in stark contrast to the Commonwealth's approach. There was no consultation or co-operation from the Commonwealth and then a threat to use the corporations power if we do not agree.⁸³

In September 2004, Minister Della Bosca had indicated that the NSW government would be "willing to work with Mr Andrews, the Commonwealth Government and the other States to harmonise industrial relations legislation in a manner that is efficient, just and fair for everybody and of practical value to those global enterprises that operate onshore".⁸⁴

The former leader of the NSW Opposition, Hon John Brogden MP, announced that "he would hand responsibility for industrial relations to the federal government if elected in 2007".⁸⁵ It is not clear whether this remains the NSW Opposition's policy under the leadership of Hon Peter Debnam MP.⁸⁶ The Oppositions in other States have not adopted the same position. The leader of the Nationals in Queensland and the South Australian and West Australian Oppositions do not support the push for a unitary system.⁸⁷ Apart from their belief in States' rights, their stance appears to be based on their belief that, in the event of a change in government, a Labor Government would make a national industrial relations system union-friendly.⁸⁸

⁸² *NSW Parliamentary Debates*, 26/5/05.

⁸³ *NSW Parliamentary Debates*, 26/5/05, p16224.

⁸⁴ *NSW Parliamentary Debates*, 2/9/04.

⁸⁵ 'Brogden vows to hand IR to Canberra, *Australian Financial Review*, 12/4/05.

⁸⁶ See discussion in *NSW Parliamentary Debates*, Legislative Assembly, 11/10/05.

⁸⁷ See "WA Liberal leader opposes Govt's plans to federalise industrial relations", *ABC Radio, AM*, 22/4/05. Transcript at <http://www.abc.net.au/am/content/2005/s1351243.htm>. See also 'States to resist federal IR takeover', *The Australian*, 27/5/05; and 'Western Libs' labour law revolt widens', *Sydney Morning Herald*, 29/6/05.

⁸⁸ *Ibid.* Note that the Federal Opposition Leader, Kim Beazley, has said that he would roll back parts of the Federal Government's reforms: see 'Labor to ditch IR reforms', *The Australian*, 11/10/05.

The new national system based primarily on corporations power⁸⁹

As the States will not refer their powers to the Federal Parliament, the Federal Government is proposing to rely on the corporations power in the Constitution to establish a new national system, known as *WorkChoices*, which will exclusively regulate the industrial relations of corporations and their employees. Corporations and their employees who are currently regulated by State industrial laws and industrial instruments (ie awards and agreements), will be required to move into the new *WorkChoices* system. After a maximum three-year transitional period, State laws and industrial instruments will no longer apply to corporations and their employees, except for State laws that regulate occupational health and safety, workers compensation, trading hours, public holidays and long service leave. After a maximum five-year transitional period, *non-corporation* employers and their employees that are currently regulated by Federal industrial laws and industrial instruments will be required to move into State systems.

5. COVERAGE OF PROPOSED NATIONAL SYSTEM

The system will only apply to trading and financial corporations

A system that is based on the corporations power in section 51(20) of the Constitution can only apply to corporations, and in particular only to “foreign corporations”, or “trading” or “financial” corporations formed in Australia. Creighton and Stewart comment on the limits of a system that applies only to corporations:

...there are many small to medium employers in Australia who do not have corporate status, but instead operate as sole traders or partnerships. In 1997, for example, the ABS estimated that around 26% of all employees in the private sector were working in such businesses. Ironically, therefore, it is the small business sector, considered so politically and economically vital by the Howard Government, that would most likely be excluded from the regulatory framework it has proposed...⁹⁰

Creighton and Stewart summarise the meaning of “trading” and “financial” corporations:

It is true that the High Court has come to take a broad view of what constitutes a “trading” or “financial” corporation, considering it sufficient that trading or financial activities represent a substantial part of what the corporation does, irrespective of the purpose for which it was established. On the basis of that test, it would seem that besides the many companies operating for a profit, a wide range of “non-commercial” [incorporated] bodies may come within the reach of the power, such as local councils, public universities and providers of medical and emergency services. Only a relatively small number of incorporated bodies would be excluded, such as charities and community service organisations that do not receive fees for services provided, and perhaps also registered trade unions.⁹¹

According to the Federal Government, examples of bodies that the High Court has held to be trading or financial corporations include football clubs, a state superannuation board, the Red

⁸⁹ This information is taken from Australian Government, *WorkChoices: A new workplace relations system*, October 2005, p11 and p57ff.

⁹⁰ Creighton B and Stewart A, *Labour Law*, The Federation Press, Sydney, 4th ed, 2005, p 108.

⁹¹ *Ibid*, p108.

Cross Society, a city council, and a public hospital.⁹²

The new system will not apply to part of State public service

The new system will apply to a large number of State government bodies that are trading or financial corporations: for example, Rail Corporation NSW, Sydney Water Corporation, and Sydney Ports Corporation. However, the operation of the new laws in relation to a State's public service is limited by the *implied immunity* principle. The High Court has held that, under the Federal Constitution, the States have an implied immunity such that the Federal Parliament cannot enact "laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments".⁹³

In *Re Australian Education Union*⁹⁴, the High Court held that this principle prevents Federal industrial laws (and awards) from impairing a State's right to "determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and...the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds".⁹⁵ Thus, in *Re Australian Education Union* the High Court invalidated interim awards made by the Australian Industrial Relations Commission preventing Victoria from offering voluntary redundancies to teachers and other workers.⁹⁶

The High Court also held that the implied immunity principle prevents Federal industrial laws (and awards) from impairing a State's right to determine the terms and conditions of employment of persons whom it engages *at the higher levels of government*.⁹⁷ This group would include, but may not be limited to, "Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges".⁹⁸ In *Victoria v Commonwealth*⁹⁹, the High Court held that certain amendments in 1993 to federal industrial laws, such as those allowing for the making of minimum wage orders, and mandating the provision of parental leave, could not validly apply to such high level employees.¹⁰⁰

At budget estimates hearings in September 2005, the NSW Minister for Industrial Relations, Hon John Della Bosca MLC, was asked: "What proportion of New South Wales public sector

⁹² Australian Government, *WorkChoices: A new workplace relations system*, October 2005, p11.

⁹³ *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 217 (per Mason J); applied in *Re AEU: Ex Parte Victoria* (1995) 184 CLR 188 at 231.

⁹⁴ (1995) 184 CLR 188

⁹⁵ *Ibid* at 232.

⁹⁶ Creighton B and Stewart A, *Labour Law*, The Federation Press, Sydney, 4th ed, 2005, p115.

⁹⁷ (1995) 184 CLR 188 at 233 (emphasis added).

⁹⁸ *Ibid* at 233.

⁹⁹ (1996) 187 CLR 416.

¹⁰⁰ Creighton B and Stewart A, *Labour Law*, The Federation Press, Sydney, 4th ed, 2005, p116

employees would come under Federal jurisdiction as a result of the Commonwealth's use of corporation powers?". The Minister's response was that:

That is a bit of an open question at the moment. Some of this is guess work because we have not seen the detail...Up to 50 per cent of the current New South Wales public sector, as we broadly understand it, would come under the Commonwealth [system]. Clearly those who would be definitely excluded are those currently covered by the various Crown employee awards. They are the only ones we would be absolutely certain would remain in the New South Wales system as it is currently constituted.¹⁰¹

Other constitutional powers will be relied upon to extend the new system

While the new industrial relations system will be based primarily on the corporations power, the Federal Government will also continue to rely on other constitutional powers to extend the reach of its system. Thus, the new system will continue to apply to the Commonwealth public service. It will also apply to all employers and employees in the Territories¹⁰² and in Victoria¹⁰³. In addition, it will apply to maritime, waterside and flight crew employers and employees.¹⁰⁴ The Federal Government estimates that the new system will "cover up to 85 per cent of employees across Australia".¹⁰⁵ The proportion of employees in NSW who would be covered by the new *WorkChoices* system will be lower because the national figure of 85 per cent presumably incorporates all employees who are located in Victoria and in the Territories.

6. CONSTITUTIONAL VALIDITY OF NATIONAL SYSTEM

Constitutional issues

In looking at the constitutional validity of the *WorkChoices* system, there are two main issues:

- (1) To what extent can the corporations power be relied on to enact industrial laws?
- (2) To what extent can such industrial laws override State industrial laws?

To what extent can corporations power be relied on to enact industrial laws?

The corporations power

The corporations power in section 51(20) of the Constitution allows the Federal Parliament to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". For most of last century, the corporations power was

¹⁰¹ Hon John Della Bosca MLC, Minister for Industrial Relations, *Budget Estimates Hearing*, 15/9/05, p20.

¹⁰² Under the Territories power in section 122 of the Constitution.

¹⁰³ Under Victoria's reference of powers pursuant to section 51(37) of the Constitution.

¹⁰⁴ Under the interstate trade and commerce power in section 51(1) of the Constitution.

¹⁰⁵ Australian Government, *WorkChoices: A new workplace relations system*, October 2005, p11.

largely ignored as a basis for Federal legislation because a High Court decision in 1909 had interpreted this power very narrowly.¹⁰⁶ The High Court overturned that decision in 1971.¹⁰⁷ Since then the Federal Government has relied on the corporations power to enact significant legislation in a range of areas such as national trade practices laws.¹⁰⁸ In recent times, it has also relied on the corporations power to enact certain industrial laws.

Past reliance on corporations power to enact certain industrial laws

McCallum summarises the position as follows:

In 1977, the Fraser Government used this power to outlaw trade union secondary boycott activities against corporations. In 1993, the Keating Government used the corporations power...to establish non-union collective agreements known as enterprise flexibility agreements...

...in 1996 the Howard Government made extensive use of the corporations power to uphold aspects of the Workplace Relations Act 1996. The corporations power currently upholds laws granting remedies for unfair dismissals by incorporated employers, enabling incorporated employers to enter into collective agreements either with or without trade unions and which permit statutory agreements between [incorporated] employers and individual employees [AWAs].¹⁰⁹

The scope of the corporations power

The High Court has not issued clear guidance as to what type of laws the Federal Parliament can enact under the corporations power. More particularly, the High Court has not defined to what extent the corporations power allows the Federal Parliament to enact laws regulating the industrial relations of corporations and their employees.

Before discussing decisions concerning the scope of the corporations power, it is necessary to make two initial points about the way in which the High Court interprets the Constitution. The first point is that in the *Engineers Case* in 1920 the High Court overturned the “reserved State powers” doctrine. As Williams explains, the High Court held that:

...the legislative power granted to the Commonwealth by the Constitution was not to be cut down by any implied notion that certain areas of power are reserved to the States. The *Engineers Case* has meant that the scope of Commonwealth power is to [be] construed by having reference to the language of the Constitution without taking account of whether an interpretation would enable the federal Parliament to legislate in an area [that] might be considered to be the domain of the States.¹¹⁰

¹⁰⁶ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

¹⁰⁷ *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

¹⁰⁸ See *Trade Practices Act 1974* (Cth).

¹⁰⁹ McCallum R, ‘The Australian Constitution and the Shaping of our Federal and State Labour Laws’, Industrial Relations Society of New South Wales 46th Annual Convention: *Beyond the Centenaries, Rethinking Labour Relations*, Sydney, Friday 13 May 2005, p 5.

¹¹⁰ Williams G, *Labour Law and the Constitution*, The Federation Press, 1998, p5.

The second point to note is that the limits of the conciliation and arbitration power in section 51(35) of the Constitution do not restrict the scope of other legislative powers such as the corporations power.¹¹¹ Thus, to the extent that the corporations power can be relied upon to legislate with respect to the industrial relations of corporations and their employees, such legislation can go beyond what is authorised by the conciliation and arbitration power.

The most recent decision of the High Court that discusses the scope of the corporations power is *Re Dinjan; Ex parte Wagner* (1995)¹¹². In that case a (4:3) majority of the High Court held that a provision in the *Industrial Relations Act 1988* (Cth), which was enacted in reliance on the corporations power, was invalid. The provision gave the Industrial Relations Commission the power to vary or set aside unfair contracts imposed on independent contractors but only if (a) a trading or financial corporation was a party to the contract or (b) the contract related to the business of a trading or financial corporation. The majority held that (b) could not be supported under the corporations power ((a) was not challenged). More important than the result of the case was the High Court's interpretation of the scope of the corporations power. Four members of the Court adopted a relatively broad interpretation of the scope of the power:

For Mason CJ, Deane and Gaudron JJ, a law would be valid so long as it was 'expressed to operate on or by reference to the business functions, activities or relationships' of corporations. McHugh J adopted a slightly narrower approach, in that he would require a law to have 'some significance for the activities, functions, relationships or business of the corporation'.¹¹³

Justice Dawson, on the other hand, adopted a narrow view of the corporations power holding that it was necessary that the law relate to the "trading" or "financial" character of a corporation. According to an article in 2001 by Professor Stewart:

...the tenor of all bar [Justice] Dawson's judgment in *Dinjan* suggest that a provision that is carefully drafted so as to apply specifically to corporations, and that directly relates to employment conditions or industrial relationships at those corporations, would fall within the scope of the power.¹¹⁴

In *Victoria v Commonwealth* (1996)¹¹⁵, three States challenged the constitutional validity of amendments to the *Industrial Relations Act 1988* made by the Keating Government in 1993 and 1994. However, Western Australia was the only State that challenged the validity of the amendments that were based on the corporations power. The relevant amendments empowered the Industrial Relations Commission to approve "enterprise flexibility agreements" between trading and financial corporations and their employees. The challenge to these provisions in the High Court was ultimately abandoned at the hearing, with Western Australia conceding that the

¹¹¹ *Pidoto v Victoria* (1943) 68 CLR 87, cited by Gleeson CJ in *Re Pacific Coal Pty Ltd; Ex Parte CFMEU* (2000) 172 ALR 257 at 263. See further the discussion in Williams G, *Labour Law and the Constitution*, The Federation Press, 1998, p24ff.

¹¹² (1995) 183 CLR 323

¹¹³ Stewart A, 'Federal Labour Law and New Uses for the Corporations Power', (2001) 14 *Australian Journal of Labour Law* 145 at 156.

¹¹⁴ *Ibid*, pp157-58.

¹¹⁵ (1996) 187 CLR 416

Commonwealth “has the power to legislate as to the industrial rights and obligations of constitutional corporations...and their employees”.¹¹⁶ Because of this concession, it was not necessary for the High Court to decide whether the provisions were valid.

Provisions in the *Workplace Relations Act 1996* that were enacted by the Howard Government in reliance on the corporations power have not been challenged in the High Court. However, in a High Court decision in 2000 concerning sections in the 1996 Act, Justice Gaudron dealt with an argument concerning the corporations power (it was unnecessary for the other Members of the Court to deal with this argument). After reiterating the broad view of the corporations power that was expressed in *Re Dinjan*, Justice Gaudron stated, “I have no doubt that that [the power] extends to...laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations”.¹¹⁷

Some provisions of the 1996 Act that are based on the corporations power have been challenged, unsuccessfully, in the Federal Court. Professor Stewart (2001) has commented on the Federal Court decisions as follows:

The assumption that the corporations power should be read broadly in this context is...supported by a series of decisions of the Federal Court upholding its use to underpin significant parts of the [1996 Act].

...

Despite the Full Court’s refusal to commit itself to the broadest possible view of the corporations power, there seems sufficient encouragement in these decisions to believe that the power would support appropriately drafted legislation which provided for any or all of the following:

- The conciliation and arbitration of industrial disputes involving corporations;
- The applicability to corporations of employment conditions stipulated by tribunals or indeed in the legislation itself;
- The certification of individual or collective agreements to which a corporation was a party;
- The regulation of matters incidental to any of the above, such as bargaining tactics (including industrial action), victimisation of various kinds and (possibly) registration of unions and employer associations.¹¹⁸

Recent comments by experts on constitutional validity of proposed new system

Professor Ron McCallum recently expressed the following opinion:

From my reading of the jurisprudence of both the High Court and the Federal Court of Australia, the corporations power would support national laws governing certified agreements, protected and unprotected industrial action, Australian workplace agreements, unfair dismissals, minimum wage rates and minimum terms and conditions of employment, at least for incorporated employers.¹¹⁹

¹¹⁶ Ibid at 539.

¹¹⁷ *Re Pacific Coal Pty Ltd; Ex Parte CFMEU* (2000) 172 ALR 257 at 275.

¹¹⁸ Stewart A, ‘Federal Labour Law and New Uses for the Corporations Power’, (2001) 14 *Australian Journal of Labour Law* 145, p158, 160.

¹¹⁹ McCallum R, ‘The Australian Constitution and the Shaping of our Federal and State Labour Laws, Industrial Relations Society of New South Wales 46th Annual Convention, *Beyond the Centenaries, Rethinking Labour Relations*, 13 May 2005, p6.

According to a media report, Mr Joe Catanzariti, a lawyer at Clayton Utz has said:

...that he would be advising clients the Government's legislation would withstand attack from unions and the states so long as the Government drafted it carefully.

"I've had a good look at this, my people have had a pretty good look at this, and we don't think [a challenge] has any prospects of success," he said.¹²⁰

Professor George Williams has issued a more cautious opinion:

Uncertainty about the scope of the corporations power means that it cannot be said with confidence that a law that sought to regulate the full range of industrial matters that can arise between employers and employees would be a valid enactment under the power.

This uncertainty is magnified by the fact that any determination would be made by a High Court composed of entirely of judges who did not sit on the decision in *Re Dinjan; Ex parte Wagner* (Justice McHugh retires on 1 November 2005). Moreover, most of the current members of the Court have not even delivered judgments that enable an assessment of their likely approach to the power. Resolution of the scope of the power remains very much open.¹²¹

Professor Greg Craven has offered the following view on the High Court and federalism in the context of the proposed industrial relations reforms:

The High Court has not been a historical friend to federalism but there are three reasons to think it might be a little more amicable today. One is that it has a lot of capital C conservatives and [they] tend to be conservative constitutionally as well as politically...

Second...there has been a nervousness about the corporations power for some time... [T]he final point is if there's one thing the High Court hates, it is being taken for granted. There is some sensation I suspect that there is a degree of confident acceptance in Canberra towards the High Court which might not go down well.¹²²

To what extent can such industrial laws override State industrial laws?

Section 109 of the Constitution states that, "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid". Even though section 109 refers to "a law of a State" and "a law of the Commonwealth", it is also capable of operating in relation to Federal and State awards and enterprise agreements.¹²³ Professor George Williams explains that:

The High Court has developed three tests that may be used in applying s 109...According to these tests,

¹²⁰ 'IR Challenge will lead to confusion: lawyer', *Sydney Morning Herald*, 3/8/05.

¹²¹ Williams G, untitled, paper delivered at *Fair Go or Anything Goes?* conference, Sofitel-Wentworth, Sydney, 13 July 2005, p3. Accessed online at: http://www.apo.org.au/webboard/results.html?filename_num=12124

¹²² Craven G, transcript of *Fair Go or Anything Goes?* conference, Sofitel-Wentworth, Sydney, 13 July 2005. The transcript can be accessed at: <http://www.iceaustralia.com/ir/>

¹²³ See Williams G, *Labour Law and the Constitution*, The Federation Press, 1998, pp147-149.

“inconsistency” is present and the [Federal] law (or award) prevails:

1. If it is impossible to obey both laws (the reference is to a logical impossibility: one law requires that you must do X, the other that you must not do X).
2. If one law purports to confer a legal right, privilege or entitlement which the other law purports to take away or diminish (one law says you can do X, the other that you cannot do X).
3. If the [Federal Parliament] evinces a legislative intention to “cover the field”. In such a case there need not be any direct contradiction between the [Federal and State laws]. It may even happen that both require the same conduct, or pursue the same legislative purpose. What is imputed to the [Federal] Parliament is a legislative intention that its law shall be all the law there is on that topic. In that event, what is “inconsistent” with the [Federal] law is the existence of any State law at all on the topic.¹²⁴

The Federal Government is proposing to rely on the third principle: ie it is proposing to cover the field of industrial relations with respect to corporations and their employees.¹²⁵ The writer of this briefing paper is unaware of any specific comments by constitutional law experts that cast doubt on the Federal Government’s ability to use this principle to override the State systems (assuming that such laws are validly enacted in reliance on the corporations power).

High Court challenge by States

Like former NSW Premier Carr, the new Premier, Hon Morris Iemma MP, has said that the NSW government will launch a High Court challenge to the Federal Government’s use of the corporations power to takeover the State systems.¹²⁶ While the NSW government is waiting to see the legislation before making a decision, on 17 October 2005, a spokesperson for the NSW Minister for Industrial relations confirmed that, “NSW is still fully committed to a High Court challenge”.¹²⁷ Other State governments are likely to join the challenge.¹²⁸ It could take over a year from the High Court hearing the case to making a decision.¹²⁹

7. STATE LEGISLATION TO PROTECT CONDITIONS

In August 2005, the Queensland Government passed new laws to “provide protections for workers whose entitlements are eroded or removed under the federal government’s proposals”.¹³⁰ These new laws confer on Queensland employees minimum entitlements in

¹²⁴ Ibid, p150.

¹²⁵ See. Australian Government, *WorkChoices: A new workplace relations system*, October 2005, p11.

¹²⁶ ‘IR challenge will lead to confusion: lawyer’, *Sydney Morning Herald*, 3/8/05.

¹²⁷ See ‘States seek talks on IR changes’, *Australian Financial Review*, 17/10/05.

¹²⁸ See ‘States prepare for High Court showdown’, *Sydney Morning Herald*, 11 October 2005.

¹²⁹ ‘IR challenge will lead to confusion: lawyer’, *Sydney Morning Herald*, 3/8/05.

¹³⁰ Hon TA Barton, Minister for Employment, Training and Industrial Relations, *Queensland Parliamentary Debates*, Assembly, 9/8/05, p2203. For new laws, see *Industrial Relations Amendment Act 2005*.

respect of a range of conditions that are currently covered by awards, which, under the new system, could be excluded by new enterprise agreements or Australian Workplace Agreements. These include, for example, overtime loading, weekend penalty rates and meal breaks. It appears that the Federal Government could exclude these new State laws. When introducing the laws, the Queensland Minister for industrial relations stated:

We are aware that if the federal government seeks to expressly exclude state laws providing these conditions, then the federal law will take precedence, but that will be on the Commonwealth's head. If they choose to go down that route, it will be very clear exactly what conditions they are taking away from Queensland workers.¹³¹

In August 2005, the Premier of Tasmania, Paul Lennon, announced that the Tasmanian Government will introduce similar laws.¹³²

8. DEBATE ABOUT PROPOSED NATIONAL SYSTEM

Arguments for proposed national system

The reasons given by the Prime Minister for creating a single national system of industrial relations are that “the system of overlapping Federal and State awards is too complex, costly and inefficient”; and that, “in an age when our productivity must match that of global competitors, forcing Australian firms [that operate nationally] to comply with six different workplace relations systems is an anachronism we can no longer afford”.¹³³ The other argument for the proposed national system is that it will enable the Federal Government to extend the coverage of the Federal system (in particular, the system that will exist after the reforms). The Federal Government argues that this will give employers and employees more choices and will lead to productivity gains, more competitive businesses, and a better Australian economy.

In a Senate Committee report, published in March 2003, on a bill to introduce a national unfair dismissal system, Coalition Senators argued that:

...a national economy needs a national workplace relations regulatory system; that maintaining six separate industrial jurisdictions is not only inefficient, but excessively complex and known to create confusion and uncertainty for employees and employers alike. The committee considers that a more unified national workplace relations system would result in less complexity, more certainty and lower costs, with flow-on benefits for employment.¹³⁴

¹³¹ Ibid, p2204. For media reports on the new laws see for example ‘Beattie acts on workers’ rights, *Australian Financial Review*, 13/8/05.

¹³² See Pittard M and Lunny J, ‘Anticipating federal industrial relations changes’, (2005) 11(7) *Employment Law Bulletin* 1.

¹³³ Prime Minister John Howard, ‘Prime Ministerial Statement on Workplace Relations’, Parliament of Australia, 26 May 2005, pp8-9.

¹³⁴ Employment, Workplace Relations and Education Legislation Committee, *Provisions of the Workplace Relations Amendment (Termination of Employment) Bill 2002*, p9.

In the same report, the Australian Democrats put the following case for a unitary system:

There are areas of policy and jurisdiction the States no longer have sensible involvement in. After seventy plus years we finally got a unitary system of trade practices law. After one hundred years states rights and vested interests finally gave way to one unitary financial system for Australia. Although the process was messy in execution we have a unitary system in corporations law.

The same shift is necessary in industrial relations.

.....

We need one industrial relations system not six. We have a small population, yet we have nine governments and a ridiculous overlap of laws and regulations. There are areas of the economy that genuinely require a single national approach. Like finance, corporations and trade practice law, labour law is one of those areas.

Globalisation and the information revolution have created competitive pressures that require us as a nation to be as nimble as possible in adapting to changing circumstances.

It will be a difficult task but it is time we moved toward a national system of industrial regulation that will do away with unnecessary replications, conflicts and complexity.

.....

Apart from the attractions of efficiency and simplicity, a unitary system would mean that all Australians, employers and employees alike, would have the same industrial relations rights and obligations, regardless of where they live.¹³⁵

According to Catanzariti, an industrial relations lawyer at the law firm Clayton Utz, the main advantages of a unitary system are as follows:

1. Cost reduction

The current system involves a lot of duplication. There are often two sets of laws governing one workplace. Companies operating across Australia are complaining that there are large costs, and a great deal of effort involved in having to comply with a number of different systems across Australia. A unitary system would reduce a lot of these costs.

2. Equality

At present, there is also a level of inequality amongst employees. Different working conditions are applicable depending on which State the employee is engaged. There are also differences within the State, depending on the nature of the employer...A unitary system of industrial relations would ensure that all workers, no matter where they worked, would be subject to the same set of laws.

3. Certainty

The current system is confusing and inefficient. Many employers and employees are unsure of which laws or industrial relations systems apply to them. This inefficiency is exacerbated by the duplication of certain provisions. Sometimes, different State and federal laws apply at the same workplace. The result of these inefficiencies are higher costs and lower productivity.

A further consequence of the complexity of overlapping jurisdictions is that courts and tribunals spend a lot of time dealing with jurisdictional issues. This imposes unnecessary costs on governments and litigants....

.....

¹³⁵ Ibid, pp26-27.

4. Forum shopping

Given the duplication of laws, parties are able to shop around from one jurisdiction to another trying to find the best deal. The implementation of a unitary system would mean that there is only one set of laws that apply in particular circumstances, such as when a party is seeking relief for unfair dismissal or unlawful discrimination.¹³⁶

Creighton and Stewart have commented that:

The existence of federal and local regimes in each State might be supportable if it were possible to draw a simple and predictable line of demarcation between them. Since this is not the case, it is hard to see what justification there can be for maintaining dual jurisdiction. One option would of course be for the Commonwealth to vacate the field. However, it would clearly be preferable for the States to adopt that course. The relatively small size of the Australian economy, together with its high levels of integration and interdependence, suggest that industrial relations should be a matter of federal responsibility, as is the case in relation to most other fundamental features of economic activity.¹³⁷

Arguments against proposed national system

There are various kinds of argument that have been made in response to the Federal Government's proposed national *WorkChoices* system. These include:

- (1) The problems of multiple and dual systems are overstated
- (2) A "national system" based on the corporations power will still be a dual system
- (3) There are benefits of having multiple systems
- (4) Taking over the State systems undermines federalism
- (5) The NSW system is better and fairer than the Federal system

(1) The problems of multiple and dual systems are overstated

It has been argued that the problems of having multiple State systems in Australia, and dual Federal and State systems in each of those States, are overstated. Mark Wooden, from the Melbourne Institute of Applied Economic and Social Research, states:

It is sometimes argued that there are clear efficiency gains from eliminating wasteful duplication of activity that arises when employers have to deal with both federal and State systems (eg Ryan 2005). Nevertheless, as argued by Ford (2005), proponents of reform often oversell the benefits. The proportion of businesses affected by multiple systems of regulation is almost certainly quite small, and restricted

¹³⁶ Catanzariti J, 'What should the IR system in NSW look like?', Industrial Relations Society of NSW, Annual Convention, Blue Mountains, 13 May 2005, pp2-3.

¹³⁷ Creighton B and Stewart A, *Labour Law*, The Federation Press, Sydney, 4th ed, 2005, p115. For further discussion of advantages see the Hancock Report (1985) and the Federal Government's series of discussion papers, *Breaking the Gridlock*, published in 2000.

mainly to the well-resourced large multi-state businesses.¹³⁸

Justice Michael Walton of the NSW Industrial Relations Commission has argued that there are no known problems or deficiencies associated with the dual system that would provide a compelling impetus for adopting a unitary system.¹³⁹ Justice Walton states:

...evidence of some actual complexity or significant cost arising from the existence of the respective Federal and State award systems is somewhat scant. Cases involving a genuine conflict of laws are few...

The state of industrial relations in the metal industry in New South Wales contradicts any proposition that there are significant deficiencies in the present Federal and State mix.¹⁴⁰

According to Briggs and Buchanan, “the Productivity Commission (2005) recently concluded that there ‘would be ‘little pay off’ from a single national industrial relations system and the federal government should focus on other areas of federal-state relations”.¹⁴¹

(2) A “national” system based on the corporations power will still be a dual system

The new national system, which is based primarily on the corporations power, will continue to be a dual system. Trading and financial corporations and their employees will be covered by the Federal system, while other employers and employees will be covered by the State systems. Therefore, some complexity and confusion will still exist. Professor George Williams has said that it may take some time to work out who is covered by the new system:

I can foresee one [High Court] case determining whether the scheme itself is valid but then potentially you have a series of cases after that – a case by case look at exactly who is covered and who is not. There’s still uncertainty in some areas about what types of corporations will be covered. There’s certainly uncertainty about exactly what entitlements of state employees might be regulated through this and with any new system, but particularly one as large as this, relying upon a significant new head of power, I mean these things will take five or ten years to work through....¹⁴²

(3) There are benefits of having multiple systems

Some commentators argue that, “duplication of government activity can allow healthy competition among governments, resulting in better public policy”.¹⁴³ This is known as

¹³⁸ Wooden M, ‘Australia’s Industrial Relations Reform Agenda’, paper presented at 34th Conference of Economists, University of Melbourne, 26-28 September 2005, p7.

¹³⁹ Justice Michael Walton, ‘The Industrial Relations System in New South Wales: 1998 to the Reform Proposals of 2005’, speech given at Symposium on *The State Systems of Industrial Relations: Past Present and Future*, University of Sydney, 26 August 2005, p2.

¹⁴⁰ *Ibid*, p2.

¹⁴¹ Briggs C and Buchanan J, ‘Work, Commerce and the Law: A new Australian model?’ (2005) 38(2) *Australian Economic Review* 182 at 186.

¹⁴² Williams G, transcript of *Fair Go or Anything Goes?* conference, Sofitel-Wentworth, Sydney, 13 July 2005. The transcript can be accessed at: <http://www.iceaustralia.com/ir/>

¹⁴³ Parliament of Victoria, Federal-State Relations Committee, *Report on Australian Federalism: The Role of the States: Second Report on the Inquiry into overlap and duplication of roles and responsibilities*

competitive federalism.¹⁴⁴ In a submission to the Federal Government, the Western Australian Chamber of Commerce and Industry argued that:

The current system allows for diversity and for improvements through the rivalry and demonstration effects that flow from competitive federalism. For all the drawbacks of the inconsistencies of the current system, a consistently bad industrial relations framework would be worse.¹⁴⁵

The Federal Government's discussion paper in 2000 regarding use of the corporations power to create a national system made a counter-argument, suggesting that, "the factors that create a public benefit through competitive federalism in some areas of public policy are not so readily apparent in the area of workplace relations".¹⁴⁶ The reason given was that Federal laws and awards have been able to override what would otherwise be competitive State laws and awards, and this has reduced the incentive for States to build significantly different systems.¹⁴⁷

(4) Taking over the State systems undermines federalism

Professor Greg Craven argues that the take over of State industrial relations systems represents an attack on federalism and that the creation of a national system can be fundamentally opposed on that ground alone without taking a position about the content of the proposed new system.¹⁴⁸ Furthermore, Professor Craven argues that:

This is an industrial relations exercise in the context of the greatest attack on federalism as a concept since World War II. We have...suggestions of Commonwealth control of universities, the creation of Commonwealth technical colleges and proposals for a national certificate of education, pressure on the GST, suggestions for control of infrastructure like ports, [and] uniform defamation laws and heavens knows what else.¹⁴⁹

He notes that this represents a "fundamental shift in Australian constitutional politics, a conservative government determined to attack federalism".¹⁵⁰ Historically, Labor governments

between the Commonwealth and the States; and areas of responsibility for which the States should have an enhanced role for the benefit of Federation, Government Printer, Melbourne, 1998, p115.

¹⁴⁴ Competitive federalism is discussed a recent report by the Productivity Commission. See *Annual Report 2004-05: Annual Report Series*, Canberra, 2005. An article that refers to this report in the context of industrial relations is 'IR overlap has benefits: report', *Australian Financial Review*, 1/11/05.

¹⁴⁵ Quoted in Hon Della Bosca MLC, untitled, speech delivered at Industrial Relations Society of NSW Annual Convention, Blue Mountains, 13 May 2005, p17.

¹⁴⁶ Australian Government, *Breaking the Gridlock: Towards a Simpler National Workplace Relations System – Discussion Paper 1: The Case for Change*, October 2000, p22.

¹⁴⁷ *Ibid*, p22.

¹⁴⁸ Craven G, transcript of *Fair Go or Anything Goes?* Conference, Sofitel-Wentworth, Sydney, 13 July 2005. The transcript can be accessed at: <http://www.iceaustralia.com/ir/>

¹⁴⁹ *Ibid*. See also 'PM's grip on power has states in a spin' *The Age*, 22/5/05.

¹⁵⁰ Craven, *ibid*.

have tended to oppose federalism while conservative governments have tended to support it.¹⁵¹ The States would argue that the Constitution clearly intended to leave the States with the primary responsibility for regulating industrial relations; and that, if we are going to have a national system of industrial relations, this should be achieved through consultation and cooperation with the States, rather than via a hostile takeover of the State systems. This would also allow for the creation of a national system with *full* coverage. However, having regard to their very different policies on industrial relations, it is highly doubtful whether the Federal Coalition and State Labor governments could agree on the content of a national system.

The Prime Minister, John Howard, has responded to concerns that his government “has discarded its political inheritance in a rush towards centralism” by stating (in part):

These fears of a new centralism rest on a complete misunderstanding of the Government’s thinking and reform direction. Where we seek a change in the Federal-State balance, our goal is to expand individual choice, freedom and opportunity, not to expand the reach of the central government.

For example, the desire to have a more national system of industrial relations is driven by our wish that as many businesses and employees as possible have the freedom, flexibility and individual choice which is characteristic of the Liberal Party’s workplace relations philosophy. This can only be achieved by removing the dead weight of Labor’s highly-regulated State industrial relations systems.

The goal is to free the individual, not to trample on the States.¹⁵²

(5) The NSW system is better and fairer than the Federal system

As noted above, the NSW Government opposes the proposed national system on the grounds that the NSW system is better and fairer than the Federal system. It states, for example, that the NSW system has half of the number of industrial disputes than the Federal system, which operates exclusively in Victoria. The NSW Government is also concerned that the proposed national system will substantially reduce employee’s entitlements. Commenting on the proposed reforms, Hon John Della Bosca MLC has said recently that:

The Federal Government’s proposals will reduce the real value of minimum rates of pay, bypass both the Commonwealth and New South Wales award safety nets, and force employees into stripped-down Australian workplace agreements with fewer entitlements and little or no protection.¹⁵³

It is beyond the scope of this paper to compare the relative merits of the NSW and Federal systems (both the current Federal system and the proposed new system). However, it is relevant to refer to a couple of other comments about the relative advantages of the NSW system. Joe Catanzariti, an industrial relations lawyer at Clayton Utz, states:

At present, the NSW industrial relations system generally provides more favourable terms and conditions of employment than its federal counterpart. It follows that if the State system is forcibly taken over by the Commonwealth and replaced with the (current) federal system, employees are going to forego a number of

¹⁵¹ Craven, *Ibid.*

¹⁵² Prime Minister John Howard, *Reflections on Federalism*, Address to Menzies Research Centre, Melbourne, 11 April 2005, pp2-3.

¹⁵³ Hon John Della Bosca MLC, *NSW Parliamentary Debates*, 12/10/05.

benefits that they have fought long and hard to obtain.¹⁵⁴

He refers in particular to the limited number of matters that may be included in Federal awards, which has reduced the safety net of minimum employment conditions. In addition, Justice Walton, Vice President of the NSW Industrial Relations Commission, argues that the NSW system has substantial system-based advantages over the federal system in terms of simplicity, accessibility, timeliness and practicality.¹⁵⁵ Other commentators have also referred to the complexity of the Federal system compared to State systems.¹⁵⁶

9. CONCLUSION

Due to the terms of the Federal Constitution, for over 100 years, Australia has had a Federal system of industrial relations that has operated in tandem with separate State systems. In that time, there have been a number of failed attempts to change the Constitution to give the Federal Government a general power to legislate with respect to industrial relations. In 2000, the Howard Government floated the idea of using the corporations power in the Constitution to create a national system of industrial relations. It now intends to introduce legislation to that effect.

After a three-year transitional period, the new system will cover most corporations and their employees, which is estimated to be up to 85 per cent of the Australian workforce. Those not covered by the new system include employees of employers that are not corporations (eg sole traders) and a proportion of State public services. These employees will continue to be covered by the State systems. NSW and other States are planning to challenge this hostile takeover of their systems in the High Court. The case will test whether the corporations power can be used to comprehensively regulate the industrial relations of corporations and their employees. Varying expert opinions have been offered as to the likely success of such a challenge.

The main arguments in favour of the proposed national system relate to the complexity, cost and inefficiency of having both multiple State systems and dual Federal and State systems. In view of the importance of industrial relations for the economy, it is argued that it should be a matter of Federal Government responsibility. The Howard Government also argues that the proposed national system is important for productivity gains, international competitiveness and for a strong Australian economy. The main arguments against the proposed national system are that the new system will still be a dual system with some complexity, that the proposed national system is an attack on federalism, that a national system should be achieved in consultation with the States rather than by hostile takeover, and that the State systems are better and fairer than the Federal system as it exists now and especially as it will operate after the reforms.

¹⁵⁴ Catanzariti J, 'What should the IR system in NSW look like?', Industrial Relations Society of NSW, Annual Convention, Blue Mountains, 13 May 2005, p3.

¹⁵⁵ Justice Michael Walton, 'The Industrial Relations System in New South Wales: 1998 to the Reform Proposals of 2005', speech given at Symposium on *The State Systems of Industrial Relations: Past Present and Future*, University of Sydney, 26 August 2005, p3.

¹⁵⁶ Briggs C and Buchanan J, 'Work, Commerce and the Law: A new Australian model?' (2005) 38(2) *Australian Economic Review* 182 at 186.

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<i>Industrial Relations Reforms: the proposed national system</i> by Lenny Roth	11/05