The People's Solicitors Pty Ltd

321 South Dowling Street, Darlinghurst, NSW 2010 Tel (02) 9356 3307 Fax (02) 9356 3389
Email: peoplesolicitors@gmail.com ACN121 376 690

Newsletter No. 1

The People's Solicitors Pty Ltd was incorporated in September 2006. It is located in the heart of Darlinghurst and a short walk from the Downing Centre and Central Court House.

This is a new idealistic venture in the legal profession.

The Peoples Solicitors aims to provide legal advisory services and advocacy work at a high standard of efficiency and at low cost (or, in appropriate circumstances, no win/no pay) bases.

We are anti-Establishment and work for the battlers. We will substantially under-cut the rates by the big firms.

Our people are engaged not only for their legal skills but also their communication skills and their ability to develop workable solutions.

Our team:

The firm is generalist with particular interests in criminal, civil administrative, employment and immigration law.

Our Directors:

Kingsley Liu (*above*) has a background in commercial transactions, investment and securities law and engineering. He formerly ran an ASX stock broking company and has engaged in business developments in a range of industries.

Jeff Shaw (*above*) was the Attorney General from 1995 to 2000 and was a former Minister of Industrial Relations and former Judge of the Supreme Court. He has a background on key areas of the law.

Janice Gounder (*above*) is a migration specialist and has worked in diplomatic and government circles.

Paralegals:

We also have several Graduate Clarks completing their practical law training, including Stan Ilic, BA/LLB, Grad. Dip. Law, Shaun Mortimer MA/LLB Grad. Dip. Law, Amanda Pickles, BA(Psyc)/LLB Grad. Dip. Law and Darren Avalons (*below*) LLB/BComm (Accounting), Grad. Dip. Law.

We are also assisted by undergraduates like Sophie Lock (*below*).

Future plans:
We are currently developing an after hours and weekend law service to meet local community needs in the Darlinghurst/East Sydney area.

Opening Ceremony

A formal opening ceremony of the People's Solicitors Pty Ltd at 321 South Dowling Street (just off Oxford Street and Taylor Square) will be organised early in the New Year. In the meantime, Merry Christmas!

A Unitary System of Industrial Relations: Workplace Legislation

By J. W. Shaw, Q.C.

At Federation in 1901, the colonies agreed to 'unite in one indissoluble Federal Commonwealth', as proclaimed by the preamble to the Australian Constitution. It is unlikely that the drafters of the document would have envisioned the ascendancy of the federal government 104 years on. They may however have guessed that if the balance of power were to shift, it would be with the assistance of the High Court. As Albert Dicey famously noted in 1885, 'federalism… means legalism, the predominance of the judiciary in the constitution'. In concert with intergovernmental agreements, wartime fiscal relationships, and constitutional amendment by referendum, the High Court's interpretation of the Constitution has steadily increased the financial, political and legal clout of the Commonwealth government.

It seems that High Court has before it questions going to the heart of contemporary Australian federalism. In March 2005, John Howard's Coalition government, armed with a majority in the Senate, announced that it intended to introduce federal legislation so as 'to work towards a unified national system' for industrial relations.
Since the states declined to refer their industrial relations powers to The Commonwealth on 3 June 2005, the Commonwealth intends to rely on the Constitution's corporations power to over-ride the state jurisdictions (s51(20) of the Australian Constitution). The political and legal debate surrounding these proposals extends beyond labour and industrial issues, to questions of state's rights, and the appropriate use of federal power. Prime Minister John Howard has said that 'the goal is to free the individual, not to trample on the states'. Having refused to refer their powers, the states have mounted High Court challenges to the take-over.

Accordingly, we should focus on constitutional aspects of the Coalition's proposal for a unified industrial relations scheme. The first part sketches arguments which might be raised to challenge the use of the corporations power to displace state industrial relations jurisdictions. The second part maps the known limits of the corporations power's application, and the questions which remain to be resolved in this regard. It is argued that, in the event that the proposed new system was found to be valid, it could not profess to be united, as its coverage would be both patchy and uncertain.

Constitutional validity of a national system based on the corporation power

Section 51 of the Australian Constitution lists the subject matter with respect to which the Commonwealth parliament is entitled to make laws. Subsections 20 and 35 of the Constitution are the corporations and industrial powers. They are worded as follows:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:
…
(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth
…
(xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state.

The industrial power is a limited one, as is clear from the wording of the provision. Section 51(35) has the following characteristics:

- it is not a direct power for the federal parliament to legislate with respect to the wages and conditions of employees;
- on the contrary, it is a power to provide a system of conciliation and arbitration to deal with or prevent disputes about such matters;
- it does not create an obligation upon the Commonwealth parliament to have a conciliation and arbitration system, but merely empowers it to do so if it chooses;
- the power may only be applied when the dispute extends beyond the limits of any one state.

The Commonwealth has therefore pinned its hopes on the corporations power, whose potential has been progressively expanded by the High Court over the last hundred years. Simply put, from being restricted to the regulation of interstate activities of foreign, trading and financial corporations (henceforth referred to as 's51(20) corporations'), the power evolved to enable the regulation of the trading and financial activities, including protection against industrial action. In 1995, a narrow majority of judges indicated that they understood the power to be plenary, allowing the regulation of *any* activities of s51(20) corporations. The question has yet to be formally resolved: the precise scope of the corporations power in the area of industrial relations is undetermined.

Similarly, the specific wording and form in which the Commonwealth will put forward its new system is, at the time of writing, unknown. Nevertheless, it is possible broadly to outline three potential arguments against the validity of a national industrial relations system founded on the corporations power.

The first argument looks to precedent to contend that, although the corporations power extends to allow the protection of corporations, the proposed over-ride of state industrial relations systems is qualitatively different from such protection and is beyond the scope of the corporations power. In 1981, Fontana Films asked for an injunction against a trade union of actors and artists for organising a secondary boycott of Fontana when it refused to sign a preference agreement with the union. The law which prohibited secondary boycotts was challenged as invalid under the corporations power. The High Court decided that the power allowed the Commonwealth to regulate not just the trading activities of s51(20) corporations, but also the conduct of others if this achieved the protection of those activities. Hence, the first argument would seek to highlight the differences between the direct protection of the activities of s51(20) corporations and a forceful displacement of state industrial relations jurisdictions. By distinguishing the nature of the two forms of legislation, the idea would be to show that the latter falls outside the agreed scope of the corporations power. The corporations power is both regulatory and protective, but whether it can validly be said that the 'protection' of corporations includes the decimation of state industrial relations systems is more problematic.

The second potential argument is a doctrinal one. The *Melbourne Corporation* case of 1947 stands for the proposition that the federal nature of the Constitution implies certain prohibitions on Commonwealth action. The case involved a challenge to a federal banking law which prohibited any banks from doing business with state government agencies. The aim was to compel all the state governments to bank with the Commonwealth Bank. The Court found that the law was invalid because:

federal laws which 'discriminate" against the states are not laws authorised by the Constitution. Laws 'discriminate' against the states if they single out the states for taxation or some other form of control, and they will also be invalid if they 'unduly interfere' with the performance of what are clearly state functions of government.

The doctrine was restated in 1995, in the following terms:

The limitation (recognised the Melbourne Corporation *case) consists of two elements (1) prohibition or disabilities which involves the placing on the states of special burdens or disabilities ('the limitation against discrimination') and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the states or their capacity to function as government.*

Commonwealth laws may be struck down for infringing either of these limbs. The first has been used to invalidate a federal law obliging an agency of the Queensland government to submit to arbitration. The second has prevented Commonwealth laws from control of the number and identity of state employees, and prevented control also of their appointment and their dismissal. While the precedent is not strong, a challenge to Commonwealth industrial relations laws on doctrinal grounds might therefore seek to show that the Commonwealth laws unduly interfere with the performance of state functions of government; namely, state industrial relations jurisdictions. Alternatively, it would seek to show that by aiming to restrict and control state industrial relations jurisdictions, the Commonwealth laws affect the integrity of the states and their capacity to function as governments.

The third potential argument is an originalist one. The validity of Commonwealth laws resting on the corporations power to create a national industrial relations system would be weakened if it could be contended that the framers of the Constitution did not intend to enable direct industrial relations regulation under s51(20). This contention is supported - though certainly not resolved - by the observation that s51(35) grants only very limited industrial powers to the federal parliament, leaving intra-state matters to be dealt with by the states. Championed by Justice Scalia of the US Supreme Court, originalism is often sharply contrasted with theories of living, adaptable Constitutions. Even though the High Court has long adopted an approach which looks to *both* the original meaning of words and their contemporary understanding, a strong originalist argument would assist any challenge to the validity of the proposed Commonwealth laws.

As far as is possible, the legislation will be crafted to avoid these issues. The composition of the High Court has, moreover, changed since the last time its members gave an indication of their position on industrial relations and s51(20), and the question of the scope of the corporations power has divided opinions on the bench since 1909.

Therefore it is impossible to predict with any dogmatism whether or not the High Court will grant the Commonwealth a further extension of its influence by validating a national industrial relations system under the corporations power. In any event, the challenges will provide us with a glimpse of the future of the Australian states' relationship to the Commonwealth. Meanwhile, absent on injunction, the federal legislation as enacted remains in force and effect.

Likely extent of a national IR system

The Coalition has put forward its proposals for changes in the industrial relations arena on the ground that 'the workplace relations system is still complex and further improvements are needed to make the system simpler, accessible and more effective'. It is true that the current system is complex and could do with improvement. However the suggestion that the proposed changes will achieve these aims requires qualification.

First, it may be possible that, despite the enactment of a federal law, state conciliation powers might persist. This is currently being determined with respect to the present federal legislation: the union representing the employees of Newcrest Mine is attempting to have a state tribunal exercise some powers of conciliation and/or, recommendation in relation to their dispute.

Second, even if the proposals are found to be valid under the Constitution, the power in s51(20) cannot support a uniform industrial relations system across all employers, since it applies only to laws with respect to certain sorts of corporations.

There are a number of areas, in which it is clear that proposed changes will not operate. The Commonwealth Constitution via section 133, gives the federal parliament power over the Australian Capital and Northern Territories. Outside these areas, its powers over employees are limited to people working for the types of corporations named in section 51(20): 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. Therefore, any industrial relations system relying on the corporations power will not extend to the employees of businesses which operate as sole traders, partnerships or trusts. In 1997 such businesses employed a significant number of private sector workers in Australia. Workers outside the scope of the power include the following:

- Employees of small to medium businesses, which tend to be sole traders or partnerships. As Breen Creighton and Andrew Stewart have pointed out, it is ironic that the small business sector - considered so politically and economically vital by the Howard government - will be excluded from the proposed system.
- Owner-managers of unincorporated enterprises. These accounted for 13 per cent of employed people nationwide in 2005.
- Farmers and their employees, another group of significance to the Coalition parties, would be excluded as they tend not to incorporate for tax reasons.
- Contract workers who do not contract directly with foreign, trading or financial corporations would not be covered by the new system, as laws purporting to affect these contracts are not considered to be laws with respect to s51(20) corporations.
- People working directly for the state Crown (i.e. the administrative edifice of the executive) and for other unincorporated government departments and, arguably, people working for local government. The Crown, although perhaps a corporation sole, would not generally be regarded as a trading or financial corporation.

Should a new national industrial relations system based on the corporations power be found valid, these workers would not be covered. A range of others would find their position uncertain, their awards and rights subject to litigation. This is for two reasons.

The first is that some employees work for corporations whose status under the Constitution is unclear. One example is local councils. In 1974, local councils were held not to be s51(20) corporations. This decision has never been technically overruled, but the High Court's reasoning on the question has since changed. The Court now looks to the actual activities of the corporation rather than the purpose for which it was established. If trading or finance are a substantial or significant proportion of its overall activities, the corporation will fall within s51(20), irrespective of whether it also performs a government or public interest role. Because the question is one of fact and degree, the status of each council - and the consequent industrial rights of its employees - will need to be determined on a case by case basis.

The same goes for any incorporated organisation which has made some

investments or which sells goods or services for a profit. This could include some state government departments, medical services, emergency services and universities. For example, the Federal Court recently decided that University of Western Australia is a trading or financial corporation because 18-28 per cent of its activity was trading, and it also had 'substantial' investments in the short-term money market and short-term bills. Given that the trading and investment activities of universities are likely to vary across the sector, employees of each institution may well need to have their rights determined through litigation.

A special case of corporations of indeterminate status is state-owned corporations (SOCs). A number of states have created SOCs by legislation. The laws creating these corporations show a legislative intention to provide for commercial, profit-oriented entities. If their activities match this intention, they may be trading corporations under the Constitution and within the Commonwealth's power. Of interest is the fact that, with a few intricate exceptions, the NSW legislation about SOCs explicitly excludes them from the reach of existing national corporations legislation. An argument could be attempted that, because of this exclusion, and because of the *Melbourne Corporation* doctrine, the SOCs are not within the scope of the corporations power. These limitations provide a doubtful basis for such an argument, however, as has been recognised by the CPSU-SPSF (Community and Public Sector Union-State Public Services Federation group). In March 2005, the CPSU-SPSF announced that it would lobby the states to bring employees of SOCs back into direct employment by the Crown, in the hope of removing them from the reach of the corporations power. Approximately 300,000 employees nationwide were thought to be eligible for such a transfer.

The second reason for which some employees' status under the new system will be unclear is as a result of the *Melbourne Corporation* doctrine, which protects the integrity of states as functioning entities. As mentioned, the Commonwealth is prevented from passing laws which destroy or curtail the continued existence of the states or their capacity to function as governments. It has been held that, because of this protection, those working 'at the higher levels of government ... Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges ... and possibly others as well' may not have their terms of employment regulated by the Commonwealth under s51(35) of the Constitution… It is possible that the same doctrine may prevent Commonwealth control over these people under s51(20). Also excluded from the new system might be employees engaged in 'the administrative services of the state'. As with the 'higher level' employees, these have previously been considered to fall outside the scope of s51(35) and may arguably be beyond the reach of s51(20).

From what we have set out above, it seems that any new system relying on the corporations power cannot expect to be either unified or simple. Though many more employees would come under the federal system, state conciliation and arbitration functions will persist and may even coexist with it. Anyone not working for or contracting directly with a foreign, trading or financial corporation will be excluded, and a range of employees will be in uncharted legal territory. The new system, if valid, would still be incomplete, uncertain and would therefore inevitably precipitate litigation. The new system would still be inconsistent with the professed goals of the proposal.

Certainly, this prospect is not a fundamental obstacle to the Coalition government's plans. The Prime Minister expects that states may eventually cede and refer their industrial relations powers, should they find running a separate system for fewer workers too burdensome. In the meantime, lack of uniformity and lack of certainty are consistent with the ultimate aim of de-regulation. The Coalition wishes to create a fragmented system of negotiation in the place of centralised adjudication or bargaining. And uncertainty as to the detail of what employees may expect from their employers may not be seen as undesirable - rather, it is just another way of referring to the 'flexibility' of employment conditions on which the Coalition places so much importance.

Conclusion

The manner in which change is brought about will have just as significant an effect on Australian federalism as the operation of the new system will have on industrial relations. Reducing the complexity of Australia's overlapping industrial relations systems is an arguable objective, but for such an objective to be properly achieved, the simplification must be a matter of substance: the new system must in fact work better than the ones it replaces. And it must be fair to employees, protective of their wages and all of their working conditions. The creation of a so-called unitary system may be more ideological than technocratic: to prevent state labourist systems being a fetter on the de-regulation of the labour market. To recall

Albert Dicey again, in 1885 he also observed that federalism tends to produce conservatism. How the High Court will resolve the tension between legal conservatism and John Howard's self-proclaimed political conservatism remains to be seen. Ironically, a relatively conservative constitutional court may take a sceptical view of the use of the corporations power for ulterior purposes.

J.W. Shaw Q.C. with Justice Keith Mason, President of the NSW Court of Appeal.

The Debate

Discord amongst labour market economists occurred during a conference in September 2005 concerning the proposed federal changes. Professor Mark Wooden criticised every plank of the changes and suggested that it was either "pork barrelling" or acquiescence to employer interest. He said: "There is no economic sense in it."

Wooden is pro-labour market deregulation, but seems less than enthusiastic about the changes which he describes as being hastily drawn up, do not give employees real choices and asserted that there was "no evidence" to show that AWAS's (individual contracts) would enhance productivity as the government has claimed. On the contrary, the professor asserted that productivity in the 1990's was helped by union- based collective agreements and that "individual arrangements did not suit work places based on team work". (See *The Australian*, 28 September 2005; *Sydney Morning Herald,* 28 September 2005.)

On the other hand Professor John Freebarin, Director of the Melbourne Institute of Applied Economics and Social Research at the University of Melbourne, argued at the same conference that lower minimum wages could open up training and job experience for the low skilled leading to better job opportunities in the future. He argued that minimum wage objectives were outdated and that the lowest income earners were protected by welfare payments. He argued that changes in the social security system were a better way to improve social equity. Professor Freebarin said that minimum wages in Australia were high by international standards, being about 58% of median earnings. The essential ingredients for the package were described by Paul Gollan, a fellow at the London School of Economics and also at the Labour-Management Studies Foundation at Macquarie University (*Australian Financial Review*, 27 September 2005). His summary of the proposals is as follows:

- The centrepiece of the package would be the creation of a new statutory body, the Australian Fair pay Commission [something ludicrously described in the Murdoch press as the 'Low pay commission'] to replace the Australian Industrial relations Commission ("AIRC") in deciding minimum wage rates and also to encourage skills in the labour market by setting minimum apprentice and trainee wages. (It is curious that in relation to a government which has unfettered powers to make appointments to the AIRC over many years that a new and totally replacement body is called for. If more technical economic expertise had been required, then it was entirely open to the executive government to appoint such people to the bench. Certainly, under the Hawke government, distinguished labour economists Professors Joe Issac and Keith Hancock were appointed as Deputy Presidents of the Commission and played a valuable role in injecting their technical knowledge in the decision about minimum wages and the like.)
- It is suggested by Gollan that the long term impact of the AIRC's role is to create "artificially high wages" and lack of skills in the labour market.
- Another significant ingredient of the package is to change unfair dismissal laws, in particular to amend the definition of "employee" to further exclude casual and temporary employees from the scope of such remedies.

However, the author's conclusions about these proposed reforms are deeply agnostic. He says that there are "many unanswered questions" and he says that "only time will tell". So much for evidence-based or empirical material being the sub-stratum for the legislative change. On one analysis, the theory is that any labour market deregulatory regime, however hypothetical, is worth a go.

By way of stark contrast are the observations of Professor James Galbraith whose observations to the Economist Society of Australia are reported in the same edition of the *Australian Financial Review* (27

September 2005). According to Galbraith, employers would not demand more labour simply because pay scales were widened through de-regulation. Galbraith argued that what it is all about is businesses deciding whether they can make money selling the product and that it is an "aggregate demand" function, with nothing to do with the structure of the labour markets.

This is a rather ancient debate about the relationship between minimum wages (and at least, by analogy, unfair dismissal laws) to employment levels. The classic work is David Card and Alan B Krueger, *Myth and Measurement, the New Economics of the Minimum wages*, Princeton University Press, 1995. Based upon rigorous empirical investigation, the authors argued that: "…the anticipated negative effect of a minimum wage hike on employment failed to materialise." And so the authors questioned the applicability of the conventional models that were taught as a matter of orthodoxy in introductory economic courses. This book, therefore, constitutes a piece of healthy scepticism about conventional economical though in terms of linkage between labour costs and employment levels. Of course, the federal reforms are not put forward straight forwardly as a matter reducing labour costs. It is suggested that greater flexibility or deregulation would enhance employment in the Australian economy. Yet, some might regard this as shorthand for capping wages and/or reducing the conditions of employment at work.

Mr Andrew Robb, the federal Liberal MP for Goldstein has argued for the simplification of the industrial relations system (the unification of six different systems) streamlining awards into documents reflecting the needs of the modern workplace and more ready access to agreement making (see *Australian Financial Review*, 24 August 2005).

On the contrary side of the argument, Greg Comber, the leader of the Australian Council of Trade Union ("ACTU"), has argued that "collective bargaining rights" constitute the defining issues in contemporary times. He argues for good faith bargaining process, as distinct from individual contracts (*Australian Financial Review*, 24 August 2005).

There is no convincing evidence that collective bargaining undermines productivity or that individual contracts boost productivity. The issue is in the area of metaphysics rather than rational analysis. It should be observed that supporter of the Howard proposed changes (Mr Allan Wood, Economics Editor of *The Australian*) has urged that the government should hasten slowly in relation to the matter. He supports the thrust of the proposed reforms but argues that it is crucial to "get the legislation right" and allow more time to do that so that, notwithstanding the publicly announced deadline for the bill to be introduced into Parliament, there is the potential for the AIRC to expand its jurisdiction into new areas left open, there is the risk of drafting errors, there is a problem about farmers being thrown into state industrial relations system, gaps in federal legislation would leave (for example, in the case of long service leave, state laws to apply) and that "chasing out" agreements into the mining and other industries as to the annual leave would be put under scrutiny by the federal proposals. In short, Mr Wood argues that the federal changes may result in change and complexities in the legislation which means that it is less transparent and offers the possibility of "loop holes" to be exploited. Mr Wood is also concerned about residual powers in the AIRC to deal with matters such as penalty rates and that in the process "business can be its own worst enemy…"

When the current federal government gained a majority in both houses of Parliament a radical industrial relations agenda become inevitable.

Laurie Oakes ('Exit Stage Right", *The Bulletin,* 18 October 2005) has reminded us that as long ago as 1985, when addressing the Metal Trade Association, Mr Howard engaged in a vigorous critique of the H B Higgins criteria for wages determination – what was "fair and reasonable" – as distinct from market determination.

The Higgins tradition has, so far, prevailed as orthodoxy in Australia. It is exemplified not only in the famous Higgins' judgment which fill the early years of the *Commonwealth Arbitrations Reports* – the 1907 *Harvester Case* (the basic wage) and the 1909 Broken Hill Mine Case ("proper wage") – but also in a series of articles Higgins published in the *Harvard Law Review* in 1915, 1919 and 1920, gathered together in the volume *A New Province for Law and Order* (London 1922).

For Mr Howard, the Higgins philosophy needed fundamental review because "Australia cannot become fully competitive while we … determine wages without regard to the capacity of individual industries and enterprises to pay."

The humorous columnist for *The Australian Financial review*, Peter Ruchl (18 October 2005) has quoted US economic guru, Alan Greenspan, as arguing that the diminution of unfair dismissal laws "apparently" increases willingness to hire. But is there empirical

evidence for this somewhat tentative proposition? And, ominously, Greenspan, so it is said, acknowledges "losers' in the process, described in the bloodcurdling expression "creative destruction". The agnosticism of the economic commentators prevails to this day. Saul Eslake (chief economist at the ANZ) says: "My interpretation of the economic data is that it lends some support to the Howard government's proposed reforms, but that support is neither unequivocal nor incontestable." (*Australian Financial Review* 2 October 2005.)

"Should We Centralise Labour Relations?"

The understandable desire of business to have the issue of Commonwealth power over corporations clarified by the states referring such power to Canberra has been distracted and complicated by the former minister by Mr Reith's bid for a unitary system of industrial relations. States of different political complexions are apprehensive that the accrual of power at a federal level may have the unintended consequence of assisting demolition of state-based labour law. The onus will fall on the Commonwealth to persuade the states that the complexities of business law can be rectified without intruding on the more controversial territory of industrial relations.

When the framers of the Australian constitution adopted the industrial power in relation to conciliation and arbitration, it is clear that they intended to divide the regulation of labour disputes between state and federal governments. The federal government was given power to establish a system to deal with disputes extending beyond the boundaries of any one state, whereas state governments were left to make laws with respect to interstate disputes.

That provision remains intact today, although the authority and scope of federal regulation have increased, mainly because of the use of logs of claims to create interstate disputes with resultant federal awards or agreements. The states, with the recent exception of Victoria, maintain viable and respected state systems of conciliation and arbitration to deal not only with state public sector employees but a variety of industries within those states.

If the industrial power were the only relevant constitutional provision, then that would be the end of the argument. However, the 1920 *Engineer's Case* exploded the doctrine that there were implied immunities to safeguard the powers of the state. And the High Court held that each head of power was to be given a broad general meaning, and was not to be read down merely by reason that there were other more specific powers. The external affairs power can be used where the legislation is grounded upon fulfilling international treaty obligations. Second, the corporations power has been liberally interpreted by the High Court and can sustain legislation designed to regulate the employment relationship between a corporation and its workforce.

In this legal environment the Commonwealth has suggested, for discussion, the idea of more comprehensive Commonwealth legislation dealing with workplace relations, either abolishing or greatly reducing the role of the states.

A case can be made for a single system. Industry and commerce increasingly cross historically determined state boundaries. The wage and conditions of employees are relevant to national economic considerations, and it will often be convenient for both employers and unions to have uniform national conditions.

However, that result can be achieved under the current structure. For example, the major retail stores and the union covering shop employees reached a series of national agreements prescribing employment conditions for the employees of those big stores. On the other hand, smaller shops continue to be regulated by state common-rule awards.

The technical arguments for the abolition of the separate state systems have been overstated. Issues are from time to time raised as to whether a state or federal award applies and whether if the federal award applies state laws are void to the extent of the inconsistency. Some employees have worksites on which federal awards apply to some employees and state awards to others. The Australian Industrial Relations Commission has sometimes to determine whether it should intervene in a dispute and has the power to decide that the dispute is proper to be dealt with by a state industrial tribunal or that further proceedings are not necessary or desirable in the public interest.

However, these frictional issues are peripheral. They do not go to the heart of our contemporary debate about industrial relations. If one party or other wants to "go federal" then, despite its apparently artificial nature, an interstate dispute can readily be created by the service of written claims. Moreover, in the last decade or so state and federal industrial laws have developed reciprocal arrangements for joint sittings and dual appointments.

Take, for example, the handlings of the industrial relations of the Sydney Olympics. In January 1999, New South Wales IRC President Justice Wright made consent awards covering Games employees. In May 1999, the President sat on a federal full bench which suspended various federal awards for the period of the Olympics. This was cooperative federalism in action.

In the determination of wage issues of national importance there has been a high degree of comity between federal and state tribunals. As to national wage increase, J H Portus said in 1979 that in practice, inconsistency between Commonwealth and state awards has not been significant. He said that "taken as a whole, state tribunals have tended to follow the lead of the Commonwealth Commission in an industrial field where the Commonwealth is dominant". The same can be said of the subsequent history as exemplified by state tribunals adopting the determinations of the AIRC as to "living wage" adjustments.

There is nothing unique to industrial relations about competitive tribunals. It occurs in the mainstream court system. Adam Smith noted in *The Wealth of Nations* that competition amongst courts has led to the development of causes of action like trespass, and he, as an advocate of the free market, regarded that as a good thing.

There are a number of problems about the proposed unity system based on the corporations power. One is that, however expansively that power might be interpreted, it cannot apply to non-corporations. So, the employees of partnerships, trusts or sole traders could not be comprehended by the system. Much of small business would fall within this lacuna. Second, the system could only apply to those corporations which were trading or financial corporations, and there is obvious scope for argument about the extent of that expression, including whether local government or statutory suppliers of electricity are within the power. Third, there are limitations on the Commonwealth's powers with respect to state public sector employees.

In *Re Australian Education Union: ex parte The State of Victoria* (1995) 184 CLR 188, the High Court affirmed that disputes between a state and its employees could fall within the conciliation and arbitration power of the Australian constitution. However, the court also affirmed earlier authority to the effect that there was an implied limitation on the exercise of any power that would threaten the existence or their capacity to govern, or would impose a particular disability or burden upon an operation or activity of a state. So it was that the court quashed certain orders which had been made by the Australian Industrial Relations Commission preventing or inhibiting certain Victoria sate government instrumentalities from offering redundancy packages to employees.

Moreover, the judgement of the court casts great doubt about the capacity of the AIRC to deal with redundancy disputes at all affecting state government employees. The court referred to certain aspects of a state's functions which are crucial to its capacity to function as a government. The court then said:

> *"it seems to us that critical to the capacity of a state is the government's right to determine the number and identity of the persons whom it wishes to employ, the term of employment of such persons, and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds"*

So, while minimum wages and conditions could be prescribed for state government employees there is a constitutional barrier to dealing with the redundancy question; question marks were also raised over the possibility of dealing with questions of promotion or transfer. There was also reference to a difficulty of federal legislation with respect to "the highest levels of [state] government" and in relation to this rather vague category even minimum wages and working conditions could not be fixed under Commonwealth law.

It is unlikely that any proposed system would be comprehensive, so the issue is whether the supposed problems justify the project, fraught with legal and political hurdles.

A cynic might think that the competing arguments were driven more by policy than by technocratic considerations. For example, at a time when state governments, other than New South Wales were legislating for a deregulated labour market, the Commonwealth parliament in 1996 passed a provision, breaking from the tradition of paramount federal law in this area, to the effect that a state employment agreement binding an employee would mean that federal wards coverage would no longer apply.

The proposal for a single national scheme heads precisely in the other direction. Perhaps the political cycle is seen as more relevant than any questions of principle.

All relevant data is received by an independent tribunal and debated in an open forum. It is then the subject of objective adjudication.

So, it is asserted, the "adversarial" system of minimum wage fixation is no good. But what is so wrong with giving everyone with an interest in the matter their say? There are said to be "huge gaps" in the evidence which the commission itself should have removed.

Two aspects of the scheme seem problematic as a matter of law:

1.) The internal regulation of state regulated industrial organisations – is this sufficiently connected with the regulation or protection of trading or financial corporations?

2.) The effect of s16 of Work Choice Act – excluding/over-riding state and territory laws providing for variation or setting aside of unfair employment laws (i.e. in NSW context, s106 of the IR Act 1996). But it does so in a context where there is no substantive provision about unfair contracts (apart from s16 itself intended to cover the field).

If upheld, this provision would have a major impact on the daily work of state industrial jurisdictions.

Questions of severability would then arise.

. . . .

On Tuesday the 14th November, the High Court decided by a majority of 5:2 to uphold the validity of the Work Choices legislation.