



The Corporatisation of Australian Labour Law: Completing Howard's Unfinished Business

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The 2005 Work Choices Amendments to the Workplace Relations Act are largely based on s 51(xx) of the Constitution. Their validity therefore turns upon whether they can be characterised as laws with respect to that particular power. The scope of the corporations power has been much debated in recent years. If the High Court interprets it as either a 'plenary' power, or as supporting laws that regulate the activities, functions and relationships of constitutional corporations undertaken for business purposes, the amendments are likely to be constitutionally valid.

Introduction

The changes made to the Workplace Relations Act 1996 (Cth) (WRA) by the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (Work Choices Act) are complex and surprisingly radical.¹ They are also highly contentious. Paradoxically perhaps their complexity derives in no small degree from a determination on the part of the present Federal Government to minimise the role and influence of certain 'third parties' — most notably trade unions and the Australian Industrial Relations Commission — in the regulation of the labour market. The surprising radicalism of the amendments arises out of the government's decision to base the remodeled statutory scheme on the corporations power of the Federal Constitution rather than the conciliation and arbitration power, thereby appearing to jettison more than a century of Australian industrial jurisprudence and practice. Of course the fact that changes of this magnitude and character, ostensibly aimed at creating a unitary national system of industrial relations,² would prove to be very contentious and succeed in generating widespread public opposition was entirely predictable. Now, however, the critical question is whether the amendments are a valid exercise of Commonwealth legislative power. Consideration of that question turns on difficult issues of constitutional law, some of which are briefly discussed below.

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1 Notwithstanding government protests to the contrary: see, eg, Hon Kevin Andrews MHR, 'Work Choices builds on Keating's start', *Australian Financial Review*, 27 March 2006, p 63, putting the case that the changes are merely incremental; cf Paul Keating, 'Work Choices the enemy of productivity', *Australian Financial Review*, 28 March 2006, p 63.

2 WRA s 16 purports to 'cover the field' and exclude the operation of State industrial laws, however under even the most optimistic estimate at least 15% to 20% of employees will remain beyond the regulatory scope of the federal statute. Unless otherwise indicated, for convenience all references are to the renumbered sections of the WRA in the compilation taking account of the Work Choices Act amendments.

Characterisation and Constitutional Validity

It is a trite proposition of law that the only legislative powers available to the Commonwealth Parliament are those set out in the Federal Constitution. Although the conciliation and arbitration power (s 51(xxxv)) has traditionally been relied upon by successive governments of all political persuasions as the principal source of constitutional authority to enact legislation regulating industrial relations, there is certainly nothing new in the use of the corporations power (s 51(xx)) for the same general purpose. Prior to late 2005 however, the latter power had played only a supplementary (if increasingly important) role in this connection.³ The Work Choices Act marks a watershed in this regard. But is s 51(xx) capable of giving constitutional validity to the recent and very ambitious re-structure of our federal industrial framework?⁴ In my view the answer is likely to be that it is. Central to that is the way in which the court now approaches questions of constitutional characterisation.

Legislation enacted in reliance on s 51(xx) must be able properly to be regarded as a law ‘with respect to’ constitutional corporations. The characterisation of a law is tested according to its actual legal operation and effect.⁵ The nature of the connection that must exist between the operation and effect of a law, on the one hand, and the relevant enumerated power(s), on the other, in order for the law to be constitutionally valid remains somewhat elusive. But there is no doubt that the liberal approach to this question that has evolved in the decades since federation has greatly amplified the Commonwealth’s legislative authority.⁶

Of course any law may concern more than one subject, and indeed most complex modern legislation does — including many provisions of the WRA as amended. It is important to appreciate however that it is possible for a statute or a statutory provision to be a law with respect to several different topics, most or all but one of which have no foundation in the Constitution, and nonetheless still be a valid enactment.⁷ So, for example, legislation may deal with intra-State secondary boycotts involving sole traders or partnerships and yet still properly be regarded as also a law with respect to constitutional corporations.⁸

³ See, eg, WRA, former Pts VIA, VIB and VID.

⁴ A valuable earlier discussion of this general issue is provided in A Stewart, ‘Federal Labour Law and New Uses for the Corporations Power’ (2001) 14 *AJLL* 145; see also W Ford, ‘Using the Corporations Power to Regulate Industrial Relations’ (2001) 6 *Employment Law Bulletin* 70.

⁵ See *Fairfax v FCT* (1965) 114 CLR 1 at 7; *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 186; [1948] 2 ALR 89.

⁶ Among the paraphrases offered in the cases are ‘substantial connection’ or a connection which is not ‘insubstantial, tenuous or distant’, ‘remote’ or ‘exiguous’. See, eg, *Melbourne Corporation Ltd v Commonwealth* (1947) 74 CLR 31 at 79 per Dixon J; [1947] ALR 377; *Cunliffe v Commonwealth* (1994) 182 CLR 272; 124 ALR 120 (*Cunliffe*); *Actors and Announcers Equity Ass’n of Australia v Fontana Films Ltd* (1982) 150 CLR 169; 40 ALR 609 (*Actors Equity*).

⁷ See *Cunliffe*, above n 6, at CLR 295. See also *Actors Equity*, above n 6; *Re F; Ex parte F* (1986) 161 CLR 376 at 387–8 per Mason and Deane JJ; 66 ALR 193 (*Re F*); and *Herald and Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418 at 434 per Kitto J; [1967] ALR 300.

⁸ See *Actors Equity*, above n 6.

Acceptance of the proposition that the court is not required to identify the 'paramount' or 'dominant' character of a law has greatly simplified the process and produced a corresponding enhancement of federal authority.⁹ Very importantly, it is also now well established that *for the most part* the grants of legislative power contained in the Constitution are no longer to be read as having mutually exclusive areas of operation.¹⁰ As Menzies J observed in the *Concrete Pipes* case, 'Each subject [in s 51] of the Constitution is not exclusive of the others and a limit upon one cannot be inferred *merely* from the existence of another of more particular scope'.¹¹ Just as therefore, to take a simple example, s 51(xxix) (external affairs) is not to be read down by virtue of the Commonwealth's power in s 51(xxx) to make laws with respect to 'the relations of the Commonwealth with the islands of the Pacific', so the scope of s 51(xx) (corporations) is not to be confined because of s 51(i) (trade and commerce).¹² The same is true of various other powers in s 51 and elsewhere in the Constitution.¹³

Of course as with all generalisations the comment of Menzies J was not intended to apply without exception, as his quite deliberate use of 'merely' makes clear. This issue is further examined below.

It also follows from these developments in constitutional jurisprudence that there is nothing on the face of it to prevent a particular statute from being properly characterised as a law 'with respect to' more than one head of power, for example conciliation and arbitration (s 51(xxxv)) as well as constitutional corporations (s 51(xx)) and even trade and commerce (s 51(i)).¹⁴ Acceptance of this view may be regarded as necessarily entailing the possibility that the Federal Parliament might deliberately choose to invoke one or more heads of legislative power that are available to it in order to avoid constraints thought to be inherent in or imposed by another equally or more obviously applicable power without thereby acting improperly in a constitutional sense.¹⁵ This was a central issue in both the *Concrete Pipes* case¹⁶ and the *Actors Equity* case.¹⁷ It is clear that one of the present attractions of using the corporations power for the purpose of regulating industrial relations is the apparent absence from

9 See, generally, L Zines, *The High Court and the Constitution*, 4th ed, Butterworths, Sydney, 1997, Ch 2.

10 See, eg, *Russell v Russell* (1976) 134 CLR 495 at 539 per Mason J; 9 ALR 103: 'There is no inherent reason for supposing that the legislative powers conferred by the Constitution are mutually exclusive; indeed, many instances may be given of overlapping operation.'

11 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468; [1972] ALR 3 (*Concrete Pipes*).

12 This is also consistent with the High Court's repeated affirmation that 'the pattern of distribution of legislative power in Australia is not based on a concept of mutual exclusiveness': see *Bayside City Council v Telstra Corp'n Ltd* (2004) 216 CLR 595 at 624; 206 ALR 1.

13 Other obvious examples include subss 51(xxi) (marriage) and (xxii) (divorce and matrimonial causes), as well as, more relevantly, subs 51(xxxv) (conciliation and arbitration) and 52(ii) (Commonwealth public service).

14 See, eg, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 534 per Brennan CJ; 147 ALR 42 (*Newcrest*).

15 See *Re F*, above n 7, at CLR 387-90 per Mason and Deane JJ.

16 *Concrete Pipes*, above n 11.

17 *Actors Equity*, above n 6.

that power of the various ‘restrictions’ in the conciliation and arbitration power.

It is unquestionably the case that these now generally accepted features of the process of characterisation¹⁸ have made possible over the years a very substantial expansion of Commonwealth legislative authority, without the need for securing formal amendment of the Constitutional text.¹⁹ Even so, their full import only becomes apparent when they are placed in the context of the progressive erosion of the power and political significance of State governments and, by virtue of s 109 of the Constitution, the paramountcy of Commonwealth legislation where constitutional inconsistency arises between State and federal law.

Using the Corporations Power

The validity of the changes introduced by the Work Choices Act turns upon the scope of s 51(xx) of the Constitution.²⁰ The foundation of the amended WRA is now s 6(1) which sets out the ‘basic definition’ of employer. That section provides that:

unless the contrary intention appears employer means *a constitutional corporation* [being a foreign, trading or financial corporation] so far as it employs, or usually employs, an individual . . .

Section 5(1) in turn defines the ‘basic definition’ of an employee to mean:

an individual so far as he or she is employed, or usually employed, as described in the definition of employer in subsection 6(1), by an employer . . .

In this respect the WRA is now founded on, and requires an understanding of, the recent interpretive history of the corporations power. The issue is whether the particular interpretation of the scope of that power implicit in the statute is correct.

A full discussion of that question would require a close examination of all the major cases dealing with s 51(xx), including of course *Huddart, Parker and Co Pty Ltd v Moorehead*²¹ and the *Concrete Pipes* case,²² a task well beyond the scope of this article. Suffice it to say that although a variety of opinions was expressed in these cases about the scope of s 51(xx), the continued evolution of relevant constitutional jurisprudence suggests that the reasoning they employed should be applied with care. Some of the very earliest discussions (*Huddart Parker* in particular) can now be seen as fatally influenced by the ‘discredited’ doctrine of reserved State powers, according to which the ambit of federal grants was ascertained on the basis of matters

18 See, eg, *Actors Equity*, above n 6.

19 As Kirby J put it in *Gould v Brown* (1998) 193 CLR 346; 151 ALR 395 at [276]: ‘Conformably with the constitutional text and authoritative holdings as to its meaning, this court has approached new problems with fresh constitutional insights which have ensured the adaptation of the Constitution to the needs of each succeeding generation of the Australian people.’

20 See J Williams, ‘The Constitution and the Workplace Relations Act 1996’ in (2006) *ELRR* 61 for a very recent discussion which unfortunately appeared too late for me to consider.

21 (1909) 8 CLR 330; 15 ALR 241.

22 Above n 11.

supposedly reserved by the Constitution to *State* legislatures.²³ However for present purposes, from the cases leading up to *Actors Equity*²⁴ and *Re Dingjan*²⁵ I wish only to highlight several general considerations that are very likely to be of importance in any decision concerning the validity of the Work Choices amendments.²⁶

First, these and other cases show that the constitutional reach and meaning of s 51 powers tends only to be delineated step by step in the course of explaining the validity or invalidity of *particular* legislative enactments. Unsurprisingly perhaps, in those discussions two conceptually separate issues — namely questions concerning the scope of the power, on the one hand, and, on the other, questions about the subject or character of the law being challenged²⁷ — are often conflated. In theory these two issues reflect distinct stages of a single characterisation inquiry, although in the final analysis they must necessarily be brought together in order to determine the validity of the impugned law.

Moreover the court generally resists the temptation to pronounce definitively on the outer limits (the ‘metes and bounds’) of constitutional powers. This reluctance to map out the boundaries of a grant, ‘to decide at one blow the full ambit of a constitutional power’,²⁸ is especially marked in the case of such powers as s 51(xx), which are expressed in terms of persons (albeit artificial or juristic persons) rather than fields of activity, classes of relationships or functions of government. The court’s preferred approach has almost always been to advance explication incrementally, deciding only that which is necessary to deal with the particular question before it. This point was explained and defended by Barwick CJ in an oft cited passage from the *Concrete Pipes* case:

We were invited in the argument of these appeals to set as it were the outer limits of the reach of the power under [s 51(xx)] . . . This for my part I am not prepared to do: and indeed I do not regard the court as justified in doing so. The method of constitutional interpretation is the same as that with which we have been long familiar in the common law. The law develops case by case, the court in each case deciding so much as is necessary to dispose of the case before it. ‘The limits of the power can only be ascertained authoritatively by a course of decision in which the application of general statements is illustrated by example’ *R v Burgess; Ex parte Henry*. Of course frequently in order to dispose of a case the court must state and discuss general principles or express concepts which are of value in subsequent cases. But that is a very different thing from setting out to decide at one blow the full ambit of a constitutional power.²⁹

Secondly, it follows from this that as valuable as judicial expositions of the

23 See *Concrete Pipes*, above n 11, at CLR 488 per Barwick CJ, noting that *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; 26 ALR 337 discarded the doctrine of reserved powers.

24 *Actors Equity*, above n 6.

25 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323; 128 ALR 81 (*Re Dingjan*).

26 See R Owens, ‘The Constitution and the Law of Work in the New Economy’, unpublished paper presented at the 10th Anniversary Annual Public Law Weekend, ANU, 11–12 November 2005.

27 See *Re Dingjan*, above n 25, at CLR 368–9 per McHugh J.

28 *Concrete Pipes*, above n 11, at CLR 490 per Barwick CJ.

29 *Ibid.*

corporations power may be, the question of whether any particular enactment is properly characterisable as a law supported by s 51(xx) has to be decided strictly on the facts and circumstances of each case, and ultimately by reference to the criteria provided by the Constitution itself. The test of validity is to be found in the text of the power, and ‘no commentary upon it however helpful may displace it’.³⁰ The existence of the requisite degree of connection, therefore, ‘cannot depend upon abstract formulae or analogies drawn from other cases’.³¹

Thirdly, the Constitution confers authority on the parliament not to legislate directly on or about constitutional corporations but rather to do so ‘with respect to’ those corporations. These ‘are words of very wide connection and deliberately so’.³² They are not to be treated as mere surplusage, and must be given their full constitutional force in ascertaining the sufficiency of the relationship between the grant and any law purportedly made pursuant to it. Far from being cosmetic, they enhance and reinforce the reach of all s 51 powers, including of course the corporations power.³³

Finally, and barely if at all distinguishable from the previous point, the ambit of a constitutional grant encompasses all matters that are *incidental* to the core subject of the power, and therefore validates such provisions as may be enacted ‘with respect to’ those particular (‘peripheral’) matters. This is as true of the corporations power as it is of every other s 51 power. At the very least the implied aspects of a power extend to and encompass ‘matters which are necessary for the reasonable fulfillment of the legislative power over the subject matter’. As Toohey J observed in *Re Dingjan* though, ‘within the grant of legislative power itself there is but a single grant, the principal power including within in it all that is incidental to the subject matter’.³⁴ In other words, the power remains an entirety. This *implied* power inheres in every substantive grant of Commonwealth legislative authority.³⁵ It is however separate and quite distinct from the *express* incidental power contained in s 51(xxxix), and may well be capable of supporting regulatory measures that would not otherwise be authorised by that latter power.³⁶

Scope of the Corporations Power

Turning to the more recent history of s 51(xx), it seems that broadly speaking two views about the ‘true’ scope of the corporations power have come to dominate the contemporary debate. According to the first and more expansive view, s 51(xx) gives the Commonwealth Parliament a plenary authority³⁷ to

30 Ibid, at CLR 491.

31 Ibid, at CLR 512 per Windeyer J.

32 *Leask v Commonwealth* (1996) 187 CLR 579 at 633 per Kirby J; 140 ALR 1.

33 See, eg, *Re Dingjan*, above n 25, at CLR 368–9 per McHugh J.

34 Ibid, at CLR 352.

35 See above n 32.

36 See *Jumbunna Coal Mine NL v Victorian Coal Miners Ass’n* (1908) 6 CLR 309; 140 ALR 1. In the context of s 51(xxxv), eg, the provisions dealing with the registration and regulation of organisations of employers and employees could be supported by either the *express* or the *implied* incidental power.

37 As to the suggested inappropriateness of this term to describe any s 51 power, see the comments of Gummow J in *Newcrest*, above n 14, at CLR 604–5 and 610–11.

make laws dealing with any aspect of constitutional corporations.³⁸ On this interpretation of the grant, it is clearly open to the Commonwealth to enact legislation regulating the industrial and employment relationships of corporations.³⁹ The other view of the power, of which there is more than one version, ascribes to it a somewhat narrower though still very substantial ambit. It treats the scope of the grant as at least extensive enough to validate any measure operating upon or directed to the trading or financial activities of trading and financial corporations respectively, as well as the domestic trading activities of foreign corporations.⁴⁰

Notwithstanding these two different contemporary interpretations of the scope of the corporations power, all the relevant recent decisions of the court accept that s 51(xx) can be used to enhance and protect, as well as to constrain or prohibit, various aspects of the business activities and functions of constitutional corporations.⁴¹ It has been held, for example, that a trading corporation may by federal statute validly be protected from secondary boycotts⁴² as well as prohibited from entering into contracts which are intended to control 'to the detriment of the public the supply or price of any service, merchandise or commodity'.⁴³ What is of particular importance, though, is the fact that in protecting, enhancing, constraining or prohibiting aspects of these activities and functions of constitutional corporations a law may also, perhaps even primarily, be seeking to achieve some ultimate (even if unstated) objective. If so it is clear that such ulterior motive or purpose will not, in and of itself, render that law invalid.⁴⁴ In the process of characterisation the 'real' reasons which may have actuated the legislature's enactment of a statute or provision are regarded as 'not to the point' for purposes of ascertaining its validity.⁴⁵

Moreover, although 'it is not enough to identify corporations as a reference point so as to affect the activities of others',⁴⁶ it is not necessarily a fatal objection to the validity of a law purportedly enacted under s 51(xx) that as a matter of drafting it seeks to secure the regulation of certain activities of corporations through the medium of other parties. A valid law may achieve this by explicitly addressing the measures with which it deals — the rights, duties, powers or privileges it confers or imposes — to third parties, such as the unincorporated suppliers or customers of corporations, rather than to

38 Sometimes referred to as the 'command' view of s 51(xx).

39 In modern Australian constitutional jurisprudence Murphy J was the strongest and most consistent champion of this view of s 51(xx), although other Justices, including Mason CJ and Deane J, also at various times expressed support for the same general approach.

40 See, eg, *Concrete Pipes*, above n 11, and *Actors Equity*, above n 6.

41 See *Actors Equity*, above n 6; see also *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1; 9 ALR 199 and *Herald and Weekly Times*, above n 7.

42 *Actors Equity*, above n 6.

43 *Ibid*, at CLR 204 per Mason J, describing what he saw as the central issue in the *Concrete Pipes* case.

44 *Ibid*, at CLR 202 per Mason J; see also *Re Dingjan*, above n 25, at CLR 335–6 per Mason CJ.

45 *Fairfax v FCT* (1965) 114 CLR 1 at 16 per Taylor J. The constitutional character of a law is to be determined without reference to such considerations much less to the 'indirect consequences it seeks to achieve'; see also *Actors Equity*, above n 6, at CLR 201 per Mason J. The latter case itself provides a good illustration of this point.

46 *Re Dingjan*, above n 25, at CLR 353 per Toohey J.

constitutional corporations themselves.⁴⁷

Those who subscribe to the broader interpretation of s 51(xx) emphasise that the corporations power is quite different in nature from most other legislative grants, being expressed by reference to *persons* rather than functions of government, fields of activity or classes of relationships.⁴⁸ According to this view, its reach extends to every facet of constitutional corporations, including all aspects of their commercial conduct and operations.⁴⁹ It proceeds from the premise that ‘the subject of the power is corporations of the kind described; the power is not expressed as one with respect to the activities of corporations, let alone activities of a particular kind or kinds’.⁵⁰ Construed therefore ‘with all the generality which the words of s 51(xx) admit’, the constitutional grant:

enables Parliament to make laws covering *all internal and external relations* of foreign corporations and trading or financial corporations: to enact a civil and criminal code dealing with the property *and affairs* of such corporations, or a law dealing with *any aspect of the affairs* of any such corporation or corporations.⁵¹

On this view of the scope of the power it is beyond question that the legislature can validly make laws under it dealing with the industrial and employment relations of constitutional corporations so that in regard to them ‘Parliament, uninhibited by limitations expressed in s 51(xxxv) [the conciliation and arbitration power], *may legislate quite directly about the wages and conditions of employees and other industrial matters*’.⁵² Quite clearly this would include the enactment of a law establishing schemes for the approval and registration of collective or individual employment ‘workplace’ agreements such as are provided for in Pt 8 of the WRA. Indeed its reach would extend to the validation of statutory provisions dealing with *any aspect at all* of the relations between constitutional corporations and their employees (and also their independent contractors), including the setting of minimum conditions or standards of employment⁵³ and the exercise by such employers of powers of dismissal.⁵⁴

It is, though, versions of the second and slightly narrower interpretation of s 51(xx) that appear thus far to have emerged as the court’s preferred view. These see the corporations power as certainly authorising laws which operate on or are directed to the trading and/or financial activities of constitutional corporations, although that is not necessarily the limit of its reach. Indeed, on perhaps the most immediately important version of this particular view of s 51(xx) — a version that emerged from, and appears to have commanded the

47 See *Actors Equity*, above n 6, at CLR 195 per Stephen J, and 199–200 per Mason J.

48 *Ibid.*, at CLR 207 per Mason J, and 216 per Brennan J. The only three paragraphs of s 51 which confer powers with respect to persons are (xx) (corporations), (xix) (aliens) and (xxvi) (race).

49 *Ibid.*, at CLR 212 per Murphy J.

50 *Ibid.*, at CLR 207 per Mason J.

51 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 179 per Murphy J; 158 ALR 485 (emphasis added) (*Tasmanian Dam*).

52 *Actors Equity*, above n 6, at CLR 212 per Murphy J (emphasis added); see also *Re Dingjan*, above n 25, at CLR 334 per Mason CJ.

53 See, eg, WRA Pt 7 dealing with the Australian Fair Pay and Conditions Standard.

54 See WRA Pt 12 Div 4.

support of at least three Justices in, the *Tasmanian Dam* case⁵⁵ — the scope of the grant ‘extends to the enactment of laws dealing with the activities undertaken for the purposes of the business of a constitutional corporation’, encompassing measures regulating the *business* functions and *relationships* of such corporations.⁵⁶ The potential implications of this interpretation for Federal legislation concerning the employment arrangements and industrial relations of constitutional corporations were recognised at the time by a number of commentators.⁵⁷ Subsequently they were further analysed and explored by the court itself in its 1995 decision in *Re Dingjan*.

Decision in *Re Dingjan*

The litigation in *Re Dingjan*⁵⁸ concerned a challenge to the validity of ss 127A, 127B and 127C of the then Industrial Relations Act 1988 (Cth). Section 127C(1)(b) of that statute conferred upon the AIRC the power to review the operation of any particular contract for services ‘relating to’ the business of a constitutional corporation and determine whether the contract in question was harsh, unfair or otherwise against the public interest. Although in the event the court (by bare majority) held that particular provision of the Act to be unconstitutional, not being properly characterisable as a law with respect to corporations,⁵⁹ this conclusion was based on the impermissible breadth of s 127C(1)(b) as then drafted.⁶⁰ In the course of reaching that decision, however, all but one of the seven sitting Justices inclined to acceptance of the view that appropriately drafted laws aimed at regulating the general *business* functions and relationships, and not just the *trading* (or *financial*) activities, of constitutional corporations would come within the scope of s 51(xx).⁶¹

Notwithstanding the ultimate outcome of that case, then, there are strong grounds for reading the judgments in *Re Dingjan* as endorsing the view that s 51(xx) can support and give validity to laws which deal with rather more than simply the trading or financial activities of constitutional corporations, so that ‘if a law regulates the activities, functions, relationships or business of a

55 *Tasmanian Dam* case, above n 51, at CLR 148–50 per Mason J, 179 per Murphy J and 270–1 per Deane J.

56 See *Re Dingjan*, above n 25, at CLR 334 per Mason J; and *Tasmanian Dam* case, above n 51, at CLR 157 per Mason J. See also *Actors Equity*, above n 6, at CLR 207 per Mason J.

57 See, eg, G Lindell, ‘The Corporations and Races Powers’ (1984) 14 *FLRev* 217; and D Rose, ‘Commentary’ (1984) 14 *FLRev* 251.

58 (1995) 183 CLR 323; 128 ALR 81.

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

60 Section 127C(1)(b) required that the contract(s) merely ‘relate to’ the business of constitutional corporations. The majority of the court took the view that the provisions failed to ensure that the exercise of the power so conferred would affect constitutional corporations in some direct or material way: see *Re Dingjan*, above n 25, at CLR 340 per Brennan J, 347 per Dawson J, 354 per Toohey J and 371 per McHugh J.

61 The one Justice who appeared not to take this view was Dawson J. He indicated (at 346) that in his opinion ‘before a law may be said to be with respect to trading or financial corporations or foreign corporations, the way in which the law operates upon them must be such that they impart their character to the law’.

s 51(xx) corporation, no more is needed to bring the law within s 51(xx)'.⁶² As Justice Gaudron (with whom Deane J concurred and Mason CJ expressed general agreement) explained it in the course of her distinctly robust reasons for judgment:

When s 51(xx) is approached on the basis that it is to be construed according to its terms and not by reference to unnecessary implications and limitations, it is clear that, at the very least, a law which is expressed to operate on or by reference to the business functions, activities relationships of constitutional corporations is a law with respect to those corporations. In this regard it is sufficient to note that, although the business activities of trading and financial corporations may be more extensive than their trading or financial activities, those corporations, nonetheless, take their character from their business activities.

Once it is accepted that s 51(xx) extends to the business functions, activities and relationships of constitutional corporations, *it follows that it also extends to the persons by and through whom they carry out those functions and activities and with whom they enter into those relationships . . .*⁶³

Justice Brennan, reaffirming the views he had earlier expressed in *Actors Equity*,⁶⁴ was of the opinion that a valid law under s 51(xx) had to disclose in its terms or operation a 'discriminatory effect' on the constitutionally designated categories of corporation, be they foreign, trading or financial:

To attract the support of s 51(xx), it is not enough that the law applies to constitutional corporations and to other persons indifferently. To attract that support, the law must discriminate between constitutional corporations and other persons, either by reference to the persons on which it confers rights or privileges or imposes duties or liabilities or by reference to the persons whom it affects by its operations. A validating connection between a law and s 51(xx) may consist in the differential operation which the law has on constitutional corporations albeit the law imposes duties or prescribes conduct to be performed or observed by others.⁶⁵

On this approach to the scope of the corporations power, where the relevant discrimination applies 'by reason of the differential effect on constitutional corporations which it produces', the law in question had to operate in such a

⁶² *Re Dingjan*, above n 25, at CLR 369 per McHugh J.

⁶³ *Ibid*, at CLR 364–5. Gaudron J continued (at 365):

As was pointed out by Gibbs CJ in *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 185 '[I]t is the business of a trading corporation to trade, and its business is its trading'. So too, it is the business of a financial corporation to engage in financial transactions and its business consists of the transactions in which it engages. And a foreign corporation is simply a corporation formed outside Australia that carries on business in Australia. As their business activities signify whether or not corporations are trading or financial corporations and the main purpose of the power to legislate with respect to foreign corporations must be directed to their business activities in Australia, it follows that the power conferred by s 51(xx) extends, at the very least, to the business functions and activities of constitutional corporations and to their business relationships. And those functions, activities and relationships will, in the ordinary course, involve individuals, 'and not merely individuals through whom the corporation acts . . .'.

⁶⁴ Above n 6.

⁶⁵ *Re Dingjan*, above n 25, at CLR 338.

way as to affect such corporations in a respect which was 'sufficiently material to give significance to their discriminatory treatment'.⁶⁶

As Brennan J himself suggested,⁶⁷ a test couched in these terms seems not to differ greatly from the views expressed by Gibb CJ and Wilson J in *Actors Equity*,⁶⁸ or indeed by Dawson J in the *Tasmanian Dam* case⁶⁹ and again in *Re Dingjan*.⁷⁰ Although on this interpretation the corporations power could not validate the particular provision under challenge in *Re Dingjan*, Brennan J very importantly made it clear that he believed the grant would support laws whose subject was the regulation of contractual relationships between constitutional corporations and their independent contractors.⁷¹ By parity of reasoning, and a fortiori, it must certainly therefore be wide enough to confer validity on laws regulating the standard employment relationships of such corporations.

Given the somewhat different interpretive approaches to be found in *Re Dingjan*, it is perhaps the judgment of McHugh J which best reflects the view common to the majority of the Justices of the court as to the relevant reach of the grant. In the course of his reasons, although maintaining that the 'activities, functions, relationships and business of s 51(xx) corporations are not the constitutional switches that throw open the stream of power conferred by s 51(xx)', McHugh J appears to have entertained no doubt whatsoever that the power extends to legislation that regulates a constitutional corporation's employment practices and arrangements:

Where a law purports to be 'with respect to' a s 51(xx) corporation, it is difficult to see how it can have any connection with such a corporation unless, in its legal or practical operation, it has significance for the corporation. That means that it must have some significance for the activities, functions, relationships or business of the corporation. If a law regulates the activities, functions, relationships or business of a s 51(xx) corporation, no more is needed to bring the law within s 51(xx). That is because the law, by regulating the activities, etc, is regulating the conduct of the corporation or those who deal with it. Further, if, by reference to the activities or functions of s 51(xx) corporations, a law regulates the conduct of those who control, work for, or hold shares or office in those corporations, it is unlikely that any further fact will be needed to bring the law within the reach of s 51(xx).⁷²

66 Ibid, at CLR 339.

67 Ibid, at CLR 337: 'Though I see no error in this approach [of Gibbs CJ], it leaves much to judicial impression from case to case'.

68 *Actors Equity*, above n 6.

69 Above n 51, at CLR 315–16.

70 Above n 25, at CLR 346–7.

71 Ibid, at CLR 338–9.

72 Ibid, at CLR 369. McHugh J went on to say that in his view:

where a law seeks to regulate the conduct of persons other than s 51(xx) corporations or the employees, officers or shareholders of those corporations, the law generally will not be authorised by s 51(xx) unless it does more than operate by reference to the activities, functions, relationships or business of such corporations. A law operating on the conduct of outsiders will not be within the power conferred by s 51(xx) unless that conduct has significance for trading, financial or foreign corporations, or other officers, employees or shareholders. Thus, laws that regulate conduct that promotes or protects the functions, activities or relationships or business of such corporations or laws that regulate conduct conferring benefits on those corporations are laws with respect to s 51(xx) corporations *even though they are also laws with respect to that conduct* (emphasis added).

It seems highly likely then that on any of these various formulations of the ambit of s 51(xx), the central provisions of the Work Choices Act would be regarded as a valid exercise of the constitutional grant. Properly construed they are laws that promote and protect the business functions and relationships of constitutional corporations by regulating their employment arrangements. They confer benefits and detriments (rights and obligations) on those corporations and their employees for the purposes of the corporations' business operations, that is their trading or financial activities. In so doing the particular provisions therefore disclose a sufficient — even a substantial — connection with the subject matter of s 51(xx).

Of course the composition of the High Court has changed completely since the decision in *Re Dingjan*,⁷³ but this (potentially very important) consideration aside nothing else has occurred to suggest that the court's general approach to the scope of s 51(xx) is likely to be notably different. Indeed the indications are that the majority views expressed in that case continue to command general support.⁷⁴ They are certainly reflected, as is to be expected, in subsequent decisions of the Federal Court dealing with the corporations power. Important cases in this regard include the decision of the Full Court of the Federal Court in *Quickenden v O'Connor*,⁷⁵ as well as the single instance decisions of that court in *Rowe v Transport Workers Union of Australia*⁷⁶ and *Australian Workers Union v BHP Iron-Ore Pty Ltd*.⁷⁷

Possible Objections to Constitutional Validity

I do not wish to be taken as implying that respectable arguments cannot be made *against* the adoption or maintenance of such a construction of s 51(xx).⁷⁸ To the extent, for instance, that the power might better be interpreted as limited to laws dealing with the essential and distinguishing characteristics of constitutional corporations (the criterion of discriminatory effect), it is obvious that there is nothing in the nature of their employment arrangements and relationships to distinguish them from unincorporated employers, including partnerships and sole traders. Even so, if the views of the

73 See the caustic comments of Kirby J in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; 163 ALR 270 at [179]–[185] on the impact of the changed composition of the court in that case. None of the current Justices sat in that case.

74 In the even more recent case of *Re Pacific Coal Pty Ltd; Ex parte CFMEU* (2000) 203 CLR 346; 172 ALR 257 at [83], Gaudron J again took the opportunity, in the course of considering the validity of the award simplification provisions in the then WRA, to reiterate (with if anything even greater emphasis) the views she had earlier expressed in *Re Dingjan*:

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

75 (2001) 109 FCR 243; 184 ALR 260 (*Quickenden*).

76 (1998) 90 FCR 95; 160 ALR 66.

77 (2000) 106 FCR 482; 102 IR 410.

78 See, eg, the doubts as to the High Court's likely approach to s 51(xx) expressed by G Williams, 'The Constitution and a National Industrial Relations Regime' (2005) 10 *Deakin L Rev* 498.

Full Bench of the Federal Court in *Quickenden* are correct, this in and of itself constitutes no obstacle to validity. As Black CJ and French J in their joint judgment said of the relevant provisions of the then Pt VIB of the WRA:

The rights and duties which define the relation 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* [to such entities] 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.⁷⁹

Some of the arguments that have been made about the possible invalidity of the Work Choices amendments, however, are so fundamental that in order to succeed they would seem to require the court to reconsider the correctness of the doctrine expounded in and applied since the *Engineers* case.⁸⁰ If at base they do not in terms seek to revive the ‘discredited’ principle of reserved State powers they certainly invoke objections which closely resemble the equally contentious notion of federal balance — a line of argument that, whatever its appeal, is now generally regarded by the court as more appropriately belonging to the sphere of political than legal discourse. The fact that in the decades since Federation, foreign, trading and financial corporations have come to occupy such a central place in the operation of the economy and the general life of the community is not in itself likely to be treated as a convincing reason for giving s 51(xx) a narrow interpretation.⁸¹

Similarly lacking in persuasiveness is the line of argument that seeks to elevate to a test of validity the distinction made in the dissenting judgment of Isaacs J in *Huddart Parker* between internal and external aspects of a constitutional corporation.⁸² According to that view, a corporation’s employees are properly regarded as internal to the corporation and therefore beyond the scope of s 51(xx). The unconvincing nature of that particular distinction is reflected in the dearth of judicial support for it over the course of nearly a century. This fact alone practically disqualifies the distinction from serious consideration in this connection.⁸³ It was certainly dismissed out of hand as inappropriate and incorrect by Carr J of the Federal Court in the *Quickenden* case where he expressed the view that ‘the relationship between a corporation and its employees should not be characterised as being “internal”. When a corporation enters into a contract with an employee it can be seen to be operating in the employment market place.’⁸⁴

Other arguments made against the validity of the Work Choices amendments explicitly or implicitly raise general questions concerning the

⁷⁹ *Quickenden*, above n 75, at [40] (emphasis added).

⁸⁰ See above n 23.

⁸¹ As is evident in relation to s 51(xxix) (external affairs), developments of a social, political or economic nature which were perhaps largely unforeseen may lead to an enlargement or expansion of the significance of a power and yet not be regarded as sufficient justification for reading it down.

⁸² (1908) 8 CLR 330 at 394–7; 15 ALR 241.

⁸³ Notwithstanding the efforts of Brett Walker SC as counsel for the State of New South Wales in the present challenge to the Work Choices legislation.

⁸⁴ *Quickenden*, above n 75, at [115].

proper approach to be used in the interpretation of s 51 powers. They proceed from the incontestable premise that the Constitution must be read as a whole, so that 'no section or paragraph can be interpreted without recourse to other provisions of the instrument'.⁸⁵ The most straightforward of these arguments insists that the corporations power should be construed on the basis that s 51(xxxv) represents an exhaustive statement of the Commonwealth Parliament's power to make laws with respect to the topic or field of industrial relations. Acceptance of this view of s 51(xxxv) would necessarily confine the scope of s 51(xx) to such matters concerning foreign, trading and financial corporations as are not otherwise within and covered by the Commonwealth's limited authority under s 51(xxxv). This would preclude the enactment of legislation pursuant to the corporations power dealing not merely with the prevention and settlement by conciliation and arbitration of industrial disputes between constitutionally designated categories of corporation and their employees (and independent contractors) but also the regulation of their employment relationships and arrangements more generally.

The problem with this argument is two-fold. In the first place, as illustrated above, it ascribes to the organisation and expression of the distributive scheme contained in s 51 of the Constitution a degree of integration and structural coherence not immediately apparent on the face of that section. In the second place, it seems to be inconsistent with most of the large body of case law dealing with the scope of those enumerated powers. The respective fields covered by many of the grants clearly do intersect, as both the *Concrete Pipes* case and *Actors Equity* well illustrate.⁸⁶ To date this has rarely been suggested as requiring interpretative solutions of the kind postulated. As Menzies J explained the position in relation to the operational interaction of ss 51(i) and (xx):

the grant of power in the limited terms of s 51(i) is not the equivalent of a *denial* of legislative power outside those limits. All that can properly be said now is that any power which the Parliament has to legislate with respect to intra-State trade is not conferred by s 51(i), and if, and to the extent that it exists, it is because power to make laws with respect to part of such trade is implicit in other subject matters about which the Parliament has power to legislate.⁸⁷

The same general reasoning would seem to apply to the interrelationship of ss 51(xx) and (xxxv).

A second and closely related argument (essentially a refinement of the previous proposition) focuses on the alleged constitutional impermissibility of legislative attempts directed at circumventing the so-called 'limitations' of s 51(xxxv). The gist of this argument is that the scope of the Commonwealth's power to make laws 'with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State' contains explicit (and quite deliberate) restrictions which have to be honoured and observed in any determination of the meaning of other

⁸⁵ *Newcrest*, above n 14, at 577 per McHugh J; and see also 610 per Gummow J and 653 per Kirby J (the latter observing that it is a 'rudimentary requirement of constitutional construction that each provision in the document must be read with all other provisions').

⁸⁶ See above nn 6 and 11.

⁸⁷ See *Concrete Pipes* case, above n 11, at CLR 509 (emphasis added).

powers, including the ambit of s 51(xx). That is to say, in this connection, that the corporations power must be construed in its constitutional context as at least qualified and limited by the express restrictions contained in para (xxxv). Support for this particular view relies heavily upon drawing an analogy between the interaction of these two powers (paras (xx) and (xxxv)) and the questions of construction considered by the High Court in cases dealing with the scope and interrelationship of certain other s 51 powers. As the court explained in *Nintendo Co Ltd v Centronics Systems Pty Ltd* (quoting with approval Dixon CJ in *Attorney-General v Schmidt*⁸⁸ in relation to the Commonwealth's power under s 51(xxxi)) to acquire property on just terms:

'it is in accordance with the soundest principles of interpretation to treat' the conferral of 'an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect' as inconsistent with 'any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorised the same kind of legislation but without the safeguard, restriction or qualification'.⁸⁹

Superficially there might appear to be some force to this view. The rule of construction it identifies has certainly been very important in confining the content of other substantive grants of power in decisions about the scope and operation of s 51(xxxi). But that particular grant is perhaps best regarded as a power of a special kind, being in effect a 'constitutional guarantee of just terms'.⁹⁰ Undue focus therefore on s 51(xxxi) is apt to be misleading.⁹¹ Outside the special context of s 51(xxxi), however, it is certainly true that in the *Bank Nationalisation* case members of the court were critical of the contention that s 51(xx), the corporations power, might be interpreted and used to avoid (and in effect contradict) the express limitation in s 51(xiii), the banking power. That limitation clearly excludes or abstracts State banking from the subject matter of para (xiii).⁹² As Latham CJ observed in his reasons for decision in that case:

Under s 51(xiii) there is power to make laws with respect to banking other than State banking. A State bank would almost certainly be a corporation, and, if so, it would be a financial corporation. If pl (xx) were construed to mean that the Commonwealth Parliament could pass any law whatever which touched and concerned financial corporations, then the Commonwealth Parliament could make laws controlling State banks. The result would be that the exception of State banking from the power conferred by pl (xiii) would mean nothing. *When the two provisions are read together it is a reasonable conclusion that pl (xx) was not meant to reduce to complete insignificance the specific provision excluding State banking from Federal legislative power.*⁹³

88 (1961) 105 CLR 361 at 371; [1961] ALR 806.

89 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; 121 ALR 577 (*Nintendo*).

90 See *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 201-2; 55 ALR 609; *Australian Tape Manufacturers Ltd v Commonwealth* (1993) 176 CLR 480 at 509; 112 ALR 53.

91 For similar reasons of 'exceptionalism' little assistance can be derived from decisions such as *Pidoto v Victoria* (1943) 68 CLR 87; [1943] ALR 1 involving s 51(vi), the defence power.

92 Except for State banking 'extending beyond the limits of the State concerned'.

93 *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 184; [1948] 2 ALR 89 (emphasis added). See also the joint judgment of Rich and Williams JJ in that same case at CLR 256:

A serious flaw in the extension and application (by analogy) of this argument concerning ss 51(xx) and (xiii) to the interrelationship of ss 51(xx) and (xxxv) would seem to be its failure to give proper recognition to the marked differences in structure and language between the conciliation and arbitration power and the banking power.⁹⁴ First, as a rule of construction, the relevant interpretative principle it invokes has always been understood as being 'subject to a contrary intention either expressed or [otherwise] made manifest'.⁹⁵ Second, in the particular case of s 51(xiii), the subject matter of the grant is, as Latham CJ emphasised, expressed to be banking '*other than State banking*'. Those words plainly abstract State banking from the subject matter of para (xiii).⁹⁶ In the language used by the court in *Schmidt* and *Nintendo*, it is clear that the phrase 'other than State banking' relevantly constitutes an express exclusion from, qualification of or restriction on, the main subject of the power (namely 'banking').

In the context of s 51(xiii), this express exclusion, qualification or restriction can quite properly be described as an unambiguous *limitation* on the scope or reach of the power. By contrast the words of s 51(xxxv) do not impose exclusions, qualifications or restrictions in that sense at all. They are more appropriately viewed as terms affirmatively conferring on the parliament a legislative power of limited scope. The language employed does no more than identify the subject of the power by stating positively rather than negatively the several constituent elements of the grant, thereby defining the *boundaries* of the power but not by means of express exclusion(s). The issue involved is not one of 'mere semantics'. It is the difference between an explicit statement of exception or qualification, on the one hand, and the affirmative conferral of a power of limited scope, on the other. The distinction may be subtle and somewhat elusive but it is nonetheless fundamental.

Conclusion

The political arguments in favour of a restrictive interpretation of s 51(xx) are more compelling than the purely legal arguments. The inexorable expansion of Commonwealth power, fiscal and legislative, has utterly transformed Australian federalism over the past century.⁹⁷ Decisions of the High Court have been very important in this regard. According to the States, further

In our opinion [ss 51(xiii) and 51(xx)] can only be reconciled by applying the maxim *generalia specialibus non derogant*, and by regarding corporations which are banks as placed in the separate category expressly provided for by [the banking power] and therefore as corporations outside the generality of the classes of corporations referred to in [the corporations power].

Note also the observations of Menzies J in the *Concrete Pipes* case, above n 11, at CLR 507: when there is to be found a limit in the definition of one subject matter the others should not be construed as enabling parliament, by legislation on a different subject matter, to override that express restriction.

94 The same is also true of s 51(xxxi) which, as Gummow J suggested in *Newcrest*, above n 14, at CLR 596: 'By its very terms . . . appears to draw in all powers of the Parliament to make laws, from whatever source in the Constitution they are derived'.

95 *Nintendo*, above n 89, at CLR 160. Such contrary intention may of course be 'made manifest' in the other grant by a 'necessary implication'.

96 Except for State banking 'extending beyond the limits of the State concerned'.

97 See, eg, G Craven, *Conversations with the Constitution*, UNSW Press, Sydney, 2004.

enlargement of federal authority risks reducing their role to that of mere service providers. Their hope is that the court will 'look afresh at the constitutional text'⁹⁸ and impose clear limits on the centralisation of power under the Constitution, starting with the corporations power. If however, as I am suggesting, one or other of the views outlined above concerning the scope of s 51(xx) accurately represents the interpretation likely to be adopted and endorsed by the High Court in the current challenge, it seems evident that either of them is broad enough to support legislation of the kind enacted in the Work Choices Act.

This is not to say that the validity of every aspect of the amending legislation is without difficulties, much less guaranteed. The constitutionality of some of the new statutory provisions is decidedly more problematic than others. So, for example, whether those dealing with the exclusion of State industrial laws in so far as they purport to apply to corporations presently in the State systems, or with the recognition and regulation of registered organisations of employees and employers,⁹⁹ are properly regarded as laws which fall within the scope of s 51(xx) is debatable.¹⁰⁰ The same may also be true of, inter alia, the new provisions concerning rights of entry and the very broad statutory power to make regulations on various matters pursuant to the Act.

In the final analysis these questions will need to be resolved through the process of characterisation. The issue is whether they disclose a sufficient connection with the subject matter of the constitutional grant. If they are held not to be relevantly related to the corporations power, the crucial question then becomes whether in virtue of s 14 of the statute (together with s 15A of the Acts Interpretation Act 1901(Cth)) the invalid provisions can be read down or, if need be, severed so as to permit the Act to operate to the extent that it is not in excess of power.¹⁰¹ The court's answers to these questions is much anticipated by all interested parties. They will be central not simply to the conduct of industrial relations but also to the future shape of federalism in Australia.¹⁰² It is entirely possible that in time the Work Choices Act of 2005 will come to be seen as the single most important domestic initiative of this government and of John Howard as Prime Minister.

98 See *Newcrest*, above n 14, at CLR 646 per Kirby J.

99 Schedule 1 of the Workplace Relations Amendment (Work Choices) Act 2005.

100 In the case of the provisions dealing with registered organisations this will not be a problem if they are found to be trading corporations themselves by virtue of the services they provide — that is 'sell' — to financial members. The significance of the express incidental power (s 51(xxxix)) in this regard however cannot be ignored.

101 As Menzies J pointed out in the *Concrete Pipes* case, above n 11, at CLR 503, sections of this kind provide a rule of construction and do not authorise 'the judicial conversion of one law into another law'. He went on to point out (at 506) that 'Parliament cannot direct courts to reconstruct out of the ruins of one invalid law of general application a number of valid laws of particular application.'

102 See, eg, G Craven, 'Is the IR Legislation a Federal Offence?', *Australian Financial Review*, 28 October 2005, p 3; *Conversations with the Constitution*, above n 97; R McCallum 'The Australian Constitution and the Shaping of our Federal and State Labour Laws' (2005) 10 *Deakin L Rev* 460; and Williams, above n 78.