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Federal Labour Law and New Uses for the Corporations Power

*Andrew Stewart**

It has been suggested that the Commonwealth might in the future rely on the corporations power in s 51(20) of the Constitution to underpin federal industrial regulation, rather than the arbitration power in s 51(35). This article looks at the background to the idea, outlines a number of different ways in which the Commonwealth might make greater use of the corporations power, and examines the advantages and disadvantages of the various options.

Introduction: The Use and Limitations of the Arbitration Power

From the outset, federal regulation of industrial relations in Australia has been based predominantly on the arbitration power in s 51(35) of the Constitution. That section permits legislation 'with respect to . . . conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'.[1]

Outside the federal public sector, where the Commonwealth has been able to exert direct legislative control over employment conditions,[2] federal regulation has involved the establishment of a tribunal (currently the Australian Industrial Relations Commission (AIRC)) to help resolve disputes that have an interstate dimension. In resolving those disputes, the tribunal has over time created a system of federal awards regulating wages and some (though not all) other employment conditions for a significant proportion of the Australian workforce.[3] The expansion of this system has been facilitated by the willingness of unions to manufacture 'paper disputes' with employers

* Professor of Law, Flinders University of South Australia; Legal Consultant, Piper Alderman Lawyers. This article is based on a paper delivered at ACIRRT's 8th Annual Labour Law Conference in Sydney on 16 June 2000. I am grateful to Ben Bridge for research assistance, to the attendees at the conference for their helpful questions and comments, and to the *Journal's* editors and anonymous referees for their comments on an earlier version.

1 See generally B Creighton and A Stewart, *Labour Law: An Introduction*, 3rd ed, Federation Press, Sydney, 2000, pp 65–82; G Williams, *Labour Law and the Constitution*, Federation Press, Sydney, 1998, ch 2; W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials*, 2nd ed, Law Book Co, Sydney, 1993, chs 14–20.

2 Principally through the 'public service' power in s 52(2), though also under whatever power allows the creation of a public instrumentality — for example, the power in s 51(5) over 'postal, telegraphic, telephonic and other like services' would permit regulation of employment conditions at bodies such as Australia Post and Telstra.

3 The proportion of the paid workforce that is presently covered by awards, and the balance between federal and State award coverage, are matters on which no up to date statistics are available. It seems likely that total award coverage is now somewhere between 70 and 80%, with perhaps just under half of those workers being subject to federal awards (see Creighton and Stewart, above n 1, p 17, n 85); but it is certainly possible that this estimate overstates the reach of the award system. A discussion paper released in 2000 by the Federal Government estimates total award and registered agreement coverage at 87% of non-farm employees, with 50% in the federal system: *Breaking the Gridlock: Towards a Simpler*

in more than one State in order to attract the jurisdiction of the federal tribunal and ensure that its awards apply as widely as possible throughout particular industries or occupations.[4]

Thanks to a fairly liberal approach by the High Court over the years, the Commonwealth has also been able to use the arbitration power to make provision for the following matters, on the basis that they are 'reasonably incidental' to the conciliation and arbitration of interstate industrial disputes:

- certification by the AIRC of agreements (including enterprise-level agreements) made in partial or complete settlement of interstate disputes which would, but for that certification, be subject to the AIRC's powers of conciliation and arbitration;[5]
- enforcement of awards and registered agreements made in settlement of industrial disputes;
- registration of unions and employer associations, and regulation of their internal affairs;[6]
- determination of the legality of industrial action taken by registered bodies or their members, or indeed by anyone if in connection with an interstate dispute or a federal award or agreement;[7] and
- prohibition of victimisation or discriminatory conduct by or against registered bodies, or relating to the membership of such bodies, or concerning the enforcement of entitlements established under the federal legislation.[8]

However, there are a number of significant limitations or problems associated with use of the arbitration power as the principal source of federal regulation. At the most obvious level, the Commonwealth cannot use the power to regulate industrial relationships in any direct fashion, for instance by requiring certain employment conditions to be observed.[9] Nor (at least according to the High Court) can it authorise a tribunal otherwise exercising powers of conciliation and arbitration to make 'common rule' awards that bind persons who have no connection to the dispute originally before the tribunal.[10]

Hence, while the federal award system has assumed a much greater coverage than might have been expected by the framers of the arbitration

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National Workplace Relations System — Discussion Paper 1, The Case for Change, Department of Employment, Workplace Relations and Small Business, Canberra, 2000, App D. However, aside from the fact that not all workers who are subject to agreements are necessarily covered by awards, federal system coverage is defined in such a way as to include many employees in Victoria who, following the reference of powers in that State (below n 26), are subject to legislated minimum standards but not awards.

4 For acceptance by the High Court of the constitutionality of this tactic, see eg *Attorney-General (Qld) v Riordan* (1997) 192 CLR 1; 146 ALR 445.

5 *Victoria v Commonwealth* (1996) 187 CLR 416; 138 ALR 129.

6 *Jumbunna Coal Mine, No Liability v Victorian Coal Miners Association* (1908) 6 CLR 309.

7 *Victoria v Commonwealth* (1996) 187 CLR 416; 138 ALR 129.

8 *R v Bowen; Ex parte Amalgamated Metal Workers & Shipwrights' Union* (1980) 144 CLR 462; 32 ALR 343; *R v Sweeney; Ex parte Northwest Exports Pty Ltd* (1981) 147 CLR 259; 35 ALR 135.

9 *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association* (1920) 28 CLR 209 at 218; *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 172 ALR 257 at 263, 282, 319, 324.

10 *Australian Boot Trade Employees' Federation v Whybrow & Co* (1910) 11 CLR 311; *R v Kelly; Ex parte Victoria* (1950) 81 CLR 64.

power,[11] its reach will always be limited if based only on that power. Since interstate disputes rarely occur spontaneously, federal award coverage is constantly dependent on unions manufacturing appropriate paper disputes. With some unions content to have State awards for some or all of the occupations or industries they cover, the result is a patchwork of regulation which causes particular inconvenience for employers who have workers covered by both federal and State instruments. Indeed, employers (and workers) frequently encounter considerable difficulty in ascertaining which award(s), if any, apply to them.[12]

The potential exposure of employers to dual federal/State regulation has been exacerbated by the fact that some matters, such as workers' compensation and various forms of leave, have typically been left to State legislation.[13] Nevertheless, where a federal award deals with a matter such as long service leave that is otherwise regulated by State legislation, the federal law prevails by virtue of s 109 of the Constitution.[14] Again, this can leave employers having to apply two different standards to different parts of their workforce.

There are also inconveniences associated with the paper dispute mechanism itself. For unions, these include the need to be constantly alert to 'rope in' what may be dozens or even hundreds of new employers each year: for unless those employers join an employer association covered by a federal award, or take over the business of an employer already bound by that award, they will not automatically be subject to it.[15] For smaller businesses, on the other hand, it can be a shock to receive from a union a set of ambit claims which are designed to create an appropriate dispute. As then Workplace Relations Minister Peter Reith skilfully demonstrated in his address to the National Press Club in Melbourne on 24 March 1999 (of which more later),[16] it is not hard to exploit community ignorance of the technicalities of, and indeed the need for, this very odd system. The minister recounted an example of a 'classic' small family business that had received a log of claims from the Australian Liquor Hospitality and Miscellaneous Workers Union demanding, among other things, a huge wage increase, a 30 hour working week, eight weeks' annual leave, and so on. In response to the owner's question as to how such 'standover' tactics could be used against 'battlers like us trying to stay

11 Which is not to say that the expansion of the federal system was entirely unforeseen: see R J Buchanan and I M Neil, 'Industrial Law and the Constitution in the New Century: An Historical Review of the Industrial Power' (2001) 20 *Aust Bar Rev* 256 at 256–8. For a thoughtful review of the evolution of federal regulation by reference to the original aims of one of its leading proponents, H B Higgins, see B Creighton, 'One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?' (2000) 24 *Melbourne University L Rev* 839.

12 See *Discussion Paper 1, The Case for Change*, above n 3, pp 14–15.

13 The States have legislative powers which are not confined to particular subjects, but are regarded as 'plenary' in nature: see eg *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; 82 ALR 43.

14 See Creighton and Stewart, above n 1, pp 95–7; Williams, above n 1, ch 6.

15 See Workplace Relations Act 1996 (Cth) (WR Act) s 149(1).

16 The address is reproduced in 'Getting the Outsiders Inside — Towards a Rational Workplace Relations System in Australia', Ministerial Discussion Paper, Department of Employment, Workplace Relations and Small Business, Canberra, April 1999.

afloat', the minister directed all blame to 'the constitutional conciliation and arbitration power, as judicially interpreted by the courts, legislated by the parliament and supported by the Labor Party'.[17]

Furthermore, the requirement that a federal award or agreement be made in settlement of an actual or threatened interstate dispute means that it is constantly necessary to be concerned with 'ambit' issues — that is, whether, a provision in an award or agreement has some 'rational' connection with an element of the dispute used to provide a legal foundation for the instrument in question.[18] Not only does this complicate the process of negotiating or finalising a dispute settlement, it may also provide ample opportunity for legal challenges by disgruntled parties.

Alternative Powers

There are, on the other hand, a range of other legislative powers in the Constitution to which the Commonwealth may turn if it wishes to regulate industrial relations or employment conditions without regard to the constraints imposed by the very particular wording of the arbitration power.[19] For example, it would seemingly be possible for a federal statute to impose obligations or confer rights on an employer or worker, provided:

- the employer or the worker were engaged in, or in close connection with, interstate or overseas trade or commerce (trade and commerce power, s 51(1));[20]
- the employer or the worker were engaged in a defence-related project, or Australia was at war at the time (defence power, s 51(6));[21]
- the employer was a financial, trading or foreign corporation (corporations power, s 51(20));[22]
- the obligations in question were mandated by a treaty which Australia had ratified, or otherwise represented a matter of significant international concern (external affairs power, s 51(29));[23]
- the employer or the worker were located in a State which had referred legislative authority to the Commonwealth over the obligations in question (s 51(37)); or

17 Ibid, p 5.

18 See Creighton and Stewart, above n 1, pp 72–4; and see eg *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Kirsch* (1938) 60 CLR 507 at 538.

19 See A Stewart, 'Federal Regulation and the Use of Powers Other than the Industrial Power' in P Ronfeldt and R McCallum (Eds), *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations*, Monograph No 9, Australian Centre for Industrial Relations Research and Teaching, University of Sydney, 1993; N Williams and A Gotting, 'The Interrelationship Between the Industrial Power and Other Heads of Power in Australian Industrial Law' (2001) 20 *Aust Bar Rev* 264. Cf Committee of Review into Australian Industrial Relations Law and Systems (Hancock Committee), *Report*, Vol 2, AGPS, Canberra, paras 5.59, 6.62–6.66, recommending against the use of 'exotic' powers.

20 See *R v Wright; Ex parte Waterside Workers Federation of Australia* (1955) 93 CLR 528; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120; 22 ALR 291.

21 See *Pidoto v Victoria* (1943) 68 CLR 87.

22 The scope of the corporations power is discussed in a later section.

23 See *Victoria v Commonwealth* (1996) 187 CLR 416; 138 ALR 129.

- the employer or the worker were located in a Territory (territories power, s 122).

It is also possible to impose employment obligations indirectly through the taxation power in s 51(2), by imposing a tax penalty on any employer who does not act in a desired fashion. This method has been used to require minimum superannuation contributions,[24] and (formerly) to require a minimum level of spending on training.[25] However, while it is quite foreseeable that the taxation power will be used again to support specific legislative initiatives of this kind, more extensive use would almost certainly be viewed as politically unacceptable by the electorate. Accordingly, it is not considered further in this article.

The downside of most of the powers listed above is that they do not authorise *comprehensive* national regulation. It would in theory be possible for the Commonwealth to achieve that objective, at least in relation to the private sector, if all States referred their legislative powers under s 51(37), as Victoria did in 1996.[26] However, that presently seems very unlikely — and even Victoria, under the Bracks Government, has now (if unsuccessfully) sought to take back some at least of the powers it had previously referred.[27]

The other power that comes closest to the ideal of uniform regulation is the external affairs power. Provided an appropriate treaty can be identified, this at least permits legislation of universal application — subject to the limitations of Commonwealth power in relation to the State public sectors. Those limitations, which hinge on implications derived by the High Court from the federal nature of the Constitution, preclude federal regulation of employment conditions for 'high-level' State officials, and also bar any attempt by the Commonwealth to determine the composition of a State's workforce.[28]

The problem is that while international treaties deal with a wide range of employment issues, they are far from complete in their coverage. There is, it should be said, some possibility that one or more of the key ILO Conventions dealing with freedom of association and promotion of collective bargaining

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24 Superannuation Guarantee Charge Act 1992 (Cth); Superannuation Guarantee (Administration) Act 1992 (Cth).

25 Training Guarantee Act 1990 (Cth); Training Guarantee (Assessment) Act 1990 (Cth). The validity of these statutes, which were repealed in 1996, was upheld in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555; 112 ALR 87.

26 See Commonwealth Powers (Industrial Relations) Act 1996 (Vic); Workplace Relations and Other Legislation Amendment Act (No 2) 1996 (Cth); S Kollmorgen, 'Towards a Unitary National System of Industrial Relations?' (1997) 10 *AJLL* 158; and see also *Dempster v Comrie* (2000) 96 FCR 570; 170 ALR 386.

27 See Fair Employment Bill 2000, which would have expanded the list of minimum conditions of employment for Victorian workers and established a Fair Employment Tribunal with power to regulate conditions and resolve disputes (other than unfair dismissal claims) involving workers not covered by federal instruments. The Bill, which was defeated at the second reading stage in the Legislative Council on 4 April 2001, was based on recommendations made by a taskforce chaired by Ron McCallum: *Independent Report of the Victorian Industrial Relations Taskforce, Part 1: Report and Recommendations*, Victorian Industrial Relations Taskforce, Melbourne, 2000; and see S J Zeitz, 'The Industrial Relations Taskforce Report: A Phoenix From the Ashes' (2000) 13 *AJLL* 308.

28 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; 128 ALR 609; *Victoria v Commonwealth* (1996) 187 CLR 416; 138 ALR 129. See Creighton and Stewart, above n 1, pp 89–92; Williams, above n 1, pp 7–16.

could be used as the basis for a complete system of agreement-making.[29] In *Victoria v Commonwealth*,[30] the High Court confirmed that to be validly enacted under the external affairs power, a statute need only be 'reasonably capable of being considered appropriate and adapted to implementing [a] treaty'. It illustrated the point by upholding legislation conferring a right to parental leave,[31] despite the fact that the Workers with Family Responsibilities Convention 1981 (No 156), to which the legislation was said to give effect, makes no specific reference to such leave. Nevertheless, there would inevitably be a large gap between the generalities of the collective bargaining conventions and the detail of any federal statute establishing a system for agreement-making. As such there would be a very real risk of the court (whose composition has changed markedly in the last few years) declaring the legislation unconstitutional, notwithstanding the broad view it has previously taken of the Commonwealth's capacity to give effect to treaties.

In practice, the 'alternative' powers listed above have for the most part been invoked by the Commonwealth to extend the reach of rules or processes of a kind already enacted under the arbitration power. Examples that may presently be found in the Workplace Relations Act 1996 (WR Act) include:

- authorising the AIRC to deal with disputes that occur in Victoria or a Territory, or that involve certain waterside workers, maritime employees or flight crew officers, even if an interstate dimension is lacking to the disputes in question;[32]
- permitting the registration of agreements (Div 2 certified agreements and Australian Workplace Agreements) that are not necessarily made in settlement of an interstate dispute, so long as the employer is, for example, a trading, financial or foreign corporation, or located in Victoria or a Territory;[33] and
- empowering the AIRC to make common rule awards in the Territories.[34]

There are exceptions to this pattern, such as the use of the external affairs power by the Keating Government to establish 'stand alone' laws on termination of employment and parental leave of a kind that did not formerly exist and were unlikely to have been possible under the arbitral power.[35] Also noteworthy under the Howard Government has been the use of State-referred powers to enact minimum standards on certain core employment conditions for Victorian workers.[36]

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29 For example, the Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87) and the Right to Organise and Collective Bargaining Convention 1949 (No 98). Note that these would not support a system wholly or primarily based on *individual* agreements.

30 (1996) 187 CLR 416 at 489; 138 ALR 129.

31 Industrial Relations Act 1988 (Cth) Pt VIA Div 5.

32 WR Act ss 5, 493; Northern Territory (Self Government) Act 1978 (Cth) s 53(1).

33 WR Act ss 170LH, 170VC, 5AA, 494–495.

34 WR Act ss 141–142.

35 Industrial Relations Act 1988 Pt VIA Divs 3, 5, as introduced by the Industrial Relations Reform Act 1993: see M Pittard, 'International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment' (1994) 7 *AJLL* 170.

36 WR Act Pt XV Div 3. As a response to the dissatisfaction with these 'bare bones' minimum standards expressed in the report of the Victorian Industrial Relations Taskforce (above

Normally, however, the alternative powers have been used only to supplement the arbitration power. This has added dramatically to the complexity of federal regulation, the most extreme example at present being the freedom of association provisions in Pt XA of the WR Act. To determine whether these provisions apply to victimising or discriminatory conduct outside Victoria,[37] it is necessary first to ascertain if the conduct is caught by one of the prohibitions in Divs 3, 4 or 5. It must then be determined whether one of a number of further criteria set out in Div 2 (each supported by a variety of different powers) also apply. For example, if an employer dismisses an employee for being a member of a trade union, this is on the face of it a breach of s 298K. But s 298K will in fact only apply if the union in question is federally registered (s 298D), or the employer is a 'constitutional corporation' (s 298G),[38] or the conduct takes place in a Territory (s 298H).[39] It takes a skilled lawyer, or at least someone with a good deal of experience in reading legislation, to work their way through these convoluted provisions (plus some intricate definitions in ss 4 and 298B) and be at all confident of understanding their effect.

A More Extensive Use for the Corporations Power?

It is against this background that it is necessary to assess suggestions for a very different use of the corporations power, one that would *substitute* for the arbitration power rather than supplementing it.

The idea of using the corporations power as the basis for a radically different approach by the Commonwealth to labour regulation is hardly a new one.[40] But it has been given a significant boost over the past few years by Peter Reith, the architect of the WR Act and, until a cabinet reshuffle in December 2000, Minister for Workplace Relations in the Howard Government.

Reith first floated the idea in correspondence with the Prime Minister in December 1998 about labour market reform options,[41] and then expanded it in his aforementioned address to the National Press Club in March 1999. In this latter speech, he stressed the need to dispense with some of the complex and technical processes demanded by the arbitration power, notably the artificial

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n 27), and the Bracks Government's attempts (as mentioned above) to reassume legislative responsibility in that area, the Federal Government has moved to amend the current standards: see Workplace Relations Amendment (Minimum Entitlements for Victorian Workers) Bill 2001 (Cth).

37 By reason of the reference of powers from Victoria, Pt XA applies to *all* conduct in that State.

38 A 'constitutional corporation' is defined in s 4(1) of the Act to mean a trading, financial or overseas corporation, a corporation formed in a Territory or a Commonwealth authority.

39 See eg *Rowe v Transport Workers Union of Australia* (1998) 90 FCR 95; 160 ALR 66; and see further Creighton and Stewart, above n 1, pp 284–8.

40 See eg J O'Donovan, 'Can the Contract of Employment Be Regulated Through the Corporations Power?' (1977) 51 *Australian Law Jnl* 234; G F Smith and R C McCallum, 'A Legal Framework for the Establishment of Institutional Collective Bargaining in Australia' (1984) 26 *Jnl of Industrial Relations* 3; I F C Spry, 'Constitutional Aspects of Deregulating the Labour Market' in *Arbitration in Contempt*, H R Nicholls Society, Melbourne, 1986; S E K Hulme, 'A Constitutional Basis for the Federal Coalition's Industrial Relations Policy — and Related Matters' (1993) 4 *Economic and Labour Relations Rev* 62.

41 The correspondence was leaked to the media in February 1999, an outcome which seems to have perturbed Reith not at all: see 'Getting the Outsiders Inside', above n 16, p 2.

creation of interstate disputes so as to confer jurisdiction on the AIRC. Using the corporations power as the basis for federal regulation, he suggested, it would be possible for 'a coherent national framework of minimum standards to be established for the conduct of workplace relations in corporations', thus ending (at least in those workplaces) dual federal/State regulation.[42] Federal awards would be able to 'operate on a common rule basis (applicable to all corporations) rather than the current respondency basis'. They could also provide 'a more secure safety net of conditions to be specified across the workforce (where employed by corporations) and into award-free areas, rather than simply be orders made within the ambit of prescribed disputes'.[43]

Reith subsequently gave a group of departmental officials the task of preparing a series of discussion papers on the subject. Two such papers were released in October 2000, and a third the following month.

The first two papers essentially recapitulate and expand on Reith's March 1999 address. The first, entitled 'The Case for Change', has two major themes: the unsatisfactory nature of a federal system 'hamstrung' by its reliance on the arbitration power; and more generally the desirability of dispensing with the 'wasteful burden of six workplace relations systems'.[44] On the former, the paper takes particular aim at the need for paper disputes:

> The extension of the scope of awards by the development of the notion of paper disputes and the service of logs of claim on multiple employers has been costly in terms of complexity and administrative burden, including for unions. Manufacturing disputes that do not in reality exist at the 'shop floor' level in order to bring claims before tribunals also does little to encourage the parties to develop responsibility for their own workplace relations. It can result in attention being diverted from the resolution of the real issues, and adds to the confusion, uncertainty and sense of alienation from the system of employers and employees at the workplace level. The gridlock of technicality and manufactured paper disputes contributes to a barely comprehensible system. Put simply, the constitutional limitations of the power require a dispute, artificial or otherwise, to be created in order to then resolve it. That is hardly the foundation for a rational regulatory system.
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> . . . [S]uch a system can be confusing and alienating for parties unfamiliar with the nature of the game, and unable to participate in its processes because of its perceived complexity and cost. It is effectively in gridlock for anyone but the experts and insiders.[45]

The second paper, 'A New Structure', rehashes the arguments from the first paper and goes on to explain what a corporations-based system might look like.[46] For those concerned that such a system might be radically different from that currently in place, the tone is clearly meant to be reassuring. There is much emphasis on simplifying procedures, reducing transaction costs and making the system easier to use for employers and employees. But, as the paper reminds us, '[c]hanging the constitutional foundation of the system does

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42 Ibid.
43 Ibid, p 8.
44 *Discussion Paper 1, The Case for Change*, above n 3, p 3. As to the arguments for a unitary system, see below nn 112–113.
45 *Discussion Paper 1, The Case for Change*, above n 3, pp 10–11, 17.
46 *Breaking the Gridlock: Towards a Simpler National Workplace Relations System — Discussion Paper 2, A New Structure*, Department of Employment, Workplace Relations and Small Business, Canberra, 2000.

not compel policy redesign'.[47] Using the corporations power, while enabling improvements to be made, would also permit 'the fundamentals of the system (eg awards, agreements, the commission, unions and employer organisations) to be retained'.[48]

The third and (to date) final paper, 'A Focus on Agreement Making', adds little to the debate. It is essentially an extended advertisement for the advantages of decentralised bargaining, and for the Howard Government's policies on workplace agreements.[49] Again, there is much reassurance that while the system of agreement-making under the WR Act could be greatly simplified under a new corporations-oriented regime, the key elements of that system would not need to change. Equally though, it is made clear that a major 'benefit' of the new regime would be to extend the availability of individual and non-union collective agreements, and hence marginalise those State systems (for which read New South Wales in particular) 'where there is much less emphasis on the primacy of agreement-making'.[50]

That said, the paper also speaks of there being a 'strong case' for a new corporations-based system giving 'continued recognition to State agreements, such as individual agreements under current legislation in Western Australia'.[51] Under the Western Australian system introduced in 1993, individual workplace agreements are available on a much simpler basis, and with far fewer checks and balances, than their federal equivalents.[52] As the discussion paper notes, Reith had already indicated that these agreements should survive, on the basis that they 'have strong support from key industries, such as the iron ore industry, and their employees'.[53] Needless to say, the paper makes no attempt to explain how leaving such 'desirable' State laws intact can be reconciled with the notion of a simplified national system under which 'process requirements for different types of agreements could be consolidated to eliminate existing duplication and complexity'.[54]

As the discussion papers emphasise, the notion of basing federal regulation squarely on the corporations power has not (at least to date) been formally adopted as government policy. It is significant, however, that the Howard Government's efforts to make incremental adjustments to the reforms it introduced in 1996 have stalled. The 'second wave' amendments contained in the Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999 fell foul of Democrat opposition in the Senate. Subsequent attempts to reintroduce some of those amendments have mostly failed, as too have new

47 Ibid, p 17.
48 Ibid.
49 *Breaking the Gridlock: Towards a Simpler National Workplace Relations System — Discussion Paper 3, A Focus on Agreement Making*, Department of Employment, Workplace Relations and Small Business, Canberra, 2000.
50 Ibid, p 16.
51 Ibid, pp 18–19.
52 See Workplace Agreements Act 1993 (WA); B Ford, 'Changing the Dynamics of Bargaining: Individualisation and Employment Agreements in Western Australia' in S Deery and R Mitchell (Eds), *Employment Relations: Individualisation and Union Exclusion*, Federation Press, Sydney, 1999. The current provisions are likely to be substantially amended in the near future by the recently elected ALP Government led by Geoff Gallop.
53 *Discussion Paper 3, A Focus on Agreement Making*, above n 49, p 19.
54 Ibid, pp 20–1.

proposals to outlaw 'pattern bargaining'.[55] Against that background, it has become common in industrial relations circles to speak of Reith's proposal in terms of a possible 'third wave' of legislation — one that might act as a circuit-breaker to the government's inability to pursue its preferred agenda on labour market regulation. Significantly, Democrats industrial relations spokesman Senator Andrew Murray has repeatedly expressed interest in the idea of making greater use of the corporations power,[56] at the same time that he has been helping to block the government's other reforms.

It remains to be seen whether the Coalition opts to make the corporations power the centrepiece of the workplace relations policy that it takes into the next election. It may be that with Reith no longer in that portfolio, the proposal will not be pursued with the same vigour. Certainly if Labor regains government, it is likely to focus in the first instance on 'rolling back' key aspects of the 1996 reforms, rather than on anything more radical. Nevertheless, the possibility of one of the major parties embracing this idea seems closer than ever.

The Scope of the Corporations Power

Before analysing the various options for using the corporations power, it is useful to review what the power does and does not cover. Section 51(20) authorises the Commonwealth Parliament to enact legislation 'with respect to . . . foreign corporations, and trading and financial corporations formed within the limit of the Commonwealth'. The two key issues here are the scope of the terms 'trading' and 'financial', and the breadth of the power to make laws 'with respect to' such corporations.

In terms of the former question, the High Court has come to take a very broad view of what constitutes a 'trading' or 'financial' corporation. It is sufficient that trading or financial activities represent a substantial part of what the corporation does, irrespective of the purpose for which it was established.[57] On this test, it would seem that besides the many companies operating for profit, a wide range of 'non-commercial' bodies may come

55 See Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000; Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2000; Workplace Relations Amendment Bill 2000. The government has had only three minor successes in recent years. The first was when the Workplace Relations Legislation Amendment (Youth Employment) Act 1999, permitting the continuation of junior rates of pay, was passed (ironically) with ALP support and over Democrat opposition. More recently, the Workplace Relations Amendment (Tallies) Act 2001 has made 'tallies in the meat industry' a non-allowable award matter, while the Workplace Relations Amendment (Termination of Employment) Act 2000 is a watered-down version of a more radical package of amendments to the unfair dismissal provisions in the WR Act. Proposals currently before parliament whose fate is not yet determined include the Workplace Relations (Registered Organisations) Bill 2001, the Workplace Amendment (Transmission of Business) Bill 2001 and the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001.

56 See, eg, 'Democrats see merit in Reith plan', *Daily Telegraph*, 26 March 1999, p 26; 'Murray hints at Bill agreement, talks up unitary system' *Workforce*, Issue 1258, 26 May 2000, p 2.

57 *R v Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190; 23 ALR 439 (football clubs and football league 'trading' corporations); *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR

within the reach of the power, such as local councils,[58] public universities[59] and providers of medical or emergency services.[60] Only a relatively small number of incorporated bodies would be excluded: some charities and community service organisations,[61] and perhaps also (ironically) registered trade unions.[62] On the other hand, it is worth emphasising that many smaller employers in Australia are not incorporated at all, but rather 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.[63]

As to what kind of laws the Commonwealth can pass under the corporations power, there has never really been a definitive High Court decision on its scope.[64] Since the 1971 case of *Strickland v Rocla Concrete Pipes Ltd*,[65] it has been clear that the Commonwealth may at the very least regulate the trading activities of the kinds of corporations mentioned in s 51(20). Indeed in the *Tasmanian Dam* case,[66] a majority of the court went further and accepted that regulation of activities undertaken by a corporation simply for the purpose of trading is permitted. The court also made it clear in *Fontana Films*[67] that it is possible for a law to impose duties on a person or body that is not a constitutional corporation and still be valid under the power, provided the law has a sufficient connection to such corporations. In that case it was the 'secondary boycotts' provisions in s 45D of the Trade Practices Act 1974, which sought to protect corporations from damage to their trading activities.

Beyond that, it has sometimes been suggested by members of the court (especially Murphy J) that the power would justify virtually any kind of law directed to corporations, and would certainly allow regulation of the

282; 44 ALR 1 (superannuation board a 'financial' corporation); *Commonwealth v Tasmania* (1983) 158 CLR 1; 46 ALR 625 (public utility a 'trading' corporation).

58 *Todd v City of Armadale* (1998) 44 AILR para 3-812; *Burrows v Shire of Esperance* (1998) 86 IR 75. Cf *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533; 2 ALR 371.

59 *Quickenden v O'Connor* [2001] FCA 303 (23 March 2001, unreported, BC200101151); *National Tertiary Education Industry Union v University of Wollongong* [1997] AIRC 574 (4 June 1997); *University of Western Australia v National Tertiary Education Industry Union* [1997] AIRC 681 (20 June 1997).

60 *Jones v Aboriginal Medical Service* [1997] AIRC 557 (25 September 1997); *United Firefighters Union v Metropolitan Fire and Emergency Services Board* (1998) 44 AILR para 3-842.

61 See eg *Fowler v Syd-West Personnel Ltd* (1998) 44 AILR para 3-836 (company funded by government grants to establish employment programmes for people with disabilities not a trading corporation); but cf *Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane* [1997] AIRC 1038 (27 April 1997); *Belcher v Aboriginal Rights League Inc* (1999) 45 AILR para 4-045 (services found to be trading corporations, since although government funded they received fees for services from some clients).

62 This point was raised but not decided in *Rowe v Transport Workers Union of Australia* (1998) 90 FCR 95; 160 ALR 66.

63 '1.2 million workers in the cold', *Workforce*, Issue 1114, 9 May 1997, p 1.

64 As to what follows, see further W J Ford, 'Reconstructing Australian Labour Law: A Constitutional Perspective' (1997) 10 *AJLL* 1 at 20–30 and 'Using the Corporations Power to Regulate Industrial Relations' (2001) 6 *Employment Law Bulletin* 70; Williams, above n 1, pp 112–20.

65 (1971) 124 CLR 468.

66 *Commonwealth v Tasmania* (1983) 158 CLR 1; 46 ALR 625.

67 *Actors & Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169; 40 ALR 609.

employment conditions and industrial relations at a corporate employer.[68] That there are limits to the reach of the power, however, clearly emerges from *Re Dingjan; Ex parte Wagner*.[69] It was stressed by a number of judges in that case that a law could not be said to be valid *merely* because it was directed at or concerned a corporation of the relevant kind: the Commonwealth may not, in other words, simply use a reference to a corporation as a 'peg' on which to hang any kind of law.[70]

Nevertheless, a majority in *Dingjan* adopted a broad view 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.[71] 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'.[72] On the facts of the case, he joined with the remaining three judges in striking down s 127C(1)(b) of what was then the Industrial Relations Act 1988. This permitted an independent contractor to challenge the fairness of their contract, provided it was one 'relating to the business' of a corporation. Since the contract need not be with the corporation, nor have any particular significance for the corporation, the connection was regarded as too remote. Nevertheless, the test used by McHugh J is more akin to that of the dissentients (who would have upheld s 127C(1)(b)) than to the approaches taken by the other majority judges. Of the latter, Brennan J spoke of the need for a law to affect a corporation in a different manner to other persons in order for that law to be valid (the 'discrimination' test);[73] Toohey J required a relationship between the law and a corporation's 'rights, duties, powers or privileges' that must be more than tenuous;[74] and most narrowly of all, Dawson J demanded that the law relate to the 'trading' or 'financial' character of a corporation.[75]

If we assume then that the Commonwealth may legitimately use s 51(20) to pass laws which have some significance for its 'activities, functions, relationships or business', where does that leave the possibility for regulation of employment conditions and workplace relations? The term 'relationships' would plainly encompass a corporation's relations with its workforce and with any unions representing that workforce, matters which are also intimately connected with its 'activities', 'functions' or 'business'. This surmise is supported by the fact that in *Victoria v Commonwealth*[76] the High Court chose to accept without question a concession by the applicants as to the validity of the provisions in Div 3 of Pt VIB of the Industrial Relations Act 1988 permitting constitutional corporations to enter into non-union 'enterprise flexibility agreements' with their workers. While not a conclusive indication

68 See eg *Actors & Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 207–8, 212; 40 ALR 609; *Commonwealth v Tasmania* (1983) 158 CLR 1 at 148–53, 179, 269–71; 46 ALR 625.
69 (1995) 183 CLR 323; 128 ALR 81.
70 Ibid, at CLR 339, 344–5, 353, 369–70.
71 Ibid, at CLR 364; and see also at 333–4, 342.
72 Ibid, at CLR 369 (emphasis added).
73 Ibid, at CLR 336–7.
74 Ibid, at CLR 352–3.
75 Ibid, at CLR 346.
76 (1996) 187 CLR 416 at 539; 138 ALR 129.

as to the validity of similar provisions in the WR Act,[77] or in any future legislation, the decision suggests that the court would be unlikely to strike them down.

Most recently, in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union*[78] Gleeson CJ observed that whatever the scope of s 51(20), it would not be affected by any limitation on the Commonwealth's power to regulate employment conditions under the arbitration power.[79] Gaudron J reiterated her broad view of the corporations power and indicated she had 'no doubt that it 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'.[80] However, she went on to reject an argument that the laws under challenge could be regarded as validly enacted under the corporations power.

The case concerned Items 50 and 51(1)–(3) of Sch 5 of the Workplace Relations and Other Legislation Amendment Act 1996, which from July 1998 onwards invalidated award provisions dealing with 'non-allowable' matters.[81] Although these provisions might 'have some effect on the rights and obligations of corporations and their employees', this was not sufficient for Gaudron J to give them the character of a law 'with respect to' corporations.[82] Kirby J was the only other judge in the case who directly addressed the corporations power argument. He too rejected it, primarily because the legislation in question made no attempt to 'differentiate' or 'discriminate' between the position of corporations and that of other parties to awards.[83] These remarks were made in the context of a consideration of s 7A of the WR Act, which encourages courts to read down provisions in the legislation to whatever extent necessary to bring them within constitutional power. It is unclear whether in speaking of the need for an element of 'discrimination' Kirby J was effectively applying the approach to the corporations power adopted by Brennan CJ in *Dingjan*.

The views expressed by Gaudron and Kirby JJ in *Pacific Coal*, like the outcome in *Dingjan*, serve as a reminder that a law will only be valid under s 51(20) if it applies to corporations in a more than passing fashion. Equally though, the tenor of all bar Dawson's judgment in *Dingjan* suggest that

77 But see *Quickenden v O'Connor* [2001] FCA 303 (23 March 2001, unreported, BC200101151): below nn 88–92.

78 *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 172 ALR 257.

79 Ibid, at 263, citing *Pidoto v Victoria* (1943) 68 CLR 87 where the same conclusion was reached in relation to regulation of employment conditions under the defence power.

80 (2000) 172 ALR 257 at 275.

81 See Creighton and Stewart, above n 1, pp 133–9. The majority in *Pacific Coal* (Gleeson CJ, Gummow, Hayne and Callinan JJ) held that these provisions could be characterised as laws concerning the conciliation and arbitration of industrial disputes, notwithstanding the fact that they selectively disallowed award provisions that had been valid at the time they were made, and that they might obviously disturb the balance originally struck by the AIRC in settling the disputants' rights. Gaudron, McHugh and Kirby JJ dissented, with Kirby J accusing the majority of ignoring 'nearly a century of previously unbroken legislative authority' in upholding, under the arbitration power, the direct alteration by parliament of existing awards: (2000) 172 ALR 257 at 333.

82 Ibid, at 275.

83 Ibid, at 332–3.

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.

The assumption that the corporations power should be read broadly in this context is also supported by a series of decisions of the Federal Court upholding its use to underpin significant parts of the WR Act. In the first of these, *Rowe v Transport Workers Union of Australia*,[84] Cooper J rejected a challenge to various provisions in Pt XA of the Act prohibiting industrial action taken by unions and workers for the purpose of compelling an employee or independent contractor of a constitutional corporation to become a union member. Applying the 'activities, functions, relationships or business' test, on the basis that this represented the view of a majority of judges in *Dingjan*, he found a sufficient connection or nexus between the laws in question and the subject-matter of the corporations power. This was so even to the extent that the laws prohibited conduct directed against third parties in a relationship with a corporation, rather than the corporation itself:

> Conduct of third parties may be controlled by a law which is properly characterised as a law with respect to corporations insofar as it operates to protect the corporation and its activities, functions, relationships and business from being adversely affected by such conduct: *Fontana Films*. Such conduct may impact directly on the corporation itself or directly on its activities, functions, relationships or business. An adverse effect is nonetheless an adverse effect because it is caused indirectly. Where an employee or the independent contractor is in such a relationship with the corporation that the effect of the conduct on the employee or the independent contractor interferes with the relationship, the indirect effect of the conduct is to adversely affect the corporation itself. This is because it affects the corporation in its right to enter into that relationship, and in the enjoyment of any rights or benefits flowing from it.[85]

The key provision, s 298G(2)(b), only applied to the extent that the conduct in question was directed against a person in their 'capacity' as an employee or contractor of a corporation. On the basis that such conduct would necessarily affect their relationship with the corporation in some way, the provision was properly characterised as a law relating to the corporation itself. This distinguished it from the provision struck down in *Dingjan*.

In *Australian Workers Union v BHP Iron Ore Pty Ltd*,[86] Kenny J was also concerned with Pt XA, but on this occasion with provisions prohibiting certain forms of conduct *by* such corporations — specifically, victimisation of employees because of their membership of a union or entitlement to the benefit of an industrial instrument, and the inducement of employees to relinquish their union membership. She accepted that there was majority support in *Dingjan* for a broad view of s 51(20), though she also considered that the provisions in question would in any event be valid even on the slightly stricter tests articulated by Brennan and Toohey JJ in that case. As she noted:

> The provisions expressly affect the rights of [constitutional] corporations . . . As far as the operation of the enterprise of a corporation is concerned, the relationship of

84 (1998) 90 FCR 95; 160 ALR 66.
85 Ibid, at FCR 105; ALR 75.
86 (2001) 106 FCR 482; 102 IR 410.

> the corporation to its own employees is directly germane to its business. This is not to say that all aspects of that employment relationship are permissible subjects of regulation under s 51(xx), but, on the test favoured by Mason CJ, Deane, Gaudron and McHugh JJ, the laws in question in this case are . . .
>
> Each proscription directly governs a central aspect of the industrial arrangement between the constitutional corporation as employer and the employees who carry out its business. As this case illustrates, the connection between the relevant prohibitions and the corporation's business is a real and practical one.[87]

In *Quickenden v O'Connor*,[88] the Full Court of the Federal Court considered the validity of Div 2 of Pt VIB of the 1996 Act, in so far as it authorises the certification of agreements to which corporations are party. Again, the Full Court found the provisions to be constitutional, though the majority adopted what was perhaps a slightly more cautious approach to the scope of the corporations power. According to Black CJ and French J:

> It is neither possible nor necessary for the purposes of this case to extract from [the High Court] authorities an exhaustive statement of the limits of the corporations power. It is sufficient to say that the state of the law after *Dingjan* supports, as a valid exercise of the corporations power, a law that applies expressly and specifically to constitutional corporations in their capacity as such corporations or to other persons or bodies in their dealings with such corporation or their conduct in relation to them. A fortiori a law is a valid exercise of the power under s 51(xx) if it confers rights or powers or imposes duties or liabilities peculiarly on such corporations or those who deal with them or engage in conduct affecting them in connection with those dealings or that conduct. It may be accepted that a law of general application which happens to apply to constitutional corporations among others is not a law with respect to such corporations for the purposes of s 51(xx).[89]

Section 170LI of the Act requires that a Div 2 agreement concern 'matters pertaining to the relationship' between (in this instance) a constitutional corporation and those of its employees who will be subject to the agreement. As their Honours observed:

> These elements . . . are sufficient to indicate that the impugned laws apply directly to constitutional corporations in that character and to their employees. If satisfaction of a discrimination test as enunciated by Brennan J can be regarded as at least sufficient to determine validity then these laws are valid on that basis. They are also valid if the test applied is that of 'sufficient connection'. The rights and duties which define the relationship between a corporation and its employees are central to its functioning. It is true that employee relations are not peculiar to constitutional corporations, but neither are trading or financial activities. The fact that the subject of the law is not itself unique does not deprive it of the character of a law with respect to constitutional corporations if it is specifically and uniquely directed to them. That direction is no mere peg or reference point.[90]

Carr J delivered a separate judgment to similar effect, accepting that 'a law which regulates the industrial rights and obligations of trading and financial corporations, and persons employed by those corporations, clearly relates to

87 Ibid, at FCR 492–3; IR 418.
88 [2001] FCA 303 (23 March 2001, unreported, BC200101151).
89 Ibid, at [39].
90 Ibid, at [40].

the business activities and relationships of that corporation'.[91] He also rejected any suggestion that employment relationships were 'internal' to a corporation (even if that mattered, which he considered it did not): when negotiating conditions with employees or with their unions, corporations 'can be seen to be operating in the employment market place'.[92]

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 by the legislation itself;
- the certification of individual or collective agreements to which a corporation was 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.

Options for Using the Corporations Power

On the face of it then, the option floated by Peter Reith of underpinning federal industrial regulation with the corporations power rather than the arbitration power would seem to be soundly based, at least in terms of constitutionality. There is always the possibility that a differently constituted High Court in the future will adopt one of the narrower views expressed in *Dingjan*. But as the more recent Federal Court decisions suggest, even on a stricter view of s 51(20) it seems likely that such regulation would still be upheld.

There are in any event other options which might be considered, each involving a greater use of the corporations power than at present. The various options are outlined in the sections that follow, together with an assessment of some of their respective advantages and disadvantages.

Option A — Substitute the corporations power for the arbitration power

Dispensing with the arbitration power in favour of the corporations power would provide the Commonwealth with a greater range of options as to the kind of regulatory system it could adopt. For example it might (as Reith was at pains to point out in his March 1999 address, and as his second discussion paper emphasises) choose to retain a system which involved the conciliation and arbitration of disputes and the making of awards for corporations and their workers, but remove many of the technicalities and limitations of the current model — for example, by authorising the AIRC to make common rule awards and by dispensing with the need to identify and name individual respondents.

91 Ibid, at [114].
92 Ibid, at [115].

How much of an impact such a system would have on the operation of State laws would depend on how the power to set common rules were exercised. To take one extreme, if the federal tribunal were directed to make awards applying to every conceivable kind of employment, or took it upon itself to do so, the entire corporate sector could become the preserve of the federal system, leaving State awards to apply only to non-corporate employers and (perhaps) to those State public sector workers effectively immune from federal regulation. If, on the other hand, the tribunal were directed not to intrude without good reason into industries or occupations traditionally regulated by State awards, as the present legislation effectively provides,[93] the impact of the new system would be much more modest.

It would also be possible for the Commonwealth to supplement the operation of the arbitration system by directly regulating certain employment conditions. Ron McCallum for one has argued that this would have the benefit of 'speaking' more directly to employers and employees by clearly setting out minimum labour standards, even if those standards were supplemented by more detailed award regulation.[94] For corporate workplaces, such direct regulation might supplant State legislation on matters such as annual leave, sick leave, long service leave and employment termination — though probably not workers compensation and occupational health and safety, which require attendant bureaucracies that the Commonwealth would probably prefer to leave to the States. (If there is to be national and universal regulation of those matters, as many believe should be the case, it is better done under the external affairs power in any event.)[95]

There is no doubt that the principal advantages of a conciliation and arbitration system based on the corporations power lie in the potential for greater simplicity and effectiveness of regulation.[96] Freed of the constraints imposed by s 51(35), such a system could operate without any need for the manufacture of paper disputes, the pursuit of roping-in awards, or arguments about ambit. The availability of common rules would mean that federal awards could have wider and more consistent coverage, extending throughout an industry or occupation and automatically applying to greenfield sites. Aside from (potentially) simplifying the operation of the federal system, many corporate employers could also benefit from not having to cope with the operation of both federal and State regulation on most issues, depending (as discussed above) on the extent to which the new federal awards were allowed to intrude into areas traditionally left to the States.

By the same token, however, switching the basis of federal arbitration to the corporations power would obviously mean that a group of workers would 'drop out' of the federal award system — those working in non-corporate organisations, or in corporations which cannot be characterised as trading, financial or foreign. As previously noted, around a quarter of the private sector

93 WR Act s 111AAA: see Creighton and Stewart, above n 1, pp 114–16.
94 'Too Much Law and Too Little Reform: Industrial Law Regulation in Australia', Industrial Relations Society of New South Wales 42nd Annual Conference, Bowral, 18 May 2001.
95 See Creighton and Stewart, above n 1, pp 447–8.
96 See *Discussion Paper 2, A New Structure*, above n 46, pp 17–20.

workforce have non-corporate employers,[97] though many of these are presently covered by State instruments, if at all. The Federal Government has in fact estimated that only 1.6% of non-farm employees would be lost to federal coverage under a corporations-based regime.[98] However, this figure assumes a new system underpinned not just by the corporations power, but by a combination of the corporations power and of other non-arbitration powers, as per Option B below; in particular, it includes virtually all Victorian workers as being within federal coverage because of the reference of powers in that State.[99] Even accepting the estimate, however, that still would leave 116,000 employees being transferred to State coverage. These workers would not necessarily become subject to State awards, since in many instances there would simply be no applicable instrument. Such a consequence might well be regarded as unpalatable by sections of the labour movement.

Looking at it from another perspective, there might also be objections from many of the employers who would cease to be covered by the federal system, especially if they felt that they were being exposed to State regulation in jurisdictions with governments and/or tribunals less inclined to favour business interests. Since most of these employers would tend to be small businesses, the 'natural' constituency of the conservative parties, this point may have particular significance for the Coalition.

A further source of discontent and opposition would in all likelihood be the States — especially the more parochial ones such as Queensland, Western Australia and Tasmania — which might well mount both political and constitutional challenges in order to preserve the operation of their own systems. Under a system of the kind proposed by Peter Reith, the proportion of the workforce that could be covered by State-based arrangements would fall to something in the region of 20–25% — a figure that includes many workers who are currently award-free.[100] One can imagine many State politicians bridling at the suggestion (very much apparent in Reith's March 1999 address and in his subsequent discussion papers) that they choose between being 'relegated' to deal with the non-corporate sector and handing over power to the Commonwealth to do so.

There is a further disadvantage of switching to the corporations power, at least for those philosophically committed to the traditional system of conciliation and arbitration. While that system might for a time survive, severance of the link to the arbitration power might well be seen as a symbolic move which would legitimate the replacement of the system by other, quite different forms of regulation. In other words — and this has surely occurred to the present government! — the transformation of the arbitration system into one capable of operating without the need for a dispute as such, and of being overridden by direct statutory regulation of conditions, might simply lay the groundwork for the abandonment of compulsory conciliation and arbitration altogether.

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97 Above n 63.

98 *Discussion Paper 1, The Case for Change*, above n 3, App D.

99 As to the definition of federal coverage, see above n 3.

100 *Discussion Paper 1, The Case for Change*, above n 3, App D; *Discussion Paper 2, A New Structure*, above n 46, pp 15–16, App B. Again, this assumes that the federal system would be underpinned by a combination of the corporations power and other powers.

It is quite clear, after all, that the Commonwealth could use s 51(20) to regulate industrial relations and employment conditions at corporations in a manner entirely different to the present system. Reith's March 1999 address was (not unusually) peppered with attacks on the role of third parties in workplace relations, and on the 'industrial relations club and its intelligentsia in the Labor Party' who persisted in defending a system that treats employers and employees as 'outsiders'.[101] These suggest that his real target was the role that unions and the AIRC currently play under the arbitration system in regulating wages and conditions, not merely the need for the creation of artificial disputes as part of that system. Given the tenor of the address as a whole, not to mention the Coalition's decade-long interest in radical reform,[102] one might reasonably expect he and his colleagues to be committed (at least in the longer term) to instituting a system of individual agreements backed by a small number of legislated minimum standards, with no formal role for either unions or tribunals.

Even if this did not eventuate, and some form of arbitration mechanism were retained, trade unions might also object to the fact that their role in a new corporations-based system would be less central than it has tended to be under the present regime. Without the requirement for interstate disputes to be created, and indeed with the federal tribunal presumably able to act of its motion to make or vary awards, the scope of the award system would no longer hinge so much on the strategic decisions taken by unions. This is not to say, of course, that unions would not play an important part in such a system: in practice, they would in all probability remain significant agents for change.

On the subject of unions, there might also be some question as to whether the Commonwealth could validly provide under the corporations power for the registration and incorporation of unions and for control of their internal affairs. Should the thrust of legislation under that power still be to facilitate collective bargaining and/or the resolution of disputes affecting corporations, regulation of unions and their affairs would arguably still be reasonably incidental to the attainment of those objectives. But it might be otherwise if the new federal system were directed merely to the enforceability of individual agreements and the enactment of minimum employment conditions, in that it would be hard to see how laws directed to union governance would in any sense support or be relevant to the operation of such a system.[103]

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101 'Getting the Outsiders Inside', above n 16, p 6.

102 See especially Liberal and National Parties, *Jobsback*, 1992; though cf the compromises evident after the 1993 election defeat in *Better Pay for Better Work* (1996) and *More Jobs, Better Pay* (1998).

103 Note in this regard the observations in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 172 ALR 257 at 268–9, 304–5 as to the relevance of determining the 'purpose' of a law claimed to be valid under the concept of incidental power.

Option B — Use the corporations power and plug gaps with other powers

There are obvious strategies for extending the reach of a regulatory system otherwise based on the corporations power. Aside from including the federal public sector, the Commonwealth could extend such a system with relatively little difficulty to employment relationships that involved work in a Territory, or in a State (such as Victoria) which had referred appropriate powers to the Commonwealth, or in connection with interstate or overseas trade or commerce. On this basis, the federal system could encompass at least 85% of the workforce.[104]

The Commonwealth could in addition use the external affairs power to impose national regulation on certain matters covered by ILO Conventions and other international treaties, so as to protect workers even if they fell outside the new federal system. Aside from existing regulation on discrimination and parental leave,[105] this might extend to matters such as termination of employment and minimum wages.[106]

It would also be possible, presumably, to use the arbitration power to make transitional arrangements for workers with non-corporate employers who were no longer covered by a new federal arbitration system.[107] For example, it might be provided that federal awards and/or agreements made under the old system would remain binding until superseded by a new award/agreement, or until revoked by the federal tribunal on the basis that appropriate provision had subsequently been made under State law. This would ensure at least some protection of existing conditions for those excluded from the new system. Given in particular the approach taken by the majority of the High Court in upholding the award simplification provisions in the 1996 legislation,[108] this would seem a valid exercise of the arbitration power, since it would simply involve continuing in force instruments properly made in settlement of an interstate dispute that had existed at some point in the past.

The obvious advantage to Option B (in addition to those articulated in relation to Option A) would be a reduction in the number of workers disadvantaged by a switch to a corporations-based system. Indeed if more States were prepared to follow Victoria's lead in referring some or all of their powers, something they might be more inclined to contemplate if already faced with the prospect of 'losing' their corporate employers to federal coverage, momentum could quickly develop for a genuinely national system.

In practice, however, the more likely scenario is that most of the States

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104 *Discussion Paper 1, The Case for Change*, above n 3, App D.

105 See Racial Discrimination Act 1975; Sex Discrimination Act 1984; Human Rights and Equal Opportunity Commission Act 1986; Disability Discrimination Act 1992; WR Act Pt VIA Div 5. This legislation gives effect to a variety of international instruments, including the ILO's Discrimination (Employment and Occupation) Convention 1958 (No 111) and Workers with Family Responsibilities Convention 1981 (No 156).

106 Relevant instruments for this purpose might include the ILO's Termination of Employment Convention 1982 (No 158) and Minimum Wage-Fixing Convention 1970 (No 131).

107 See *Discussion Paper 2, A New Structure*, above n 46, pp 20, 21, though the paper is disappointingly short on detail.

108 *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 172 ALR 257: above nn 78–83.

would continue to find reasons to maintain their own systems, meaning that even if all available powers were used by the Commonwealth, gaps in coverage would remain. Furthermore, any transitional protection provided by the continuation in force of 'old' awards or agreements would decline in value over time, particularly where wage rates were concerned.

Option C — Use both the corporation and arbitration powers in parallel

Rather than substitute the corporations power for the arbitration power, or use the corporations power merely to extend the operation of a system otherwise based on the arbitration power (see Option D), it is possible to envisage a dual system of regulation which would in effect involve a new corporations-based regime (as per Options A or B) operating alongside the existing regime.

There is a clear precedent for this in the present WR Act, in the form of the provision made in Pt VIB for the certification of agreements under either Div 2 or Div 3. The former generally requires that the employer concerned be a constitutional corporation or be located in Victoria or a Territory. The latter can be accessed by any type of employer, but generally requires that each agreement be made in settlement of an interstate dispute. Thanks also to a quirk of the arbitration power, as interpreted by the High Court, Div 3 agreements may not validly impose obligations on non-union employees, while Div 2 is unaffected by that limitation.[109] Some employers may only be able to have an agreement certified if they proceed under Div 2, because they are not party to an actual or threatened interstate dispute. For non-corporate employers, it may be the reverse: Div 3 may be their only option. Those who effectively have a choice generally opt for Div 2 because it is simpler and does not have the problem with binding non-unionists.[110]

Similarly, it would be possible to confer jurisdiction on the AIRC to make and vary awards that would be binding on corporations (and employers in Victoria or a Territory, etc) regardless of the existence or scope of any particular dispute. Unions would still, however, be able to manufacture paper disputes so as to obtain or update awards binding on identified non-corporate employers in States which had not referred power to the Commonwealth. As with certified agreements at present, the federal statute would have separate provisions dealing with the two types of award, while for many purposes imposing common requirements and indeed often dealing with them in an undifferentiated fashion.

There could also be direct federal regulation of some employment conditions for corporate employers, while leaving other employers to be subject (as is generally the case at present) to a mixture of State legislation and federal award provisions.

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109 See *Re National Tertiary Education Industry Union; Ex parte Quickenden* (1996) 140 ALR 385; 71 ALJR 75; *Quickenden v O'Connor* [2001] FCA 303 (23 March 2001, unreported, BC200101151).

110 As at June 2000, 'dispute-based agreements' under Div 3 were reported to comprise only 25% of the total number of agreements formalised under the WR Act, covering some 28% of employees subject to federal agreements: *Discussion Paper 3, A Focus on Agreement Making,* above n 49, p 13.

This approach would obviously overcome the problem of having a section of the workforce drop out of the federal system and (in many instances) join the ranks of the award-free. It would also involve less radical change to the present system. However, many of the advantages of Options A and B in terms of simplification would be lost, except to the extent that corporate employers at least might be freed from the complexities of the present award system and of much dual federal/State regulation. The technicalities and peculiarities of the paper dispute-driven award system would remain, even though (just as with certified agreements) it might be expected that the 'corporations stream' would quickly assume much greater importance in terms of coverage of the workforce. Unions would still, therefore, have to worry about roping-in and the like. Moreover, even if concomitant action were taken (as it ought to be in any event) to simplify the existing provisions in the federal statute,[111] a reform of this kind would further add to the overall complexity of the legislation.

It would also seem likely that most States would object to this model as much as to Options A or B — in fact even more so, perhaps, since any loss of coverage of corporate employers would not on this scenario be balanced or compensated by non-corporate employers dropping out of the federal system.

Option D — Extend the supplementary use of the corporations power

There are various ways in which the corporations power could be used to extend the reach of the federal arbitration system, just as the trade and commerce and territories powers have been, without altering the central character of that system as being one based on the arbitration power. Most obviously, the AIRC could be empowered to deal with any dispute that involved a corporation, regardless of the lack of any interstate dimension. It could also be empowered to extend awards made in settlement of a particular dispute to apply by way of common rule to any corporation operating in the relevant industry or employing workers in the relevant type of job. The more these sort of options are pursued, of course, the more that the outcome begins to look like Option C.

As with Option C, the advantages here are that the reach of the federal system could be extended without 'losing' workers to the State systems. Indeed, there would be even less change to the essential character of the current system — something that is likely to appeal to those who, as discussed earlier, are concerned to ensure that the corporations power is not used in a more radical fashion to abolish arbitration and the award system. Again, however, the more 'supplementation' that occurred, the higher the resulting degree of complexity in the regulatory regime, and the more strenuous the opposition likely to emanate from the States.

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111 See A Stewart, 'Reforming Workplace Relations and the Innovation Gap', Keynote Address, Industrial Relations Society of South Australia 1997 Annual Convention. Reith's discussion papers, by contrast, seem to make the assumption that switching to the corporations power is somehow a prerequisite to simplifying the legislation: see eg *Discussion Paper 3, A Focus on Agreement Making*, above n 49, p 16.

Conclusion

This article has sketched out some of the options for making greater use of the corporations power. In terms both of improving the simplicity and efficiency of federal regulation, and of hastening the abandonment of State regulation in favour of a single, national system, there is much to be said for Option B — especially if it involved extensive use of the external affairs power to impose national standards in key areas such as wages and job security, and the 'freezing' of federal awards to offer protection over a transitional period to those workers excluded from the new federal system.

This assumes of course that instituting a unitary system of regulation in Australia is a desirable goal. For myself and many other 'neutral' observers (if there is such a thing) this is almost a given, so obvious are the advantages in terms of cost savings and policy coherence.[112] It is clear that there are many in the business community who feel the same way, and the Business Council of Australia in particular has been quite vocal over the past year in seeking to promote the benefits of a unitary system.[113]

But the cold hard reality is that there are formidable political obstacles to the attainment of that objective. Mention has already been made of the difficulties that the Coalition might face in promoting a corporations-based federal system that looked after the 'big end of town' but excluded the many small businesses that are not incorporated. The Liberal and National Parties also have a tradition of strong State divisions and an even stronger adherence to the rhetoric of 'States' rights'.

If anything, opposition might be even greater on the other side of politics. There are many Labor politicians whose power base or factional support lies in State-based unions or peak councils. The influence of these bodies would inevitably be diluted if the State industrial systems were dismantled. There are also those, especially (though not exclusively) in the labour movement, who believe that preserving dual regulation means that there is always a chance of escaping from a hostile State government by switching to the federal system, or vice versa. Naturally, this only works if different parties are in government at the time *and* the prevailing regulation permits some degree of 'forum-shopping'.[114] That these conditions are only rarely met seems not to deter such thinking.

A key here — from both the perspectives just mentioned — is likely to be the attitude of some of the leading ALP figures in New South Wales. Aside

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112 See Creighton and Stewart, above n 1, pp 97–8 and the sources there cited; and see also *Discussion Paper 1, The Case for Change*, above n 3, pp 22–3, rejecting arguments that 'competitive federalism' can generate public benefits in the context of industrial regulation.

113 In November 2000 the BCA convened a Forum on 'A Unitary Industrial Relations System: Unfinished Business of the 20th Century', the papers from which can be accessed on its website <www.bca.com.au>. It subsequently announced an intention to convene a taskforce to promote further debate on the issue.

114 The classic example of this was the Keating Government's willingness to alter the federal system in 1993 so as to facilitate the transfer of Victorian workers to federal awards in order escape the effect of the Kennett Government's Employee Relations Act 1992: see Creighton and Stewart, above n 1, p 114. See also Reith's proposed 'loophole' for corporations who have entered into workplace agreements under Western Australian law: above, text at nn 51–54.

from being the most populous State, New South Wales has the regulatory system which in retrospect can be seen to have been least affected by the wave of radical reform that swept Australia in the 1990s.[115] Indeed, the Carr Government's Industrial Relations Act 1996 is now revealed as the first in a series of 're-regulatory' initiatives introduced by a new wave of State Labor administrations elected following a period of conservative dominance in the mid-1990s.[116]

On the face of it then, the chances of NSW Labor supporting a radical use by the Commonwealth of the corporations power in the industrial arena might seem fairly slim.[117] The Queensland Government has already expressed its opposition to any moves to create a unitary system.[118] It is possible that the Bracks Government in Victoria might be prepared to relinquish its attempts to re-establish (at least in part) a State system,[119] should a federal ALP government be elected with a commitment to address concerns about the current arrangements for Victorian workers not covered by federal awards or agreements. But beyond that, it is hard to see there being a groundswell of opinion in the labour movement in favour of an expanded federal system — especially if the proposal is coming from politicians or business groups whose 'real' motives are viewed with suspicion.

The prospect we face is that a combination of conservatism (in the true sense), suspicion of centralisation, vested interests and the prospect of short-term political pain may force the major parties to look at Options C or D — if they are prepared to go down the corporations power track at all.

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115 Which is not to say that the changes effected by the Greiner Government's Industrial Relations Act 1991 were not significant: see generally R C McCallum, 'Two Approaches to Industrial Relations Reform in New South Wales: The Making of the Industrial Relations Acts of 1991 and 1996' in D R Nolan (Ed), *The Australasian Labour Law Reforms: Australia and New Zealand at the End of the Twentieth Century*, Federation Press, Sydney, 1998.

116 See also Industrial Relations Act 1999 (Qld); Industrial Relations Amendment Act 2000 (Tas); Fair Employment Bill 2000 (Vic). Legislation is also expected from the newly elected Gallop Government in Western Australia. See further A Forsyth, 'Re-Regulatory Tendencies in Australian and New Zealand Labour Law', Working Paper No 21, Centre for Employment and Labour Relations Law, University of Melbourne, 2001, which examines the 'subtle' tendencies to re-regulation even in the federal system, as well as the Employment Relations Act 2000 introduced by the Labour Government in New Zealand.

117 Ironically, perhaps, New South Wales has in fact agreed to refer to the Commonwealth its powers in relation to the formation and internal regulation of corporations in order to help underpin a new national system of corporate law: see Corporations (Commonwealth Powers) Act 2001 (NSW).

118 'Queensland says no to Reith unitary IR model', *Workplace Express*, 4 November 2000.

119 Above n 27.