



## **Workplace Relations and the Federal Magistrates Court *and***

### **An Overview of the *Workplace Relations Case***

A paper by Ingmar Taylor, Barrister, prepared for the  
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#### **A new jurisdiction**

1. On 27 March 2006 the Federal Government's *Work Choices* legislation<sup>1</sup> came into effect, amending the *Workplace Relations Act 1996* ('the Act').
2. One aspect of the comprehensive amendments was to confer on the Federal Magistrates Court of Australia a new workplace relations jurisdiction.

#### **The nature of the new jurisdiction**

3. Prior to the *Work Choices* amendments the Federal Court of Australia was the only Court with jurisdiction to hear proceedings commenced under the *Workplace Relations Act 1996*, with the exception of underpayment claims, where it shared jurisdiction with State courts. Now the Federal Magistrates Court in has concurrent jurisdiction with the Federal Court in respect of most matters that can be commenced under the *Workplace Relations Act*.
4. The jurisdiction of the Federal Magistrates Court is stated at s847(4) of the Act to be:

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<sup>1</sup> *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) contained 7 Schedules, each containing amendments to the *Workplace Relations Act 1996* (Cth). Schedule 1, titled 'Main Amendments' was proclaimed to take effect on 27 March 2006. Some more minor amendments came into effect on 14 December 2005: see s2 of the Amendment Act.

"jurisdiction with respect to matters arising under this Act in relation to which:

- (a) applications may be made to it under this Act; or
- (b) actions may be brought in it under this Act; or
- (c) questions may be referred to it under this Act; or
- (d) penalties may be sued for and recovered under this Act; or
- (e) prosecutions may be instituted for offences against this Act.

5. In brief the primary areas of jurisdiction conferred on the Federal Magistrates Court by the Act<sup>2</sup> are in respect of:

- a) applications requiring observance of employee entitlements prescribed in **Part 7, The Australian Fair Pay and Conditions Standard**; for example a claim claim for payment of annual leave on termination;
- b) applications for civil penalties for breach of provisions governing the making of workplace agreements pursuant to **Part 8, Workplace Agreements**, such as an application for a civil penalty for seeking to include in a workplace agreement 'prohibited content'<sup>3</sup>;
- c) applications civil penalties for breach of provisions governing industrial action, pursuant to **Part 9, Industrial Action**, and the power to grant injunctive relief to enforce orders made by the Australian Industrial Relations Commission to stop industrial action<sup>4</sup>
- d) applications for civil remedies and civil penalties against employers under **Part 11, Transmission of Business**, such as an application for a penalty for failing to comply with a statutory obligation to provide certain information to employees on a transmission of business<sup>5</sup>;
- e) claims of **unlawful termination of employment**, pursuant to Part 12, Division 4, Subdivision C (described in more detail below), including

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<sup>2</sup> While the word 'Court' is defined in s4 of the Act to mean the Federal Court of Australia only, proceedings in respect of matters under various particular Parts of the Act can be commenced in the 'Court' as defined for the purpose of *that* Part, namely the Federal Court *and* the Federal Magistrates Court: see for example Parts 8, 9, 10, 11, 15 and 16.

<sup>3</sup> See section 365

<sup>4</sup> See section 496(12)

<sup>5</sup> See section 599(4)

injunctive proceedings to enforce orders made by the AIRC in unfair dismissal proceedings<sup>6</sup>;

- f) **underpayment** claims pursuant to **Part 14, Compliance**; namely claims for amounts owing under an AWA, the Australian Fair Pay and Conditions Standard, an award, a collective agreement, or certain specific entitlements under the Act (Note: these claims can also be brought in State courts, including in NSW the District Court, a Local Court and the Chief Industrial Magistrates Court<sup>7</sup>; further, small claims brought in State magistrates courts can be heard pursuant to a small claims procedure<sup>8</sup>. For those reasons many practitioners may continue to file such matters before the CIM as they have to date);
  - g) applications for civil penalties arising from breach of the union right of entry provisions in **Part 15, Right of Entry**; and
  - h) applications for civil penalties and compensation pursuant to the freedom of association provisions contained in **Part 16, Freedom of Association**.
6. Pursuant to sections 848 and 849 the Federal Magistrates Court can give an interpretation of an award or a certified agreement. Further, pursuant to s16 of the *Federal Magistrates Act 1999* the Court may, in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.
7. The Federal Magistrates Court also has jurisdiction in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Federal Magistrates Court is invoked: s 18 of the *Federal Magistrates Act 1999*. Accordingly, employees will be able to bring breach of contract claims (eg claiming payment in lieu of notice on termination) that are associated with claims of underpayment under industrial instruments or

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<sup>6</sup> See section 682

<sup>7</sup> See section 717

<sup>8</sup> See sections 724-725

arising from the termination of their employment. Similarly, employers seeking to enforce orders of the Australian Industrial Relations Commission to prevent such action could also claim tortious damages for industrial action.

8. At the time of preparing this paper, five months after the Court obtained this new jurisdiction, there appear to have been no judgements handed down in respect of applications made under the Act<sup>9</sup>. As at the end of July there had been less than 15 applications made across Australia pursuant to the Act not counting matters remitted from the Federal Court. However after a slow start it is likely that there will be a significant increase in the number of applications as practitioners learn about the jurisdiction, and more particularly as unlawful termination claims in respect of dismissals which occurred on or after 27 March 2006 complete the process of conciliation and come on for hearing and determination<sup>10</sup>.

#### **Procedure in the Court**

9. The Court operates a panel system, such that employment matters will be usually heard by particular Federal Magistrates in each State. While the panels have not been published, it appears that Federal Magistrates Driver, Raphael and Smith are members of the employment panel in Sydney.
10. Seven new Magistrates have been appointed since July 2006, in part to deal with the new workplace relations jurisdiction, although none of these are to normally sit in New South Wales. Some of the new Magistrates have a workplace relations background, including John O'Sullivan (who was immediately before his appointment the Workplace Relations Minister's senior advisor), Phillip Burchardt and Toni Lucev (who were barristers with industrial law practices).

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<sup>10</sup> The Court has no jurisdiction re dismissals that occurred before that date

11. The Court operates a docket system, whereby matters are allocated to a Federal Magistrate who both manages the interlocutory steps and presides at the hearing.
12. The Federal Magistrates Court, consistent with the objects set out in s3 of the *Federal Magistrates Act 1999*, hears and determines matters as informally as possible in the exercise of judicial power, using streamlined procedures.
13. Pursuant to that Act the Court has a statutory duty to proceed without undue formality and to avoid protracted proceedings<sup>11</sup>. In particular, it has a number of procedures and approaches designed to deal with the fact that it has a large number of unrepresented litigants. For example, in a directions hearing a Federal Magistrate might type orders while on the bench, and hand them down to the parties before they leave.
14. Pleadings are not required<sup>12</sup> and there is a power to set time limits for witness and the length of both written and oral submissions<sup>13</sup>. Discovery and interrogatories are only permitted if the Court considers they are appropriate in the interests in the administration of justice<sup>14</sup>. The Court will deliver judgments ex tempore where practicable and aims to hand down all reserved decisions within 3 months of the hearing.
15. Alternative dispute resolution is strongly encouraged. For example it is likely that most if not all unlawful termination claims will be initially referred to mediation conducted by Registrars of the Court, as usually occurs in respect of claims made under *Human Rights and Equal Opportunity Commission Act 1986*.

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<sup>11</sup> Section 42

<sup>12</sup> Section 50

<sup>13</sup> Sections 51, 55 and 56

<sup>14</sup> Section 45

**Applications to the Federal Magistrates Court**

16. Applications made pursuant to the Workplace Relations Act in the Federal Magistrates Court are commenced by an application setting out the orders sought with an affidavit: see Federal Magistrates Court Rules 2001, Part 4. The application form, along with other forms are available from the Court's informative website: <http://www.fmc.gov.au>.
17. However applications in respect of unlawful dismissal under s643(1)(a) are not initially commenced in the Federal Magistrates Court, as described in the next section of this paper.

**Unlawful termination of employment**

18. The type of jurisdiction under the Act most likely to occupy Federal Magistrates is hearing and determining claims for unlawful termination of employment, pursuant to Part 12, Division 4, Subdivision C. In respect of such matters the Federal Magistrates Court has concurrent jurisdiction with the Federal Court.
19. Every employee who has had their employment terminated can bring an unlawful termination application - the various restrictions that apply to unfair dismissal claims which are heard in the AIRC, such as the requirement for the employer to have at least 100 employees, or for the employer to be a constitutional corporation, do not apply to unlawful dismissal claims; nor do the exclusions in s638 apply, so, for example, a casual employee engaged for a short period can bring an unlawful termination claim. Given the significant restrictions which now prevent the majority of employees from being able to bring unfair dismissal claims it can be expected that there will be an increase in the number of unlawful termination claims (previously they amounted to around 0.5% of all federal dismissal claims).
20. For an unlawful termination claim to succeed the dismissed employee needs to satisfy the Court on the balance of probabilities that the employment was

terminated for a prohibited reason or for reasons that included a prohibited reason<sup>15</sup>.

21. The prohibited reasons are set out in section 659(2), and include:

- “(a) temporary absence from work because of illness or injury within the meaning of the regulations;
- (b) trade union membership . . . ;
- . . . .
- (e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- (f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- (g) refusing to negotiate in connection with, make, sign, extend, vary or terminate an AWA; and
- (h) absence from work during maternity leave or other parental leave;”

22. Noting that the prohibited reasons include matters such as race, colour, sex, sexual preference, age, physical or mental disability and the like, the jurisdiction has a close similarity to the Federal Magistrates Court jurisdiction in relation to unlawful discrimination under the *Human Rights and Equal Opportunity Commission Act 1986* which it has held since its inception. This jurisdiction is to hear and determine complaints of discrimination under the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. Pursuant to that legislation the Federal Magistrates Court has since its inception heard and determined claims for compensation for unlawful discrimination alleged to have occurred in respect of a termination of employment. That experience will no doubt assist the Court in hearing unlawful discrimination claims.

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<sup>15</sup> See section 659

**Procedural Steps for bringing an unlawful dismissal claim**

23. An applicant has 21 days from the date of dismissal to lodge a claim for unlawful dismissal, although there is discretion to allow a claim out of time: s647.
24. An applicant commences a claim for unlawful dismissal by completing a standard form and lodging it with the Australian Industrial Relations Commission (note, *not* with the Federal Magistrates Court). The form, along with other useful materials can be found at the website of the Australian Industrial Relations Commission: [www.airc.gov.au](http://www.airc.gov.au).
25. The applicant must pay a filing fee of about \$51 (an amount that is indexed annually) unless that fee is waived by making application to the Registrar on the grounds that its payment would cause serious hardship.
26. After lodgement, the AIRC Registry acknowledges receipt of the application and sends a copy of the application to the employer named in the application. The Registry also sends to the employer a blank *Notice of Employer's Appearance* which the employer is required to complete and lodge within 7 days. The form provides for an employer to object on one or more jurisdictional grounds, or on the ground that the claim was commenced out of time, by ticking a relevant box. If such an objection is taken the employer must then also complete a further form titled *Motion to Dismiss the Application for Want of Jurisdiction*, which must be filed and forwarded to the applicant.
27. Upon a motion to dismiss for want of jurisdiction being filed, the Commission has no discretion other than to deal with that motion prior to taking any further steps: s 645(2). The Commission can determine the question and either dismiss the application or refuse the motion for dismissal without a hearing<sup>16</sup>. The Commission will usually list the matter for determination of

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<sup>16</sup> See section 645(7); See also s648 as to the matters the Commission is required to take into account in deciding whether to hold a hearing and the process to be adopted where the Commission determines not to have a hearing.

the jurisdictional issue at what is known as a “callover”. They are usually listed within two or three weeks of the employer’s form being filed.

28. Matters in the “callover” list are listed for hearing of the relevant issue. Parties have to come prepared to run their case on the procedural issue on that day. It is advisable to have forwarded to the Commission a few days earlier a short outline of the point being taken and where appropriate, a short statement of evidence.
29. It is to be noted that unless the parties can agree on facts, the party bearing the onus is required to prove its case in the normal manner. Statements from the bar table will be insufficient where they are contested: see for example, *Lagan v Can Print Pty Limited* (2000) 102 IR 149.
30. Matters which are not required to be placed in the callover list, or survive following a hearing at a callover, are then set down for conciliation by the AIRC.
31. Parties should come to the conciliation prepared to provide a fairly detailed summary of their respective positions and prepared to enter into discussions in an attempt to resolve the matter.
32. A conciliation hearing is held entirely off the record. No sworn evidence is presented. Conciliations usually proceed on the basis of short oral submissions only. It is not uncommon for the conciliation to be dominated by monetary negotiations, rather than an examination of the merits of the matter.
33. Upon the conciliation failing the Commission member issues a notice of failed conciliation, which *must* indicate to the parties the Commission’s assessment of the merits of the application<sup>17</sup>. Such a statement can have relevance in a later claim for costs, and can also have a practical effect on any later settlement negotiations. This raises obvious difficulties for practitioners, since they must somehow convince the member of the merits

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<sup>17</sup> See s 650(2)(b)

of their application without calling evidence and usually on the basis of short submissions only.

34. Where the Commission member conciliating the matter forms the view that there are “no reasonable prospects of success” the Commission member must invite the applicant to provide further information and then if the Commission member remains of the view that the claim has “no reasonable prospects of success” the Commission must issue a certificate to that effect which has the effect of dismissing the application: s 650(3)-(5). This is an added reason why applicants should be prepared at the conciliation hearing to put forward submissions that establish at least a prima facie case.
35. Upon a certificate of unsuccessful conciliation being issued the applicant must complete an AIRC form, being a *Notice of Election* within 7 days or the matter will go no further: s 651 (if the claim is for unlawful termination only then the applicant has 28 days to file the *Notice of Election*<sup>18</sup>). It is very important to understand that if this form is not completed within 7 days (or 28 days for unlawful termination) then the claim will automatically be discontinued<sup>19</sup> with no right of appeal<sup>20</sup> although if the claim is a claim of unlawful termination the Commission does have a discretion for the matter to proceed out of time<sup>21</sup>.
36. Where the applicant elects for the matter to be heard as an unlawful termination the applicant must then commence proceedings in the Federal Court or Federal Magistrates Court pursuant to s663. There is a further (third!) time limit – the application under s663 must be made within 14 days of the lodgement of the Notice of Election or within such further period as the Court allows: s663(6). A further filing fee of about \$51 (indexed annually) is payable – a considerable discount on the filing fees that otherwise apply to commence proceedings.

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<sup>18</sup> See section 651(6)(b)(i)

<sup>19</sup> See section 651(7) and (8)

<sup>20</sup> See section 651(10)

<sup>21</sup> See section 651(9)

37. The application can be either to the Federal Court or the Federal Magistrates Court.
38. If the application is to the Federal Court then pursuant to Order 48, Rule 4, the application must:
  - (a) be in accordance with Form 5; and
  - (b) be accompanied by a claim in accordance with Form 5A; and
  - (c) have attached to it the certificate of failed conciliation.
39. If the application is to the Federal Magistrates Court then the usual application form can be filed, or Federal Court Form 5A can be used, with the court name changed to that of the Federal Magistrates Court.
40. It is anticipated that when the *Federal Magistrates Court Rules* are next amended they will prescribe that the procedure required by Order 48 *Federal Court Rules 1979* (and accompanying Form 5A) is to be used to commence unlawful termination of employment proceedings filed in the Federal Magistrates Court. Pending such an amendment to the Rules the Federal Magistrates Court will accept applications on either Form 5 and Form 5A or the general form of application prescribed in Schedule 2 Part 1 of the *Federal Magistrates Court Rules*.

#### **Approach to hearing unlawful termination applications**

41. As noted, to date the Federal Magistrates Court has not, to my knowledge, determined an unlawful termination claim. However such claims have been brought and determined for some time in the Federal Court under virtually identical provisions, and the following summary is based on that body of case law.

42. Where an unlawful termination claim is made “it is not necessary for the employee to prove that the termination was for a proscribed reason”: s 664(a). However, it is a defence in the proceedings if the employer proves that the termination was for a reason or reasons that do not include a proscribed reason: s664(b).
43. Section 664 is similar but not identical to a reverse onus of proof. The same provision, then s170CQ, was described by Moore J in *Laz v Downer Group Ltd* (2000) 108 IR 244 at [26] in these terms:
- “In my opinion an applicant alleging termination in contravention of s170CK(2) will succeed in the application unless the employer establishes a defence by proving that the alleged reason was not the reason or one of the reasons for the termination. Perhaps it can be put in terms that though the applicant must prove on the balance of probabilities each element of the contravention, s170CQ enables the allegation that a reason was a proscribed reason to stand as sufficient proof of the fact unless the employer proves otherwise: see *Dauids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR where Wilcox and Cooper JJ refer to *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 507. The success of the application does not depend on the Court being satisfied, other than by reference to the allegation of the applicant, that the termination was for a proscribed reason (or one reason was a proscribed reason) if the employer fails to make good its defence.
44. A further defence is contained within s659 itself. It is not unlawful to terminate employment for one of the proscribed reasons where that reason “is based on the inherent requirements of the particular position concerned”: s 659(3). As to what is meant by the expressions “inherent requirements” and “particular position” see the High Court in *Qantas Airways v Christie* (1998) 193 CLR 280 where a requirement that a pilot be able to fly to a reasonable number of the airline’s overseas destinations was held to be an inherent requirement of the position (the case involved a pilot who was required to retire on turning 60yrs because many countries excluded aircraft flown by a pilot over 60yrs).

**Remedies for Unlawful Termination**

45. Where the Court is satisfied that an employer unlawfully terminated an employee (that is contravened s 659) the Court can make one or more of the following orders pursuant to s665:
- a. Imposing a penalty of not more than \$10,000;
  - b. Requiring reinstatement;
  - c. Ordering compensation of such amount as the Court thinks appropriate, subject to the provisions of sub-sections (2)-(5);
  - d. Any other order that the Court thinks necessary to remedy the effects of such determination;
  - e. Any other consequential orders.
46. The Court, like the Commission, is restricted in the amount of compensation it can order. It cannot order more than 6 months compensation for any employee<sup>22</sup> and for non-award employees it cannot order more than \$47,450<sup>23</sup> for the 2006/2007 financial year (the sum is indexed to the cost of living and increases each year). The Court cannot order any amount for shock, distress or humiliation or any analogous hurt<sup>24</sup>.

**Freedom of Association**

47. Under Part 16, Freedom of Association, claims can be brought for civil penalty, compensation and other remedies which could include (where the claim arises from a termination of employment) reinstatement<sup>25</sup>.

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<sup>22</sup> Section 665(3)

<sup>23</sup> Section 665(4)

<sup>24</sup> Section 665(2)

<sup>25</sup> See section 807(1)

48. There is no time limit to commence such an action (and hence it is a remedy in respect of a termination that can be considered outside the 21 day time limit that applies for unlawful termination and unfair dismissal claims).
49. An employer cannot “for a prohibited reason” or for reasons that include a “prohibited reason” do various things, including dismiss an employee or alter the position of an employee to the employee’s prejudice<sup>26</sup>.
50. Conduct is for a prohibited reason, pursuant to s793, if it is carried out because the employee concerned:
- “(a) is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association; or
  - (b) is not, does not propose to become or proposes to cease to be, a member of an industrial association; or
  - (c) in the case of a refusal to engage another person as an independent contractor—has one or more employees who are not, or do not propose to become, members of an industrial association; or
  - (d) has not paid, or does not propose to pay, a fee (however described) to an industrial association; or
  - (e) has refused or failed to join in industrial action; or
  - (f) in the case of an employee—has refused or failed to agree or consent to, or vote in favour of, the making of an agreement to which an industrial association of which the employee is a member would be a party; or
  - (g) has made, proposes to make or has at any time proposed to make an application to an industrial body for an order under an industrial law for the holding of a secret ballot; or
  - (h) has participated in, proposes to participate in or has at any time proposed to participate in a secret ballot ordered by an industrial body under an industrial law; or
  - (i) is entitled to the benefit of an industrial instrument, an order of an industrial body or the Australian Fair Pay and Conditions Standard; or
  - (j) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek:
    - (i) compliance with that law; or
    - (ii) the observance of a person’s rights under an industrial instrument; or
  - (k) has participated in, proposes to participate in or has at any time proposed to participate in a proceeding under an industrial law; or

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<sup>26</sup> See section 792

- (l) has given or proposes to give evidence in a proceeding under an industrial law; or
- (m) in the case of an employee, or an independent contractor, who is a member of an industrial association that is seeking better industrial conditions—is dissatisfied with his or her conditions; or
- (n) in the case of an employee or an independent contractor—has absented himself or herself from work without leave if:
  - (i) the absence was for the purpose of carrying out duties or exercising rights as an officer of an industrial association; and
  - (ii) the employee or independent contractor applied for leave before absenting himself or herself and leave was unreasonably refused or withheld; or
- (o) as an officer or member of an industrial association, has done, or proposes to do, an act or thing for the purpose of furthering or protecting the industrial interests of the industrial association, being an act or thing that is:
  - (i) lawful; and
  - (ii) within the limits of an authority expressly conferred on the employee, independent contractor or other person by the industrial association under its rules; or
- (p) in the case of an employee or independent contractor—has not paid, has not agreed to pay, or does not propose to pay, a bargaining services fee.”

51. Note however that if the ‘prohibited reason’ to be relied upon is that the employee is “entitled to the benefit of an industrial instrument, an order of an industrial body or the Australian Fair Pay and Conditions Standard”, then the employer only contravenes the Freedom of Association provisions if that was the “sole or dominant reason” for the conduct<sup>27</sup>.
52. There is a reverse onus of proof. Pursuant to s809, it is presumed that the conduct was carried out for the prohibited reason alleged unless the employer proves otherwise.
53. Proceedings can be taken not just against the employer. Pursuant to s728, a claim can also be brought against any person “involved in” the contravention of a civil remedy provision. This is something that might be considered where the employer is a corporate body with no obvious assets.

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<sup>27</sup> See section 792

## Costs

54. The Court cannot usually award costs in respect of proceedings brought pursuant to the *Workplace Relations Act 1996*.

55. Section 824 re-enacts the old s347, but with a new sub-section (2) which expands the circumstances in which costs can be obtained:

### **824 Costs only where proceeding instituted vexatiously etc.**

- (1) A party to a proceeding (including an appeal) in a matter arising under this Act (other than an application under section 663) must not be ordered to pay costs incurred by any other party to the proceeding unless the first-mentioned party instituted the proceeding vexatiously or without reasonable cause.
- (2) Despite subsection (1), if a court hearing a proceeding (including an appeal) in a matter arising under this Act (other than an application under section 663) is satisfied that a party to the proceeding has, by an unreasonable act or omission, caused another party to the proceeding to incur costs in connection with the proceeding, the court may order the first-mentioned party to pay some or all of those costs.
- (3) In subsections (1) and (2):  
**costs** includes all legal and professional costs and disbursements and expenses of witnesses.

56. In respect of unlawful termination matters the Federal Magistrates Court's capacity to order costs is governed instead by s666, which is in much the same terms:

### **"666 Costs**

- (1) Subject to this section, a party to a proceeding under section 663 must not be ordered to pay costs incurred by any other party to the proceeding unless the court hearing the matter is satisfied that the first-mentioned party:
  - (a) instituted the proceeding vexatiously or without reasonable cause; or
  - (b) caused the costs to be incurred by that other party because of an unreasonable act or omission of the first-mentioned party in connection with the conduct of the proceeding.
- (2) Subsection (1) does not empower a court to award costs in circumstances specified in that subsection if the court does not have the power to do so.
- (3) In this section:  
**costs** includes all legal and professional costs and disbursements and expenses of witnesses."

57. Where the Federal Magistrates Court does award costs it will do so pursuant to Part 21 of the FMC rules. Unless the court otherwise orders, the appropriate scale for a party-party costs order (other than bankruptcy) is the ***event-based scale*** in Schedule 1 of the FMC Rules.
58. The court has a general discretion to depart from the fixed event-based scale. Sometimes the court may order that a specific amount of costs be paid. In these situations, the federal magistrate may assess the costs by using the costs rules of the Federal Court, or another method for determining the amount of costs.
59. Taxation of costs in the Federal Magistrates Court is only possible when costs are fixed according to the Federal Court scales. There is no provision for taxation of costs if they are fixed according to Schedule 1. Federal magistrates determine disputes about the calculation of costs under Schedule 1.

#### **Federal Government Scheme to fund unlawful termination advice**

60. The Federal Government has introduced an Unlawful Termination Assistance Scheme pursuant to which employees can seek up to \$4000 to obtain advice on the merit of their unlawful termination claim.
61. The structure of the system is as follows:
- a) an employee who believes they have been dismissed unlawfully applies to the Australian Industrial Relations Commission;
  - b) the matter is heard by way of conciliation conference, and if it does not settle the Commission issues a certificate as to the merit of the claim and stating that the claim could not be resolved through conciliation;
  - c) if the certificate indicates that the claim may have merit or that the merit cannot be determined the employee may obtain a voucher from the

Department of Employment and Workplace Relations which must be shown to the legal practitioner before advice can be provided.

- d) to obtain a voucher the employee must meet a threshold of weekly earnings immediately prior to termination being at or below the UTAS income threshold (currently \$47,745 per year);
- e) a legal practitioner may provide advice at their normal rates up to a maximum of \$4000 (inclusive of GST) ;
- f) payment is made directly to the legal practitioner by the Commonwealth Department, and the legal practitioner must comply with the Department's administrative arrangements in this regard.

62. Matters which must be kept in mind are as follows:

- a) the legal funding is only for advice and is not available for work associated with lodging the claim, preparing the matter for hearing or conducting the hearing;
- b) a legal practitioner must agree to comply with the terms and conditions of the scheme. The terms and conditions do not appear to be currently available;
- c) if a legal practitioner provides advice under the scheme, they are not entitled to continue to act for the employee once the advice has been completed. In this regard note that, "legal practitioner" is expansively defined to include members of the same firm;
- d) any advice must be provided in a sufficiently timely manner to enable an application to be made within time. As this must be undertaken by a different legal practitioner, it will be necessary to allow as much time as possible in this regard.

63. The Law Council made a submission to the Government seeking changes to the scheme when it was in draft form, including removing the provision that

prevents a lawyer who gives advice pursuant to the scheme from being able to go on and represent the employee. No changes to the scheme are anticipated in the short term.

### **Federal Court or Federal Magistrates Court?**

64. As noted, in respect of most applications an applicant has a choice to file in either the Federal Court or the Federal Magistrates Court. So which Court should you choose?
65. Monetary factors are one relevant consideration. Federal Court filing fees are roughly double the fees charged by the Federal Magistrates Court (except for unlawful termination claims, where the filing fees are the same low amount).
66. Proceedings in the Federal Court are usually more costly, although that is in part a reflection of the fact that the matters heard in the Federal Court are usually more complex.
67. As noted above, costs are usually not awarded for matters commenced under the *Workplace Relations Act*, and that is the case regardless of which Court one commences in. If that were not the case then the lower fixed costs that are usually ordered in the Federal Magistrates Court may be relevant (although, as noted above, the Federal Magistrates Court has a discretion to order costs in accordance with the Federal Court procedure and taxed).
68. Cases are dealt with more informally in the Federal Magistrates Court. Cases normally come on for hearing more quickly in the Federal Magistrates Court.
69. The Federal Court has the power to transfer a matter to the Federal Magistrates Court under s32AB(1) of the *Federal Court of Australia Act*

1976, including by its own motion. Such an order would usually be made at an early stage of the proceeding (perhaps on the second directions hearing) after the parties have been given an opportunity to be heard as to why the matter would not be transferred to the Federal Magistrates Court. There is no right of appeal from such an order.

70. The matters to be considered by the Court when considering whether to make such an order are set out in s32AB(6) and Order 82 rules 6(1) and 7: see *WAAL v Minister for Immigration and Multicultural Affairs* [2002] FCA 136. They include:
- a) whether proceedings in respect of an associated matter are pending in the Federal Magistrates Court;
  - b) whether the resources of the Federal Magistrates Court are sufficient to hear and determine the proceeding;
  - c) the interests of the administration of justice;
  - d) whether the proceeding is likely to involve questions of general importance such that it would be desirable for there to be a decision of the Federal Court on one or more of the points in issue;
  - e) whether, if the proceeding is transferred, it is likely to be heard and determined at less cost and more convenience to the parties than if the proceeding is not transferred;
  - f) whether the proceeding is likely to be heard and determined earlier in the Federal Magistrates Court; and
  - g) the wishes of the parties
71. Currently many aspects of the *Workplace Relations Act* are new and proceedings commenced in respect of those areas are likely to raise 'questions of general importance', such that they would not be transferred to

the Federal Magistrates Court. However, as time goes on one might expect more cases to be transferred to the Federal Magistrates Court.

72. The unlawful termination jurisdiction however is not a new jurisdiction, and so one might expect that straight-forward unlawful termination claims will be transferred to the Federal Magistrates Court: see for example *Sheikholeslami v University of New South Wales* (2006) 152 IR 313.
73. As a rule of thumb, the types of matters filed in the Federal Court that are likely to be transferred are those which will take less than 2 days to be heard, turn primarily on their facts and raise no new questions of law.
74. There are no cost consequences for commencing in one jurisdiction and being transferred to the other (other than the party's own costs of appearing in the 'wrong' jurisdiction).
75. The Federal Magistrates Court has a complementary power to transfer a matter to the Federal Court under s39(2) of the *Federal Magistrates Act 1999* on its own initiative or on application by a party. The matters to be considered are set out in s39(3) and in Federal Magistrate Court Rule 8.02(4): see *Blanco v Minister for Immigration* [2005] FMCA 136. They are almost identical to the factors the Federal Court considers in respect of a potential transfer to the Federal Magistrates Court (set out above).

## **An Overview of the *Workplace Relations Case***

76. On 27 March 2006 the Federal Government's *Work Choices* legislation<sup>28</sup> came into effect, amending the *Workplace Relations Act 1996* in a way that fundamentally altered the system of industrial relations which had existed in Australia over the preceding 100 years.
77. On 4 May 2006, and during the following 5 days, the High Court of Australia heard argument as to the validity of those laws. The *Workplace Relations Case*, as it will be known, will not only decide the fate of the Federal Government's *Work Choices* legislation, but also has the potential to change our understanding of the constitutional balance of powers between the States and the Commonwealth.

### **Background**

78. Pursuant to the Constitution the Federal Parliament has power to make laws as to certain enumerated subject matters, which are principally found in section 51. Laws as to other subjects are the sole preserve of the States.
79. Between 1911 and 1946 the Australian people rejected six attempts to amend the Constitution by referendum to provide the Commonwealth with a general power to make national laws with respect of industrial relations.
80. Such attempts were made because it was considered that in this area the Commonwealth could only legislate to the extent permitted by 'the industrial power', section 51(35), which provides a power to make laws "*with respect to*:"

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<sup>28</sup> *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) contained 7 Schedules, each containing amendments to the *Workplace Relations Act 1996* (Cth). Schedule 1, titled 'Main Amendments' was proclaimed to take effect on 27 March 2006. Some more minor amendments came into effect on 14 December 2005: see s2 of the Amendment Act.

*Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State*".

81. Pursuant to s51(35) the Commonwealth could validly establish a system of conciliation and arbitration by which an independent tribunal sets conditions of employment. Section 51(35) does not provide the Commonwealth with the power to directly set conditions of employment.
82. Pursuant to the industrial power the Commonwealth Parliament established in 1904 a tribunal to deal with interstate industrial disputes<sup>29</sup>. In various guises it has existed ever since, currently as the Australian Industrial Relations Commission (AIRC). The Commonwealth legislation was limited to interstate disputes, as the Commonwealth perceived that it did not have the power to make laws with respect to intrastate disputes<sup>30</sup>. Accordingly each State established its own State industrial relations system under which State Awards were made to cover intrastate disputes and employment conditions of those not dealt with by the Federal system<sup>31</sup>. And so for over 100 years minimum terms and conditions of employment have been determined at both a State and Federal level by an independent third party by way of a system of compulsory conciliation and arbitration of industrial disputes.
83. The *Work Choices* amendments replace that century-old system with a statutory regime which directly prescribes a limited safety net of minimum wages and conditions with a process for limited adjustment of some of those conditions.

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<sup>29</sup> Compulsory conciliation and arbitration was first conceived in a South Australian bill proposed by Charles Kingston Smith in December 1890. It was first enacted at a Commonwealth level in the *Conciliation and Arbitration Act 1904* (Cth), which created the Conciliation and Arbitration Court.

<sup>30</sup> Due to limitations inherent in s51(xxxv) of the Constitution: see *Australian Boot Employees Federation v Whybrow* (1910) 11 CLR 311 and *R v Kelly; Ex parte Victoria* (1950) 81 CLR 64. It has only been in more modern times, since the High Court decision in *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 that commentators have suggested that s51(xx) might be capable of supporting laws in respect of employment and industrial relations.

<sup>31</sup> In 1996 Victoria referred power to the Commonwealth to legislate in respect of industrial relations and from that time it has not had a State industrial relations system.

### The amendments and the use of the corporations power

84. In the *Work Choices* legislation the Commonwealth has chosen to legislate directly as to conditions of employment (see for example Part 7 – The Australian Fair Pay and Conditions Standard – which sets minimum standards as to pay, annual leave, parental leave and sick leave).
85. The *Work Choices legislation*<sup>32</sup> places obligations on, and provides rights to, employers who are trading or financial corporations and their employees and seeks to override existing State industrial laws so far as they apply to such corporations and their employees<sup>32</sup>.
86. It does this by defining the word ‘employer’ for most purposes to be a corporation within the meaning of s51(20) of the Constitution that employs or usually employs an individual<sup>33</sup>. ‘Employee’ for most purposes is defined to be someone employed by an ‘employer’.
87. The Commonwealth by that method is attempting to rely on a different head of power, s51(20), often called the corporations power. It provides the power to make laws “*with respect to:*
- Foreign corporations and trading and financial corporations formed within the limits of the Commonwealth*”.
88. For those employers who are foreign corporations or trading or financial corporations (otherwise known as ‘constitutional corporations’) the Federal legislation seeks to override State legislation that applies to employment generally including laws dealing with unfair employment contracts<sup>34</sup>.
89. Employers who are not constitutional corporations<sup>35</sup> and are currently covered by Federal Awards are to remain covered by the Federal system for

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<sup>32</sup> See s16

<sup>33</sup> s6(1)(a)

<sup>34</sup> See s 16 and the definition of “State or Territory Industrial Law” found in s 4(1).

<sup>35</sup> That is, not corporations within the meaning of s 51(20) of the Constitution.

a transitional period of five years<sup>36</sup>. Other than for the transitional period, the legislation does not rely on the industrial power.

90. Corporations which are not 'trading' or 'financial' corporations<sup>37</sup>, and non-corporate employers who were previously covered by State awards, will remain within the State system.
91. It has been estimated that, if valid, the new federal system will cover in the order of 75 – 85% of all employees in Australia<sup>38</sup>, with the balance remaining covered by State industrial laws and instruments.

### The High Court Challenge

92. In December 2005 and early 2006 every State other than Tasmania filed proceedings in the High Court seeking declarations that significant parts of the *Workplace Relations Act* were invalid. Unions NSW along with constituent NSW unions and the Australian Workers Union also filed Summonses seeking declarations of invalidity. Tasmania and the two Territories intervened in the resultant proceedings to support the States. In the result a record 39 barristers appeared before the 7 member Full Court, 33 arguing invalidity and remaining 6 for the Commonwealth arguing that the laws were valid.
93. Every initiating party alleged that the key parts of the Act that relied on the corporations power were invalid because that power does not extend to making laws in respect of the employment conditions of those employed by such corporations. However the case was broader than that. **Attached is a schedule** that sets out every aspect of the Act that was being challenged, and notes in summary form the nature of that challenge.

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<sup>36</sup> Pursuant to Schedule 6.

<sup>37</sup> And so not corporations of the sort for which the Commonwealth has power to legislate pursuant to s51(20) of the Constitution.

<sup>38</sup> See page 129 of the *Workplace Relations Amendment (Work Choices) Bill 2005 Digest* prepared by the Commonwealth Parliamentary Library, 2 December 2005, No 66, 2005/06.

**Previous use of the Corporations Power in respect of industrial law**

94. In 1977 the *Trade Practices Act 1974* was amended to include s45D prohibiting secondary boycotts. The related s45E was introduced in 1980. Those sections relied on the corporations power for their validity.
95. In *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 the High Court upheld the validity of section 45D insofar as it protected constitutional corporations from harm being done to their trading activities by secondary boycotts. That authority, which was not questioned in the *Workplace Relations Case* would support parts of *Workplace Relations Act* such as s496(2), pursuant to which the Commission can make orders to prevent industrial action that is causing substantial damage to the business of a constitutional corporation.
96. In 1992 the then *Industrial Relations Act 1988* was amended to include provisions in respect of unfair contracts entered into between independent contractors and constitutional corporations in ss127A-127C. Those sections again sought to rely on the corporations power for their validity.
97. In *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 the High Court found those provisions invalid to the extent they purported to provide rights in respect of a contract that 'related to' the business of a constitutional corporation but was not a contract *with* a constitutional corporation. However a majority would not have found the sections invalid if they applied only where the contract in question was one between a constitutional corporation and an independent contractor<sup>39</sup>.
98. In 1993, when there was a Labor Government at the federal level, the then *Industrial Relations Act 1988* was amended by the *Industrial Relations Reform Act 1993* ('the 1993 Reform Act') to add a new Part VIB, Promoting Bargaining and Facilitating Agreements, which included Division 3, titled Enterprise Flexibility Agreements. Pursuant to that Division, and in reliance

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<sup>39</sup> See for example Brennan J at 339.1-339.2

of the corporations power, an employer that was a constitutional corporation could apply to the AIRC to enter into an instrument that applied to an enterprise to which a majority of employees covered by the instrument agreed to be bound. While in force such an agreement prevailed over any award. While an employer had to give eligible unions a reasonable opportunity to take part in negotiations in respect of such an agreement, the instrument did not require agreement from eligible unions in order to be approved.

99. Certain States with non-Labor Governments challenged parts of the 1993 Reform Act before the High Court in the *Industrial Relations Act Case* (1996) 187 CLR 416. However those parties chose, perhaps for reasons associated with the policy provisions underlying the legislation, not to challenge the constitutional validity of Part VIB, Division 3<sup>40</sup>. If they had challenged the provisions at that time then the same arguments that have now been put would have been considered by that High Court led by Brennan CJ. Gummow J is the only current High Court Judge who sat in that case. It is interesting to speculate whether that High Court would have come to a different conclusion than the current High Court as to these matters.
100. In 1996 the 1988 Act was renamed the *Workplace Relations Act 1996* and various amendments were made at that time in purported reliance on the corporations power. They included:
- a) A new form of certified agreement in Part VIB, Division 2, between a constitutional corporation and either an organisation of employees or a valid majority of employees;
  - b) The introduction of Australian Workplace Agreements (AWAs), by which a constitutional corporation could enter into an individual agreement with an employee that, if it met certain requirements, had statutory effect and would override award obligations.

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<sup>40</sup> (1996) 187 CLR 416 at 539

101. If the submissions of the States are accepted then the effect of the current case goes beyond the validity of agreements and AWAs entered into since 27 March 2006. It may also result in certain certified agreements made under the 1988 Act and the 1996 Act<sup>41</sup> and AWAs having their legal effect removed. This may mean that the underlying award obligations were not overridden. In other words the case not only questions the validity of the current Act but also calls into question the validity of agreements entered into by parties over the last 13 years.

### **The nature of the arguments**

102. Clearly to attempt a comprehensive summary of over 700 pages of written submissions and 6 days of argument would be foolish. However some flavour of the key arguments can be gained from the following paragraphs.

103. All the States argued that s 51(20) of the Constitution does not authorise a law merely because it says “a corporation shall . . . [do something, eg provide a minimum level of annual leave]” or “a corporation shall not . . . [do something, eg dismiss an employee unfairly]”<sup>42</sup>. The Commonwealth in reply sought to justify the laws on the basis that s 51(20) was that wide, but submitted that even if it was not, the laws were nevertheless valid applying narrower tests, summarised below.

104. The State of NSW argued, amongst other matters, that the corporations power is a power for the protection of the general public in respect of their trading and financial activities. It can be used to regulate the relationship between a constitutional corporation and someone outside the corporation (eg a customer) but not matters relating to the relationship between a corporation and those inside a corporation, such as its employees.

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<sup>41</sup> Namely, agreements made under Part VIB, Division 3 of the 1988 Act and Part VIB, Division 2 of the 1996 Act

<sup>42</sup> Deane J, *Tasmanian Dam Case* 158 CLR 1 at 270.2 and 272.2

105. The State of Queensland argued, amongst other matters, that the Act is outside power:

“because this statute unabashedly expressly is a statute that regulates employment, terms of employment. It is not a statute that in any sense hinges upon, focuses upon, any attribute of a trading financial or foreign corporation as such. It merely invokes those entities as persons affected by the power and seeks to make a – it is, in our respectful submission, the classic case of a peg, as I think Justice Higgins called it in *Huddart, Parker*, or a switch, as Justice McHugh called it in *Dingjan*”.

106. The States put various arguments in the alternative, including the argument (put by South Australia) that even if such laws are otherwise valid, they cannot validly apply to those employees of a trading corporation who are engaged in non-trading activities: for example, community workers engaged by charities; librarians employed by local councils; and cleaners engaged by companies.

107. The Commonwealth argued that even if the broad (‘plenary’) view of s 51(20) were rejected, all the provisions under attack were valid because (applying tests adopted by Judges in earlier High Court cases) they either:

- a) Relate to the conduct of those who control, work for, or hold shares or office in constitutional corporations;
- b) Relate to the business functions, activities or relationships of constitutional corporations;
- c) Protect a constitutional corporation from conduct that is carried out with intent to, and the likely effect of which would be to, cause loss or damage to the business of, or interfere with the trading activities of a constitutional corporation; or
- d) Otherwise in their practical operation ‘materially affect’ or have ‘some beneficial or detrimental effect on’ a constitutional corporation.

**The outcome**

108. At the time this paper was prepared the High Court had not yet handed down its decision. Some commentators have suggested the Court will hand it down in November or December of this year (ie about 6 months after the hearing). In the last major test case involving the validity of federal industrial law, the *Industrial Relations Case*, the decision was handed down 12 months after the hearing had concluded.
109. Predicting the outcome of High Court constitutional cases is not for the faint-hearted. Few who appeared in the *Incorporation Case*<sup>43</sup> predicted that the High Court would effectively strike down the *Corporations Act*.
110. The generally agreed starting point was that the central question being raised in the case had not previously been determined by the High Court. While there had been previous judgements that bore upon the arguments, there was no precedent that would need to be overturned to find favour with the arguments of the States.
111. During the proceeding five of the seven Judges asked various questions of advocates which some commentators suggested revealed what may be their eventual decision. However, since such questions are intended to explore issues rather than express concluded views, one should be slow to read too much into them. With those caveats in mind, some tentative comments can be made.
112. Two of the Judges (Kirby and Callinan JJ) repeatedly noted that the logical conclusion of the Commonwealth argument involved accepting: (a) that the limitations of s51(35) could be effectively ignored by the use of s51(20); and (b) that if a law is valid pursuant to 51(20) simply because it operates *on* corporations regardless of the subject matter of the law then the Commonwealth has a broad power to legislate in respect of many subjects that traditionally have been considered to be the preserve of the States.

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<sup>43</sup> *NSW v Commonwealth* (1990) 169 CLR 482

113. Kirby J asked whether such conclusions may require the Court to reconsider earlier authority, so as to give a narrower construction to the powers granted in s51. Kirby J noted that the industrial power was only put into the Constitution by a narrow vote in one of the constitutional conventions, and only on the basis that it was a “shackled power” to deal with *interstate* disputes. Kirby J said:

“At least arguably, there is a good reason in 51(xxxv) because it is a shackled power, it is a limited power and it is a rather unusual limitation that is imposed on, and it has been over the century a very inconvenient limitation, but it is the one that is there and it has required an independent decision-maker interposed and that has been quite important socially, apart from economically, in Australia as interposing a fair deal, and that has been part of the history of the Federation. One can rail against it and complain against it, but if you can use 51(xx) it just may as well not be there. Why have we had all those debates over 100 years about 51(xxxv)?”

114. Kirby J went on to ask the Commonwealth Solicitor-General that if the Commonwealth argument was correct:

“you could just . . . regulate any employment matter of the corporation, (a) you never needed 51(xxxv), you never needed all that jurisprudence of 100 years, and (b) you can regulate every aspect of corporations – private schools, private hospitals, all building operations and trading corporations, financial corporations in every aspect. If you are talking about “swamping” – and that is your word – you are swamping and that is what makes you stop and think, is that really consistent with reading the provision subject to this Constitution, which is what we are commanded to do by section 51?”

115. Callinan J at one point said:

“I am intrigued by the fact that there are more than a dozen principal objects of the Act stated in section 3 and not one of them refers to

corporations and every one of them refers to what is called industrial relations, with this qualification that the first one is concerned with economic prosperity which is the opposite of what Chief Justice Latham said in *Melbourne Corporation*, the opposite of what the Commonwealth had power to do. To say it is a law about corporations and the objects do not even mention them is intriguing to say the least.”

116. While Kirby and Callinan JJ raised these questions, that does not mean that their Honours will necessarily determine to strike down the legislation. As Kirby J noted during the proceeding, even if the Commonwealth’s arguments overturn some long-established understandings as to the State-Federal balance, that does not necessarily mean they are wrong.
117. The two newest Judges, Heydon and Crennan JJ, said nothing from which an observer could divine their views.
118. The remaining three Judges, Gleeson CJ, Gummow and Hayne JJ, put questions which many commentators interpreted as suggesting that they were tending to the view that the legislation was valid.
119. On the last day of hearing Gummow and Hayne JJ noted that the question of what sort of corporation is a ‘trading or financial corporation’ was not be a matter that needed to be determined in the proceedings. The following exchange then occurred with Mr Burmester QC for the Commonwealth:

**GUMMOW J:** . . . So we posit a constitutional corporation, whatever that phrase means, but we posit there is such a creature and then we ask: is it employing or usually employing individuals?

**MR BURMESTER:** Yes.

**GUMMOW J:** Then we take the next step and we look at various legislative norms that are then imposed on that relationship in way one or another and then we ask: are those particular norms which bear upon this employment relationship, are they laws with respect to the constitutional corporation?

. . .

**HAYNE J:** That task is illuminated by two further observations. Firstly, the corporations with which 51(xx) deals are juristic persons, if you like, legal constructs. Those legal constructs can act only through natural persons. The legislation with which we are concerned is directed to one particular kind of legal persons and the relationship – a natural person’s relationship with corporations, employees, and is a law with respect to the relationship between the artificial juristic person and natural persons falling within the class of employees, a law with respect to that class of artificial juristic persons. The debate, though put in terms of, amongst other things, internal/external, relationship between 51(xx) 51(xxxv), really has to shift to a debate about “with respect to” rather than the metes and bounds of 51(xx).

. . .

**GUMMOW J:** Now, that will leave for another day the question of whether the Red Cross is a 51(xx) corporation.

**MR BURMESTER:** Yes, your Honour.

120. In other words, since a ‘trading or financial corporation’ is a legal fiction, it must operate via persons, namely directors, officers and/or employees. Gummow and Hayne JJ appeared to be asking why a power to make laws ‘with respect to’ such a corporation would not encompass a law that regulates how the legal construct that is such a corporation interacts with the employees through whom it acts.

121. Later on the last day of transcript the Chief Justice had an interchange with Mr Burmester QC as follows:

**“GLEESON CJ:** If it is a trading corporation, its relations with all its employees, regardless of what particular activity they perform, are a matter of business, are they not?

**MR BURMESTER:** Yes, quite likely, your Honour, in this context.

**GLEESON CJ:** A contract of employment between a municipal council and a health inspector is a business relationship, is it not?

**MR BURMESTER:** Yes, your Honour, and we would say - - -

**GLEESON CJ:** Just as much as is a contract of employment between a council and the man who sells refrigerators.”

122. There the Chief Justice appeared to be suggesting that on one view every relationship between a trading or financial corporation and its employees is a 'business relationship', and if so it may follow that laws regulating employment are laws about (or 'in respect of') the 'business' of a constitutional corporation even where the employees are not themselves engaged in trading activities.
123. Prior to the case being heard various commentators stated a view that the Court was likely to uphold the validity of the legislation. The manner by which the debate unfolded during the hearing is unlikely to change those views.
124. If the Court were to accept the argument of the States that laws with respect to employment conditions of those employed by a constitutional corporation cannot validly be made pursuant to s 51(20) then so much of the Act will be held to be invalid as to render the whole Act either invalid or unworkable.

#### **Other aspects of the challenge**

125. Beyond the main arguments in respect of s 51(20) there are other aspects to the challenge which could result in the Court upholding the validity of the main provisions, while finding particular parts of the Act invalid, such as:
- a) It was argued that Schedule 1, which regulates registered organisations (including trade unions registered under the Act) is invalid. The AWU and Unions NSW argued that the Schedule was invalid since laws that regulate such organisations (assuming they are not themselves constitutional corporations) cannot be laws 'with respect to' constitutional corporations' merely because organisations deal with constitutional corporations. They further argued that if Schedule 1 was invalid then as so much of the Act is drafted on the assumption that there are registered organisations, it meant the Act as a whole was invalid;

- b) It was argued that s 16 does not have the effect of overriding State industrial laws that regulate or affect contracts of employment, such as s106 of the *Industrial Relations Act 1996* (NSW). It was argued by Western Australia that s16 cannot render invalid State laws dealing with such subject matters because the federal Act does not itself regulate contracts of employment; and
- c) It was argued that parts of Schedule 6, by which federal awards continue to apply for a transitional period to non-corporate employers in reliance on the industrial power, is invalid because it mandates industrial outcomes rather than permitting such outcomes to be determined by the AIRC via a process of conciliation and arbitration.

### **The next High Court Case**

126. Even if the Act is held to be valid its true reach will take some time to determine, given the uncertainty as to whether some significant types of corporation, such as private schools, local councils, unions and charities, are “trading corporations”, at least where their ‘trading’ activities are truly peripheral to their existence.

127. To date the mere fact that trading is not the principal reason for the existence of a corporation does not prevent it from being a constitutional corporation (and so covered by the legislation): the Western Australian National Football League<sup>44</sup>, the Australian Broadcasting Corporation<sup>45</sup> the Royal Prince Alfred Hospital<sup>46</sup> and the University of Western Australia<sup>47</sup> have all been found to be constitutional corporations.

128. During argument in the High Court proceedings however it was clear that some members of the current Court would consider arguments that certain

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<sup>44</sup> *R v Judges of Federal Court: Ex parte v Western Australian National Football League* (1979) 143 CLR 191.

<sup>45</sup> *Sun Earth Homes Pty Limited v Australian Broadcasting Corporation* (1990) 98 ALR 101.

<sup>46</sup> *E v Australian Red Cross Society* (1991) 27 FCR 310.

<sup>47</sup> *Quickenden v O'Connor* (2001) 109 FCR 243

types of corporations are not 'trading corporations' even if they do some level of trading, including charities and municipal corporations (local councils). It seems inevitable that the next major High Court case about the Act will consider that issue.

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28 August 2006

**List of provisions of the *Workplace Relations Act 1996* as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* challenged by the Plaintiffs in the *Workplace Relations Case***

No.	Law Challenged	Challenged By	Basis Of Challenge
1.	Section 6(1)(a).	AWU	Consequence of reading s. 51(xx) as limited by s. 51(xxxv).
2.	Part 7 insofar as it purports to apply to employers and employees as defined in s 6(1)(a) with s 5(1).	NSW, WA, SA, Qld, AWU & Vic.	Not supported by s 51(xx).
3.	Part 7 insofar as it purports to apply to employers and employees as defined in s 6(1)(e) with s 5(1).	Vic.	Not supported by s 122.
4.	Part 7 insofar as it purports to apply to employer and employees as defined in s 6(1)(f) with s 5(1).	NSW, WA, SA, Qld, AWU & Vic.	Not supported by s 122.
5.	Part 8 insofar as it purports to apply to employers and employees as defined in s 6(1)(a) with s 5(1).	NSW, WA, SA, Qld, AWU & Vic.	Not supported by s 51(xx). <u>Note:</u> Also does not satisfy the restrictions in s 51(xxxv) (argued by Vic, WA, SA & Qld).
6.	Sections 365 and 366.	AWU	Not supported by s. 51(xx).
7.	Part 8 insofar as it purports to apply to employers and employees as defined in s 6(1)(e) with s 5(1).	Vic.	Not supported by s 122.
8.	Part 8 insofar as it purports to apply to employers and employees as defined in s 6(1)(f) with s 5(1).	NSW, WA, SA, Qld, AWU & Vic.	Not supported by s 122.
9.	a) Part 9 insofar as it purports to apply to employers and employees as defined in s 6(1)(a) with s 5(1).	NSW, WA, SA, Qld & AWU.	Not supported by s 51(xx).
	b) Part 9, Divs 2, 3, 4, 5, 6 (other than s 496(2) & (3)), 7, 8, 9 & s 497 insofar as it purports to apply to employers and employees as defined in s 6(1)(a) with s 5(1).	Vic.	Not supported by s 51(xx). <u>Note:</u> Also does not satisfy the restrictions in s 51(xxxv) (argued by Vic, WA, SA & Qld).

10.	Part 9, Divs 2, 3, 4, 5, 6 (other than s 496(2) & (3), 7, 8, 9 ) & s 497 insofar as it purports to apply to employers and employees as defined in s 6(1)(e) with s 5(1).	Vic.	Not supported by s 122.
11.	a) Part 9 insofar as it purports to apply to employers and employees as defined in s 6(1)(f) with s 5(1).	NSW, WA, SA, Qld & AWU.	Not supported by s 122.
	b) Part 9, Divs 2, 3, 4, 5, 6 (other than s 496(2) & (3)), 7, 8, 9 & s 497 insofar as it purports to apply to employers and employees as defined in s 6(1)(f) with s 5(1).	Vic.	Not supported by s 122.
12.	Part 10 insofar as it purports to apply to employers and employees as defined in s 6(1)(a) with s 5(1).	NSW, WA, SA, Qld, AWU & Vic.	Not supported by s 51(xx).
13.	Part 10 insofar as it purports to apply to employers and employees as defined in s 6(1)(e) with s 5(1).	Vic.	Not supported by s 122.
14.	Part 10 insofar as it purports to apply to employers and employees as defined in s 6(1)(f) with s 5(1).	NSW, WA, SA, Qld, AWU & Vic.	Not supported by s 122.
15.	Part VIAAA insofar as it purported to apply from 14 December 2005 to 27 March 2006 to employers who were constitutional corporations.	NSW, WA, SA, Qld & AWU.	Not supported by s 51(xx).
16.	a) Part 12, Divisions 1 and 2 insofar as it purports to apply to employers and employees as defined in s 6(1)(a) with s 5(1); and also s 637(1) and (4) and s 643(1)(a).	WA, Qld & AWU.	Not supported by s 51(xx).
	b) Part 12, Divisions 1 and 2 insofar as it purports to apply to employers and employees as defined in s 6(1)(a) with s 5(1); and also s 637(1).	Vic.	Not supported by s 51(xx).
	c) Part 12, Division 1 insofar as it purports to apply to employers and employees as defined in s 6(1)(a) with s 5(1); and also s 637(1) and (4) and s 643(1)(a).	NSW & SA.	Not supported by s 51(xx).

17.	Part 12, Divisions 1 and 2 insofar as it purports to apply to employers and employees as defined in s 6(1)(e) with s 5(1); and also s 637(1).	Vic.	Not supported by s 122.
18.	a) Part 12, Divisions 1 and 2 insofar as it purports to apply to employers and employees as defined in s 6(1)(f) with s 5(1) and also s 637(1) and (4) and s 643(1)(a).	WA, Qld & AWU.	Not supported by s 122.
	b) Part 12, Divisions 1 and 2 insofar as it purports to apply to employers and employees as defined in s 6(1)(f) with s 5(1) and also s 637(1).	Vic.	Not supported by s 122.
	c) Part 12, Division 1 insofar as it purports to apply to employers and employees as defined in s 6(1)(f) with s 5(1) and also s 637(1) and (4) and s 643(1)(a).	NSW & SA.	Not supported by s 122.
19.	Part 13 insofar as it purports to apply to employers and employees as defined in s 6(1)(a) with s 5(1).	Vic, WA, SA & Qld.	Does not satisfy the restrictions in s 51(xxxv).
20.	a) Part 15, Division 5 insofar as it purports to apply through s 755(1)(a)(i).	WA, Qld, AWU & Vic.	Not supported by s 51(xx).
	b) Part 15, Division 5 insofar as it purports to apply through s 755(1)(d)(i), (e)(i) and (f)(i) (insofar as they refer to a constitutional corporation) and s 755(1)(d)(ii) and (iii), (e)(ii) and (iii) and (f)(ii) and (iii).	WA, AWU & Vic.	Not supported by s 51(xx).
	c) Part 15, Division 5 insofar as it purports to apply through s 755(1)(d)(iii), (e)(iii) and (f)(iii).	NSW & SA.	Not supported by s 51(xx).
	d) Part 15, Division 2 and s 756 insofar as they purport to apply through s 755(1)(a)(i), (d)(i), (e)(i) and (f)(i) (insofar as they refer to a constitutional corporation) and s 755(1)(d)(ii) and (iii), (e)(ii) and (iii) and (f)(ii) and (iii).	WA, Qld & AWU.	Not supported by s 51(xx).
21.	a) Part 16 insofar as it purports to apply through s 785(1).	Vic.	Not supported by s 51(xx).

	b) Part 16 insofar as it purports to apply through ss 783 and 785(1)(d)-(f).	NSW, WA, SA, Qld & AWU.	Not supported by s 51(xx).
22.	a) Part 23 insofar as it purports to apply to employers and employees as defined in s 6(1)(a) with s 5(1).	NSW, WA, SA, Qld, AWU & Vic.	Not supported by s 51(xx).
	b) Part 23 insofar as it purported to apply from 14 December 2005 to 27 March 2006 to employers and employees as defined in s 550(a).	NSW, WA, SA, Qld & AWU.	Not supported by s 51(xx).
23.	Part 23 insofar as it purports to apply to employers and employees as defined in s 6(1)(e) with s 5(1).	Vic.	Not supported by s 122.
24.	a) Part 23 insofar as it purports to apply to employers and employees as defined in s 6(1)(f) with s 5(1).	NSW, WA, SA, Qld, Vic & AWU.	Not supported by s 122.
	b) Part 23 insofar as it purported to apply from 14 December 2005 to 23 March 2006 to employers and employees as defined in s 550(f).	NSW, WA, SA, Qld & AWU.	Not supported by s 122.
25.	Section 16 or parts thereof.	NSW, WA, SA, Qld, AWU & Vic.	Not supported by s 51(xx) or other heads of power; and bare attempt to exclude State legislative power.
26.	a) Section 117.	NSW, WA, SA, Qld & AWU.	Impermissibly interferes with functioning of State courts and tribunals.
	b) Section 117.	WA, SA, Qld & AWU.	Not supported by s 51(xx) or any other head of power.
27.	a) Various regulation-making powers – ss 4(c), 16(4), 846(1), clause 5 of Sch 2 and clause 55(1) of Sch 8; and also clause 2(1) of Sch 4 to the Amending Act.	WA, Qld & AWU.	Not supported by s 51(xx), s 51(xxxv) or any other head of power.
	b) Same as (a) above except not clause 55(1) of Sch 8.	Vic.	Same as (a) above.
	c) Part 8, Division 7.	AWU.	Not a law, or, in the alternative, not a law with respect to s. 51(xx) corporations.

**Comment [V1]:** WA Note dated 15 May 2006 suggests deleting '4(c)' and substituting 's 4(1) (paragraph (d) of the definition of 'State or Territory industrial law), 16(2)(b)'.  
 Comment [V1]: WA Note dated 15 May 2006 suggests deleting '4(c)' and substituting 's 4(1) (paragraph (d) of the definition of 'State or Territory industrial law), 16(2)(b)'.

28.	a) Schedule 1	NSW, WA, Qld, AWU & Unions NSW.	Not supported by s 51(xx) or other heads of power.
	b) Alternatively, clauses 18A-18C and 27 of Schedule 1.	NSW, WA, Qld, AWU & Unions NSW.	Not supported by s 51(xx) or other heads of power.
	c) Schedule 1.	Vic.	Consequential invalidity if Parts 8, 9 and 10 are invalid.
29.	Clause 4 of Schedule 4 to the Amending Act insofar as it purports to apply to employers and employees as defined in s 6(1)(a) with s 5(1).	NSW, WA, SA, Qld & AWU.	Not supported by s 51(xx).
30.	Clause 4 of Schedule 4 to the Amending Act insofar as it purports to apply to employers and employees as defined in s 6(1)(f) with s 5(1).	NSW, WA, SA, Qld & AWU.	Not supported by s 122.
31.	Schedule 6 in entirety, alternatively clauses 1(2)(c), 8, 28(2) and 29.	SA.	Not supported by s 51(xxxv).
32.	Schedule 8 insofar as it purports to apply to employers and employees as defined in s 6(1)(a) with s 5(1).	NSW, WA, SA, Qld & AWU.	Not supported by s 51(xx).
33.	Schedule 8 insofar as it purports to apply to employers and employees as defined in s 6(1)(f) with s 5(1).	NSW, WA, SA, Qld & AWU.	Not supported by s 122.
34.	The whole of the <i>Workplace Relations Amendment (Work Choices) Act 2005</i> (Cth)	AWU	Consequence of the invalidity of Schedule 1, or, alternatively, cl. 18A-18D thereof. <u>Note:</u> See document entitled "Submissions regarding consequences of the invalidity of Schedule 1".
35.	The whole of the <i>Workplace Relations Amendment (Work Choices) Act 2005</i> (Cth).	NSW, WA, SA, Qld, AWU, Unions NSW & Vic.	Act is substantially invalid for all of the above reasons.