

INDUSTRIAL RELATIONS, THE CONSTITUTION AND FEDERALISM: FACING THE AVALANCHE

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I INTRODUCTION

Contrary to popular opinion, the primary significance of the Howard government's industrial relations legislation¹ in the long-term relates not to issues of workplace regulation but to matters of basic constitutional principle. This is because the industrial character of that legislation merely overlays a marked constitutional controversy with profound federal implications. The essence of this controversy lies in the dramatic attempted use by the Howard Government of the Commonwealth's power over trading and other corporations² as the basis for its industrial relations legislation. This use, if successful, would represent a prodigious expansion of the corporations power, which in turn would have a significant effect upon Australia's delicate federal balance.

It is the nature and extent to which these issues impact on federalism that lies at the heart of this short piece dealing with the constitutional ramifications of the Commonwealth's latest corporations-based foray into industrial relations. To this end, the piece will seek very briefly to do five things. First, it will outline generally the long-recognised potential of the corporations power under the Australian Constitution. Second, it will identify the significance of the current industrial relations legislation and the challenges to that legislation in the context of the future expansion of Commonwealth competence by means of the corporations power. Third, and critically, it will briefly address the broad themes of arguments concerning the validity of the WorkChoices legislation under the corporations power. Fourth, the piece will attempt to predict some likely future expansive uses of the corporations power should the High Court substantially uphold WorkChoices. Finally, the broader implications for Australian federalism of such an expansion of the corporations power will be considered.

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1 As embodied in the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

2 Section 51(xx) of the Constitution ('the corporations power') confers upon the Commonwealth the power to make laws with respect to foreign, financial and trading corporations formed within the limits of the Commonwealth.

II THE HISTORIC POTENTIAL OF THE CORPORATIONS POWER

The Commonwealth's power over corporations is contained in section 51(xx) of the Constitution, which relevantly provides that the Commonwealth may legislate with respect to foreign, trading and financial corporations formed within the limits of the Commonwealth. Unsurprisingly, it is the 'trading corporation' element of this power that is relied upon to provide overwhelmingly the most significant basis for the Commonwealth's current industrial relations legislation.

There is little doubt that the corporations power was intended by the founders to have a relatively limited scope.³ Historical evidence suggests, for example, that they would have taken a notably narrow view of the nature of a trading corporation, confining that description to those corporations whose essential character was defined by reference to trade.⁴ Moreover, decisions of the first High Court such as *Huddart Parker and Co Pty Ltd v Moorehead* ('*Huddart Parker*')⁵ make it clear that they regarded the scope of the corporations power as being in any event heavily circumscribed by reference to the internal limits of such other powers of the Commonwealth as that over trade and commerce conferred by section 51(i).

This confined view of the corporations power, however, has not survived the broadening tendencies of successive High Courts. The relatively early insistence of the Court that Commonwealth powers were to be interpreted independently of each other in *R v Barger*⁶ necessarily undermined the cogency of contextually restrictive decisions like *Huddart Parker* and culminated in the final rejection of such an approach in *Strickland v Rocla Concrete Pipes Ltd* in 1971.⁷ Even more important was the pervasive reasoning of *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* ('*Engineers*'),⁸ which since 1920 has provided the High Court with an interpretative creed to the effect that the powers of the Commonwealth are to be interpreted with all the broadness that their words allow, and without reference to some notional residue of State power or federal balance. The inevitable trend of these judicial approaches, as expressed in a series of cases over the last thirty years,⁹ has been to provoke suggestions – that the corporations power was a sleeping, and later a stirring, giant.

3 On the general scope and history of the corporations power, see Geoffrey Kennett, 'Constitutional Interpretation in the *Corporations Case*' (1990) 19 *Federal Law Review* 223.

4 See, eg, *Official Report of the National Australasian Convention Debates*, Sydney, 2 April 1891, 685-7 (Sir Samuel Griffith); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 17 April 1897, 793-4 (Sir Edmund Barton).

5 (1909) 8 CLR 330.

6 (1908) 6 CLR 41.

7 (1971) 124 CLR 468.

8 (1920) 28 CLR 128.

9 See, eg, *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468; *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533; *R v Judges of FCA & Adamson; Ex parte WA National Football League (Inc)* (1979) 143 CLR 190; *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169; *Commonwealth v Tasmania* (1983) 158 CLR 1.

The exact scope of the corporations power remains notably unclear for such a potentially important provision and the formulae for determining its dimensions vary markedly from case to case, and from judge to judge. Nevertheless, the scope of the power ultimately turns upon the resolution of two crucial interpretative issues. These are, first, the definition of a 'trading corporation' and, second, the delineation of the range of the activities of a trading corporation that may be regulated by the Commonwealth.

On the first of these, it has been settled for some time that the High Court will take a liberal view in determining whether a corporation is a trading corporation. In general terms, a trading corporation will be one which has 'significant' trading activities, regardless of whether or not these are such as to define the character of the corporation.¹⁰ The practical effect of this is that a very wide range of corporations, including public sector entities, will be trading corporations within the meaning of section 51(xx). Consequently, the potential of the corporations power as a base for the major extension of Commonwealth legislative capacity really depends upon the second issue, namely, the class of activities which the High Court will regard as regulable activities of a trading corporation.

The position here is far less clear, although there are some points of certainty. Thus, it is clear beyond all argument that the corporations power allows the Commonwealth to regulate the trading activities of trading corporations.¹¹ It is also clear, not only that the Commonwealth can regulate non-trading activities undertaken for the purposes of trade, but that the High Court will take a very broad view indeed of what constitutes an act undertaken for such a purpose, countenancing the regulation of activities of trading corporations that are remote from any identifiable act of trade. In the *Tasmanian Dams case*,¹² for example, the building of a dam which would be used for the generation of electricity that would ultimately be sold was regarded as an activity undertaken for the purposes of trade.¹³ Also clearly permissible, by a parity of reasoning, will be laws regulating the activities of third parties, where those activities impinge upon or burden the regulable activities of trading corporations.¹⁴

The crucial question remaining – and the one that lies at the heart of the current constitutional litigation over WorkChoices – is whether the power goes beyond these categories and permits the regulation of activities of trading corporations that neither constitute trade, nor are easily subsumed under the category of activities undertaken for the purposes of trade. A crude formulation of this query would be to ask whether the corporations power effectively permits the regulation of all activities of a trading corporation simply because it is a trading corporation, a position which did seem to recommend itself to some members of the Mason Court.¹⁵ Naturally, the adoption of such a position by the

10 See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 156 (Mason J) ('*Tasmanian Dams case*).

11 Ibid.

12 Ibid 148.

13 See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 148 (Mason J).

14 See, eg, *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169.

15 See *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 (Mason CJ, Deane and Gaudron JJ).

Court would necessarily mean that the substance of the WorkChoices legislation is validly based upon the corporations power.

This is the centre of the constitutional controversy in relation to the Howard Government's industrial relations legislation. If section 51(xx) does effectively permit the regulation of all activities of a trading corporation, regardless of their connection with trade, and likewise permits the regulation of all activities of third parties impacting upon trading corporations, regardless of whether they impact upon trade or trade related activities, then the scope of that provision will be truly vast. It will extend not only to what might be termed their wider 'industrial envelope' – which is the object of WorkChoices – but will effectively permit the regulation of the entire operational environment of trading corporations. Given the pervasiveness in Australia of the corporate form as a means of business (and governmental) organisation, this will enable the Commonwealth to control an increasingly large component of Australian society as a whole.¹⁶

It should be noted that the corporations power is significantly more politically palatable as a pervasive tool of Commonwealth regulation than its other super-placitum, the external affairs power contained in section 51(xxix). The reason for this is that section 51(xxix) carries a strong political flavour of diminution of Australian sovereignty by reference to potentially controversial norms of international law, whereas the Commonwealth will be quick to justify any action under section 51(xx) by reference to Australia's all-important commercial and business needs. The power thus combines a potent constitutional capacity with a high degree of political plausibility.

III THE CONSTITUTIONAL CONTEXT OF THE WORKCHOICES LEGISLATION AND THE CORPORATIONS POWER

The general relevance of the corporations power to the capacity of the Commonwealth to regulate industrial relations arises principally from internal limitations contained within that placitum of section 51 that does directly confer a role in the regulation of industrial matters upon the national Parliament. This is section 51(xxxv), the so-called conciliation and arbitration power, inserted into the Constitution by the founders after much debate¹⁷ and with such large restrictions upon its operation – such as its restriction to inter-state disputes and to the particular processes of conciliation and arbitration – that it has proved grossly insufficient to meet the extensive ambitions of the Commonwealth in this field.

This has led to repeated attempts on the part of the Commonwealth to secure amendments to the Constitution to confer upon it additional powers in respect of industrial relations. Indeed, referendum proposals to such effect have been defeated on no less than six occasions: in 1911, 1913, 1919, 1926, 1944 and

16 Around three quarters of private sector employees in Australia are employed by corporations: see William Breen Creighton and Andrew Stewart, *Labour Law* (4th ed, 2005) 108.

17 See *Official Record of the Debates of the Australasian Federation Convention*, Third Session, Melbourne, 27 January, 1898, 185–215 (Charles Kingston).

1946.¹⁸ Such serial defeat has apparently persuaded the Commonwealth that pursuing its aims by democratic referendum is futile, but has not dissuaded it from its object. Rather, a less direct approach toward the same end is being employed.

Thus, the corporations power offers an attractive potential way for the Commonwealth around the wreckage of its collapsed referendum proposals. If the industrial relations of trading and other constitutional corporations may be regulated under section 51(xx), then, on the evident assumption that the corporate economy comprises most of the Australian labour market,¹⁹ the Commonwealth would be able to indirectly regulate industrial relations by means of its power over corporations. The obvious and straightforward method would be to regulate the employment relations of employers who were constitutional corporations, thereby bringing the industrial relations of the vast bulk of the corporate sector within the purview of the Commonwealth. This is precisely the technique adopted in the Howard Government's WorkChoices legislation.

The crucial thing to grasp about this approach is that it assumes the correctness of the widest possible view of the scope of the corporations power. In other words, in seeking to regulate the wider industrial relations environment of trading and other constitutional corporations, the Commonwealth is effectively adopting the position that the power conferred by section 51(xx) is not limited to the trading, or to the trade related activities of corporations, or to their activities undertaken for the purposes of trade, or indeed to laws which affect the corporate character²⁰ of such corporations, or to laws which affect third parties in relation to any of these matters.

Rather, the fundamental proposition of the Commonwealth, however qualified or conditioned at the margins, appears to be that section 51(xx) extends to the regulation of all actions undertaken by constitutional corporations or in respect of constitutional corporations, regardless of any intrinsic connection to the character or characteristic activities of such corporations. The Commonwealth must advance such a position for the simple reason that acceptance by the Court of some variation thereof is vitally necessary if the Commonwealth is to be absolutely assured of the comprehensive validity of the WorkChoices legislation.

This follows from the fact that the employment relations of a corporation do not automatically fit within more narrow formulations of the scope of the corporations power. Indeed, the employment activities and relations of a corporation clearly do not constitute trade as such, at least outside the slave market. There also will be challenges in characterising such activities as activities undertaken for the purposes of trade. In many contexts, a variety of aspects of the employment relationship will be remote from and unintegrated with any trading operations of a corporation, and it arguably will be much more difficult to subsume basic human relationships within such an economic concept than, for example, an item of production capital, such as an electricity-generating

18 Lenny Roth, 'Industrial Relations Reforms: The Proposed National System' (Briefing Paper No. 11/05, New South Wales Parliamentary Library Research Service, 2005) 8.

19 Creighton and Stewart, above n 16.

20 See, eg, *Re Dingjan: Ex parte Wagner* (1995) 183 CLR 323, 369 (McHugh J).

dam.²¹ Only a comprehensive finding of Commonwealth power in respect of trading and other constitutional corporations, their activities and operational environment will render WorkChoices – and other potential Commonwealth projects²² – entirely immune from challenge.

It may be noted in passing that, in the event that the legislation is vindicated by the Court, this will represent the ultimate expression of the principle from *R v Barger*²³ that the purpose behind a law of the Commonwealth is irrelevant to its characterisation, in the sense that merely because a law clearly evinces an intention to operate upon matters otherwise excluded from Commonwealth competence by some other constitutional provision, this does not affect its validity. Clearly, in light of the internal limitations of section 51(xxxv), there could be no more blatant evasion of historic constitutional intent and federalist constitutional design than that proposed under WorkChoices. Indeed, validity of the Commonwealth's industrial relations package under section 51(xx) would embody the final and irreversible triumph of the ultra-literalistic, hyper-centralist reasoning contained in the *Engineers* case.

IV THE VALIDITY OF THE WORKCHOICES LEGISLATION UNDER THE CORPORATIONS POWER

Consistently with the preceding analysis, the validity of the legislation will depend primarily upon the view taken by the Court as to the range of the activities of a trading or other constitutional corporation which validly may be regulated under section 51(xx). It is notable that this is not a question upon which any of the present members of the Gleeson Court have previously expressed a detailed opinion as a justice of the High Court.²⁴ Most particularly, to the extent that WorkChoices seeks to regulate the activities of trading corporations that comprise neither trading activities nor activities undertaken for the purposes of trade, the Commonwealth is entering essentially uncharted territory.

The most relevant and relatively recent decision of the Court is *Re Dingjan; Ex parte Wagner* ('*Dingjan*').²⁵ This complex case also involved what might be termed a 'remoter' use of the corporations power, in that the relevant part of the impugned law sought to regulate contracts relating to the business of a constitutional corporation.²⁶ This sweeping formulation clearly was intended to apply beyond the immediate environs of the activities of a constitutional corporation that reasonably could be regarded as comprising trade or as having been undertaken for the purposes of trade.

21 This is what was held in the *Tasmanian Dams case* (1983) 158 CLR 1.

22 See below Part V.

23 (1908) 6 CLR 41.

24 Justice Gummow was a member of the Court in *Victoria v Commonwealth* (1996) 187 CLR 416 ('*the Industrial Relation Act Case*'), but the treatment of the corporations power in that decision was essentially mechanical.

25 (1995) 183 CLR 323.

26 *Industrial Relations Act 1988* (Cth) s 127C(1)(c).

Within the rather tangled strands of judicial opinion expressed in *Dingjan* it is possible to identify both broader and narrower views of the scope of the corporations power, with the mere restrictive positions displaying various shades of caution concerning the potential expansion of that power. The broad view, as expressed by Chief Justice Mason²⁷ and Justices Deane and Gaudron,²⁸ essentially was that the corporations power would authorise any law that operated upon the general business, business operations and connections of a trading corporation, which in practical terms amounts to the proposition that section 51(xx) would authorise a law addressing virtually any typical activity of such a corporation, as well as an almost unlimited range of actions by other parties affecting the operations of those corporations. On this analysis, it would clearly be the case that a law regulating the employment relationships and wider industrial environment of a trading corporation would be valid under the corporations power.²⁹

A narrower approach can be discerned in the judgements of Justices McHugh, Brennan, Toohey and – most notably – Dawson, although each judgement differs significantly from the other. In the view of Justice Dawson, section 51(xx) could be used to regulate only those activities of a trading corporation that related immediately to its trade, including activities undertaken for the purposes of trade, although this latter category was somewhat narrowly conceived.³⁰ Consistent with what has been said above, this view would not necessarily support regulation of the employment relations of trading corporations, principally on the basis that these might not be regarded as sufficiently proximate to a corporation's trading operations as to amount to activities undertaken for the purposes of trade.

The approaches taken by Justices McHugh, Toohey and Brennan were somewhat wider than this, but still less permissive than that of the remaining Justices. To Justice McHugh, for a law to be valid as a law with respect to trading corporations, it seems that the law would need to be of significance to that corporation specifically as a 'trading corporation'.³¹ To put the matter another way, it seems that there would have to be something special in the application of a law to regulated entities in the fact that they were 'trading corporations', and that it would not be sufficient for this purpose simply that the law in question was addressed to such corporations. Justice Toohey adopted a similar approach.³²

The question here in relation to WorkChoices would be whether a law relating to the industrial relations of trading corporations was really of significance to either or both of their 'trading' or 'corporate' characters, or whether it actually fastened upon their entirely generic status as employers, in which respect they were essentially undistinguished from other consumers of labour. At one point in *Dingjan*, Justice McHugh seems to assume that laws regulating the actual

27 *Dingjan* (1995) 183 CLR 323, 333–5.

28 *Ibid* 364–5 (Gaudron J, Deane J concurring).

29 As suggested by Justice Gaudron in *Re Pacific Coal Pty Ltd; Ex parte CFMEU* (2000) 203 CLR 346, 375.

30 *Dingjan* (1995) 183 CLR 323, 364.

31 *Ibid* 368–71.

32 *Ibid* 352–3.

activities of trading corporations automatically display the required element of 'significance',³³ but at another is far more doubtful concerning an undefined range of corporate 'relationships', 'functions' and 'behaviours'.³⁴ Where WorkChoices would fit on this spectrum is unclear.

Justice Brennan's position displayed significant similarities with that of Justice McHugh, requiring that a law under section 51(xx) discriminate in its operation between trading corporations and other entities before it could validly be regarded as referable to that power.³⁵ Arguably, what Justice Brennan had in mind here was a discrimination of substance that went to the broader 'trading' and 'corporate' character of such entities, rather than a formal discrimination effected purely by the purported applicability of a Commonwealth law. Again, the question might be asked whether a law in respect of industrial relations which fastened upon a trading corporation for no reason attributable to that corporation other than its fortuitous inclusion within section 51(xx) would meet such a description.

Indeed, there is in the reasoning of each of Justices Dawson, Brennan McHugh and Toohey a purposive³⁶ nuance of varying strengths which sits uneasily with the deeply artificial reasoning that lies at the heart of the WorkChoices legislation: namely, that so long as an employer happens to be a constitutional corporation, then section 51(xx) may validly be used to regulate its employment relations, even though the character and activities of that entity as a constitutional corporation are entirely irrelevant as a matter of policy reality to its selection as part of the Commonwealth's legislative regime. Echoes of this type of purposive concern, that an exercise of the trading corporations power must at least have some vestigial motivation based upon considerations specific to 'trading corporations', also may be found in relation to the external affairs power (section 51(xxix)) in the judgement of Justice Deane in the *Tasmanian Dams case*,³⁷ and the sensitivity is clearly referable to judicial uneasiness with the potential scope of the corporations power once it is freed from any more than a formal requirement of referability to such corporations.

As to which of these judicial approaches is to be preferred, and how it might be applied to the WorkChoices legislation, will very much depend upon one's general interpretive attitude to the *Australian Constitution*. If one accepts the ultra-literalism of *Engineers*, there will be a strong tendency to reach the conclusion that, as the legislation operates upon the employment relations of constitutional corporations, and as the Commonwealth has acknowledged power over such corporations, these activities may be regulated under the accommodating liberality of the High Court's customary approach.

On the other hand, if one proceeds upon the basis of valuing the constitutional intention behind section 51(xx) – together with that underlying section 51(xxxv)

33 Ibid 368.

34 Ibid 368–9.

35 Ibid 337–9.

36 Some powers of the Commonwealth are acknowledged to be purposive in character, most notably the defence power contained in section 51(vi): *Farey v Burvett* (1916) 21 CLR 433.

37 (1983) 158 CLR 1, 259–61.

– as amplified by some residual notion of federalism as an interpretative principle, it will be tempting to conclude that section 51(xx) is not to be interpreted so as to permit so obvious a subversion of constitutional intent and federal settlement. Certainly, the WorkChoices legislation represents one of the starker instances of the Commonwealth approaching its object via the use of a constitutional provision which historically could never have been conceived of as being applicable. The difficulty with such reasoning is that it reeks of the discarded – rather than discredited – doctrine of reserved powers³⁸ and flies in the face of the Court's traditional approach towards the interpretation of the powers of the Commonwealth, which has been highly amplificatory and intolerant of calls to consider such things as the federal balance.³⁹

This acknowledged, it is clear that at least some members of the Court may be troubled by the potentially unlimited capacity of the corporations power to be used to effect any regulatory object, no matter how far it otherwise is removed from the purview of the Commonwealth, provided only that the relevant law is addressed to 'constitutional corporations'. The real question will be whether some limitation of purpose, relevance, substance or discrimination may be attached to the operation of the power without outraging the vengeful, literalistic spirit of *Engineers*. In light of the *Engineers* hegemony, any such approach presumably would have to be pursued through a 'neutral' characterisation of the power itself, rather than via the attachment of external federal limitations.

There naturally are some general constitutional limitations upon the Commonwealth's legislative power, which in turn limit the scope of the WorkChoices legislation. The Melbourne Corporation doctrine⁴⁰ will act to exempt a significant proportion of State public sector employees from the Commonwealth's reach under the corporations power, a fact recognised in the legislation.

V POTENTIAL FURTHER USES OF THE CORPORATIONS POWER

One of the most significant aspects of the WorkChoices legislation is the potential for the Commonwealth to deploy a High Court decision in its favour to justify a significant number of novel, and from the point of view of the States, highly problematic exercises of federal power. Indeed, validation of WorkChoices would not only confirm the practicability of a number of long-mooted exercises of Commonwealth power, but also to raise the possibility of several even more aggressive incursions into the domains of the States. Only a few possibilities will be briefly noted here.

First, it must be absolutely clear that, were the WorkChoices legislation to be upheld, the Commonwealth's publicly discussed ambitions in respect of Australia's universities would be substantially realisable. Former Education

38 This was decisively rejected in *Engineers*.

39 A famous example of this tendency was the *Tasmanian Dams Case*.

40 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

Minister Brendan Nelson has widely canvassed the possibility of the Commonwealth directly and cohesively regulating universities,⁴¹ as opposed to relying on the present complex regulatory apparatus that is heavily based upon the funding of higher education institutions.

Presently, there would be serious doubts as to whether the Commonwealth could regulate such university activities as research or teaching, on the basis that it would be difficult to characterise these activities simply as trading activities or activities undertaken for the purposes of trade. The effect of a finding in respect of WorkChoices that section 51(xx) permitted the regulation of virtually all activities undertaken by or in respect of trading corporations, however, would be that the teaching, research and other educational activities of universities would be directly regulable by the Commonwealth, given the evident reality that all Australian universities fall within the category of trading corporations.⁴² This still would not permit the Commonwealth comprehensively to 'take over' the operations of universities, if only because such institutions are founded in State legislation, but it may be confidently predicted that were the Commonwealth to assume the entire regulatory control of universities, State ownership would become increasingly irrelevant and eventually be conceded.

Another example would concern the perennial possibility of Commonwealth laws dealing uniformly with defamation. Given that all significant Australian media outlets take a corporate form and are by definition trading corporations, a positive finding in the WorkChoices litigation necessarily would involve the proposition that any defamation occurring as part of the normal activities of such outlets would be regulable by the Commonwealth. Given that the overwhelming proportion of defamation actions will involve such corporations, it follows that Commonwealth defamation legislation would be able to dominate that field in much the same way that its WorkChoices legislation will dominate the field of industrial relations.

Even more remote applications may be imagined, and presumably will occur readily to the Commonwealth. One possibility might involve the extensive regulation of State local governments, all of which (like universities) take a corporate form under State legislation, and all of which could be viewed as trading corporations by reference to such activities as the running of municipal pools, child care centres and so forth. It may well be that section 51(xx), appropriately interpreted in the WorkChoices case, would permit the regulation of a wide range of the activities of local government, extending well beyond those activities that are loosely connected with trade. If this were so, the Commonwealth would be provided with a potent weapon with which to influence

41 See, eg, Australian Government, *Building Better Foundations for Higher Education in Australia: A Discussion about Re-aligning Commonwealth State Responsibilities* (2005) Department of Education, Science and Training <<http://www.dest.gov.au/highered/pubs/papers/responsibility/default.htm>> at 31 March 2006; Australian Government, *Issues Paper: Rationalising Responsibility for Higher Education in Australia* (2005) Department of Education, Science and Training <<http://www.dest.gov.au/highered/pubs/papers/responsibility/default.htm>> at 31 March 2006.

42 *Quickenden v O'Connor* (2001) 109 FCR 243.

social and policy outcomes within areas otherwise falling within the exclusive competence of the States.

A similar example might relate to the regulation of such areas as town planning, particularly in capital cities. Given a sufficiently broad outcome in the WorkChoices litigation, the Commonwealth might well be inclined to press the view that the corporations power enables it to intervene in such matters as the planning regimes for major urban and industrial centres, on the basis that these regimes fundamentally will impact upon the wider business and other operations of trading corporations. In short, a positive finding for the Commonwealth in respect of WorkChoices will mark the opening of a series of new chapters in its use of the corporations power.

VI WIDER IMPLICATIONS FOR AUSTRALIAN FEDERALISM

By way of conclusion, it must be accepted that a comprehensive finding by the High Court in favour of WorkChoices will have long-term implications for Australian federalism as a whole, both theoretically and practically. In terms of federal theory, the Howard Government's use of the corporations power to implement its industrial relations programme undoubtedly represents an historic breakdown in the traditional support of Australian conservatives for the concept of federalism. That support has been based on a deeply-held view that federalism is to be defended as a prime expression of the conservative attachment to checks and balances as a means of limiting power.⁴³

This has never been a view adopted by Labor, which typically has regarded itself as the party of radical policy innovation and has favoured the relatively free exercise of Commonwealth power to this end.⁴⁴ The critical result of this basic shift in conservative opinion has been to leave federalism deeply politically exposed as a constitutional value, given that it now enjoys the enthusiastic support of neither major political party. This has enormous implications for the viability of Australian federalism in the long term.

In a more immediately practical dimension, the main effect of a Commonwealth victory in WorkChoices would be to render Australia's federal balance vastly more flexible. In a great many contexts, the question from the Commonwealth's point of view no longer would be whether it had legislative power to approach a particular object, but rather whether it chose to exercise the enormously elastic competence conferred upon it by the corporations power. This would follow from the fact that, realistically, there could be relatively few desirable objects within the Commonwealth's ambitions that could not be approached via a combination of the corporations power and some other power contained in section 51.

43 See generally Greg Craven, 'The New Centralism and the Collapse of the Conservative Constitution', in Commonwealth of Australia, Department of the Senate, *Papers on Parliament: Democratic Experiments*, Lectures in the Senate Occasional Lecture Series 2004–2005, 133, 134–5.

44 Ibid 136.

The potential of these realities would be to usher in a period of ‘opportunistic federalism’, under which the Commonwealth would be free to cherry-pick those areas of activity which it chose to regulate. These choices often would be made not primarily on the basis of specific constitutional responsibility, or indeed settled policy objectives, but rather by reference to impermanent considerations of political advantage and convenience. Under such a regime, the position of the States would be substantially undermined by Canberra in an on-going and random manner. Australia doubtless would continue to be a federation, but one in which the federal balance was a political calculation to be made on a weekly basis.