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Fair Work – A Further Expansion of Federal Workplace Relations

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Introduction

1. Federal power over workplace relations was a gift to the Commonwealth from our founding fathers. It was not intended to be a significant gift. It was then a power to make laws with respect to:

> *conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State*[1]

2. Some thought that the Commonwealth might not use the power which resulted in the enactment of the *Conciliation and Arbitration Act, 1904* (Cth),[2] whilst Australia's first Prime Minister, Sir Edmund Barton[3] said of the Conciliation and Arbitration Bill that:

> *This was a power, the necessity for the exercise of which it is hoped will seldom arise.*[4]

3. And thus it may have remained, but for one of those moments upon which history turns. Such a moment arose early in the hearing of the now famous *Engineers* case.[5]

4. Robert Gordon Menzies stood before the Full High Court in Melbourne. He was counsel, junior counsel, age 25, briefed without senior counsel, appearing for a union, the Amalgamated Society of Engineers, in the High Court.

5. The question for the High Court in *Engineers* was whether a dispute between unions and Western Australian Government trading concerns was subject to the federal conciliation and arbitration power.

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[1] Constitution, s.51(xxxv).
[2] Official Record of the Debates of the Australasian Federal Convention, Vol.4, pages 197-198 (Sir Joseph Abbott).
[3] And also one of the first three Justices appointed to the High Court: T Blackshield, et al (Eds), The Oxford Companion to the High Court of Australia (South Melbourne: Oxford University Press, 2001) page 54 ("Blackshield, High Court").
[4] D Solomon, The Political High Court. How the High Court Shapes Politics (Sydney: Allen & Unwin, 1999) page 134 ("Solomon, The Political High Court").
[5] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd & Ors* (1920) 28 CLR 129 ("*Engineers*").

6. Menzies tried to argue that activities of the government trading concerns were trading, not government. Justice Starke soon said to Menzies:

> *This argument is a lot of nonsense.*

Menzies responded:

> *Sir, I quite agree.*

The new Chief Justice, Sir Adrian Knox, then said:

> *Well, why are you putting an argument which you admit is nonsense?*

Menzies, with all the brashness of youth, responded:

> *Because I am compelled by the earlier decisions of this Court. If your Honours will permit me to question all or any of those earlier decisions, I will undertake to advance a sensible argument.*

Rather than savage Menzies for what, in 1920 before the High Court might have seemed like impertinence, the Court adjourned, came back and announced that liberty would be granted to challenge any earlier decision of the High Court, and the *Engineers* case was adjourned to Sydney for further argument.[6]

7. *Engineers* is a watershed in Australian constitutional history. It provided the foundation for a significant expansion of federal power over workplace relations, as well as other areas within the heads of power under the Constitution.

8. This paper traces the steady expansion of federal workplace relations under the conciliation and arbitration power, plus other heads of power, from *Engineers* to *Work Choices*, and that proposed in the recent *Fair Work Bill 2008*. Like *Engineers*, *Work Choices* was a watershed judgment, making it clear that the corporations power could be utilised to enact valid laws dealing with workplace relations, and that the scope of the corporations head of power exceeded that under the conciliation

[6] R. Menzies, Central Power in the Australian Commonwealth (Melbourne: Cassell & Co, 1968), pages 38-39 ("Menzies, Central Power"). See also T. Blackshield & G. Williams, Australian Constitutional Law and Theory. Commentary and Materials (4th Edn). (Leichhardt: The Federation Press, 2006) page 303 ("Blackshield & Williams, Australian Constitutional Law").

and arbitration power when legislating with respect to workplace relations.

Engineers – Decision and impact

9. At the time *Engineers* was decided, Australia had a sense of national unity and identity resulting from its involvement in the First World War, "which made it appropriate for the High Court to contemplate an expansion in the exercise of Commonwealth powers."[7]

10. *Engineers* may be summarised this way. A power to legislate with regard to a given subject matter (in *Engineers*, conciliation and arbitration) enables the Commonwealth Parliament to make laws which, upon that subject, affect the operations of the states and their agencies.[8]

11. *Engineers* repudiated the doctrines of implied prohibitions and state reserve powers. It also asserted the paramountcy of Commonwealth laws over inconsistent State laws, based on section 109 of the Constitution.

12. *Engineers'* primary legacy is that it was a victory of the express over the implied. Greater literalism in constitutional interpretation prevailed, with the primacy of the text of the Constitution being asserted by the majority.[9]

13. *Engineers'* second legacy was its practical impact. Rejection of implied intergovernmental immunities and reserve state powers doctrines,

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[7] Hon. Sir A Mason, "The High Court of Australia: A Personal Impression of Its First 100 Years" (2003) Melbourne University Law Review 864 at 873 ("Mason, The High Court"). *Engineers* is not an impressive judgment. It was delivered just 29 days after 6 days of argument closed: *Engineers* at 129 - the margin note shows the case was argued before the High Court on July 26-30 and August 2, 1920 and decided on August 31, 1920. It is "poorly constructed and composed", but of undeniable significance: Mason, The High Court at 873. Sir Garfield Barwick observed on his retirement more than 60 years later that later generations of judges and citizens need to be very wary that the triumph of *Engineers* is never tarnished: (1981) 148 CLR v at x

[8] *Engineers* at 150 and 153-154 per Knox CJ, Isaacs, Starke and Rich JJ; *The Lord Mayor, Councillors and Citizens of the City of Melbourne v The Commonwealth & Anor* (1947) 74 CLR 31 at 78-79 per Dixon J ("*Melbourne Corporation*").

[9] Hon. Justice M. Kirby, Sir Isaac Isaacs – A Sesquicentenary Reflection" (2005) Melbourne University Law Review 880 at 891 ("Kirby, Sir Isaac Isaacs").

expanded the powers of the Federal Parliament.[10] It represented a fundamental shift in the High Court's attitude towards the distribution of federal and state powers. Combining literal interpretation and broad construction of Commonwealth powers, *Engineers* allowed the Commonwealth to assume a dominant position in the Australian federation vis-à-vis the states.[11] The balance was tilted decisively in favour of federal powers.[12]

Broadening approaches to workplace relations

14. Both in relation to the elements of the conciliation and arbitration power and the use of powers in relation to workplace relations matters, the High Court has gradually broadened its approach to encompass and facilitate a far broader conception of matters susceptible to federal workplace regulation than that envisaged at the Convention Debates.[13]

Industrial

15. In 1925 the High Court held that State educational activities were not "industrial" under the conciliation and arbitration power. Why? Because educational activities were not connected directly with, or attendant upon, the production or distribution of wealth.[14] This approach to what was "industrial" prevailed until the 1980s.[15]

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[10] Kirby, Sir Isaac Isaacs at 891.
[11] Mason, The High Court at 873.
[12] Kirby, Sir Isaac Isaacs at 891-892, who described a tilting "entirely in keeping with the nationalist and centralist tendencies that characterised the approach of Justice Isaacs [who wrote the majority judgment in *Engineers*] to the nature of the federation created in the Australian Commonwealth."
[13] As to the use of heads of power, other than the conciliation and arbitration power, in relation to workplace relations, see generally N. Williams & A. Gotting "The interrelationship between the industrial power and other heads of power in Australian industrial law" (2001) 20 Australian Bar Review 264 ("Williams & Gotting, Other Heads of Power").
[14] *Federated State School Teachers Association of Australia v Victoria* (1929) 41 CLR 569 at 575-576 per Knox CJ, Gavan Duffy and Starke JJ.
[15] *Pitfield v Franki* (1970) 123 CLR 448; *R v Holmes; ex parte Public Service Association of New South Wales* (1977) 140 CLR 63.

16. In *R v Coldham; ex parte Australian Social Welfare Union*[16] the High Court said:

> *It is, we think, beyond dispute that the popular meaning of "industrial disputes" includes disputes between employees and employers about the terms of employment and the conditions of work. Experience shows that disputes of this kind may lead to industrial action involving disruption or reduction in the supply of goods or services to the community. We reject any notion that the adjective "industrial" imports some restriction which confines the constitutional conception of "industrial disputes" to disputes in productive industry and organised business carried on for the purpose of making profits.*[17]

17. In *Re Australian Education Union; ex parte Victoria*[18] the High Court held that disputes between a State and its employees were capable of being industrial disputes under the Constitution, but that there was an implied limitation on the exercise of Commonwealth legislative power, derived from the general structure of the Constitution as well as the language of particular powers, protecting the States from an exercise of power that would threaten their existence or their capacity to govern or imposing a particular disability or burden upon operational activity of a State or the exercise of the State's constitutional powers.[19] The High Court did however exclude from federal industrial regulation:

(a) a State Government's right to determine the number and identity of persons to be employed, the term of appointment of its employees, and the number and identity of persons the State wishes to dismiss with or without notice from its employment on redundancy grounds; and

(b) persons to be engaged at the higher levels of government, and their terms and conditions, thus excluding Ministers, ministerial

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[16] (1983) 153 CLR 297 at 312 per Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ ("*Social Welfare*").
[17] *Social Welfare* at 313 per Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ.
[18] (1995) 184 CLR 188 ("*Australian Education Union*").
[19] *Australian Education Union* at 230 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

assistants and advisors, heads of departments and high level statutory office holders, parliamentary officers and judges.[20]

18. Thus, the Commonwealth conciliation and arbitration power has extended to:

(a) any non-State government employee, including professional employees; and

(b) State government employees, with the exception of those vital to the integrity of the maintenance of a State's government and constitutional functions.

Organisations

19. Representative organisations, and particularly unions of employees, were, in the early years of federation, subject to contradiction by their members.[21]

20. The "fully representative role [of unions] in making industrial demands"[22] arises from the judgment of the High Court in *Burwood Cinema Limited v Australian Theatrical and Amusement Employees Association.*[23] There, the High Court held that representative organisations were not mere agents of their members, but stood in their place, acted on their account and represented the class associated together in the organisation.[24] This was a judgment of the most profound practical importance: allowing unions to fully participate in and run disputes, and in conjunction with the development of the "paper

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[20] *Australian Education Union* at 232-233 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
[21] *R v President of the Court of Conciliation and Arbitration; ex parte William Holyman & Sons Limited* (1914) 18 CLR 273.
[22] R J Buchanan QC and IM Neil, "Industrial Law and the Constitution in the New Century: An Historical Review of the Industrial Power" (2001) 20 Australian Bar Review 256 at 259 ("Buchanan & Neil, Industrial Law").
[23] (1925) 35 CLR 528 ("*Burwood Cinema*").
[24] *Burwood Cinema* at 551 per Starke J. See also *Federated Iron Workers of Australia v Commonwealth* (1951) 84 CLR 265 at 280 per Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ.

dispute" was a central feature of the federal workplace relations system until its "de-regulation" in 1996.[25]

Dispute

21. The creation of artificial disputes feared by some convention delegates, but dismissed in the Convention Debates by Higgins as "mere theoretical grievance",[26] soon came to pass. It had two manifestations:

    (a) logs of claims, widely served upon employers, in more than one state, thereby creating an interstate industrial dispute, at least on paper;[27] and

    (b) ambit claims, involving inflated demands in the logs of claims, thereby investing in a federal industrial tribunal wide power to make orders settling both present and future disputes, within the inflated ambit of the claims.[28]

22. Practically, unions large and small, were able to serve multiple employers (sometimes hundreds or even thousands of them) in multiple states, with ambit claims, which upon a refusal or failure to answer by the employers created an interstate industrial "paper dispute". The demand, genuinely made, became a dispute constituted by disagreement.[29] Massive paper disputes were far removed from the interstate industrial dispute created by a waterfront dispute in Sydney affecting Melbourne, and the inability to deal with a local dispute spread to a larger area, envisaged during the Convention Debates.[30]

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[25] Buchanan & Neil, Industrial Law at 259; Blackshield & Williams, Australian Constitutional Law at 1041-1042.
[26] Convention Debates, Vol. 4, page 211.
[27] *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387 at 428 per Dixon J; *Attorney-General (Queensland) v Riordan* (1997) 192 CLR 1 at 16-18 per Brennan CJ and McHugh J ("*Riordan*").
[28] *Riordan* at 16-18 per Brennan CJ and McHugh J; *R v Ludeke; ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 183 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ.
[29] *Australian Tramway and Motor Omnibus Employees Association v Commissioner for Road Transport and Tramways* (NSW) (1938) 58 CLR 436; *Caledonian Collieries Ltd v Australian Coal and Shale Employees Federation (No.1)* (1930) 42 CLR 527.
[30] Convention Debates, Vol. 3, pages 782-784.

External Affairs

23. In 1993 the Keating Labour Government used the external affairs power to supplement the conciliation and arbitration power to include legislative provisions in the then *Industrial Relations Act, 1993* (Cth) relating to:

    (a) minimum conditions of employment (including wages and equal pay provisions);

    (b) termination of employment;

    (c) discrimination; and

    (d) parental leave.

24. The High Court held most of the relevant provisions to be valid, because most of them were laws reasonably capable of being considered appropriate and adapted to implementing international treaty obligations or an ILO Convention or Recommendation, and were therefore laws with sufficient connection between the law and the Treaty, Convention or Recommendation to be with respect to external affairs under s.51(xxix) of the Constitution.[31]

Trade and Commerce

25. The trade and commerce power extends to the regulation of acts and processes identifiably done for interstate trade or export.[32] Historically, it was "the major alternative or additional source of power to s.51(xxxv) for regulating industrial relations".[33] It has been used to regulate conditions in industries, such as the aviation and maritime industries, with an overseas or interstate trade component.[34]

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[31] *Victoria v The Commonwealth of Australia & Ors* (1995) 187 CLR 416.
[32] *O'Sullivan v Noarlunga Meat* (1954) 92 CLR 565 at 598 per Fullagar J; *Seaman's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 138 per Gibbs J and 157 per Murphy J ("*Utah Developments*").
[33] Williams & Gotting, Other Heads of Power, at 268.
[34] Williams & Gotting, Other Heads of Power, at 268-269.

26. The trade and commerce power has also been used to extend the operation of the *Trade Practices Act 1974* (Cth)[35] to outlawing secondary boycotts.[36]

Corporations

27. The *Work Choices Act* was not the first use of the corporations power for workplace relations purposes.

28. Section 45D of the *TP Act* outlawing secondary boycotts has been held to be a valid use of the corporations power by the High Court, insofar as it protects a corporation from conduct the purpose of which is to cause it loss or damage.[37]

29. The corporations power was also relied upon extensively in relation to the inclusion of provisions in the *Workplace Relations Act 1996* (Cth) concerning enterprise flexibility agreements, certified agreements, victimisation of employees and independent contractors, prohibited payments (for periods of industrial action), unfair dismissals and unlawful termination.[38]

Taxation

30. In *Northern Suburbs General Cemetery Reserve Trust v Commonwealth*[39] the High Court held that training guarantee legislation, the object of which was to achieve minimum levels of expenditure on training, was validly enacted in reliance on the taxation power under s.51(ii) of the Constitution.

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[35] "*TP Act*".
[36] *Utah Developments* at 137-139 per Gibbs J.
[37] *Actors & Announcers Equity Association v Fontana Films* (1982) 150 CLR 169 at 184-185 per Gibbs CJ; 201 per Mason J; 212 per Murphy J; 215 per Wilson J, 222 per Brennan J.
[38] Williams & Gotting, Other Heads of Power, 271-272.
[39] (1993) 176 CLR 555.

Other Heads of Power – Conclusion

31. Prior to the *Work Choices Act* being passed by the Federal Parliament, and subsequently upheld by the High Court, there had been a broadening of federal jurisdiction in relation to workplace relations by a combination of powers, including the conciliation and arbitration, trade and commerce, external affairs and corporations powers.

Boilermakers – Fitting the system

32. Before turning to *Work Choices* it is necessary to note the fundamental structural change to the consideration and determination of federal industrial disputes wrought by *Attorney-General v R*[40] in which the Privy Council upheld the High Court's (4-3) majority decision that the Commonwealth Court of Conciliation and Arbitration could not exercise both arbitral and judicial power, as it had traditionally done.[41] This was because of the constitutional division between Parliament, executive and the judiciary. Put shortly – judges could not arbitrate because the resulting form of an arbitrated award was a form of legislative instrument determining future rights, not a judgment enforcing past rights.

33. Prior to *Boilermakers* there was a Court of Conciliation and Arbitration exercising both judicial and arbitral powers. That is:

    (a) it determined future rights by arbitrating industrial disputes and making awards; and

    (b) exercised judicial power by determining breaches of awards and enforcing past rights.

34. The effect of the split in *Boilermakers* has been significant. Industrial arbitration (as it then was) was split into two branches, the judicial and the arbitral, which have endured.

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[40] (1957) 95 CLR 529 ("*Boilermakers*").
[41] *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254.

35. The judicial branch deals with breaches of the law, such as breaches of awards, civil penalty provisions and interpretation of awards and other industrial instruments. The Commonwealth Industrial Court was created as a consequence of *Boilermakers* to deal with these types of issues. It was succeeded by the industrial division of the Federal Court, and then the Industrial Relations Court of Australia. When the Industrial Relations Court was abolished the powers that it exercised were returned to the Federal Court. More recently, both the Federal Court and Federal Magistrates Court have been given concurrent jurisdiction in matters such as interpretation of awards and certified agreements, unlawful terminations, breaches of federal awards and certified agreements; and breaches of provisions relating to freedom of association, duress under Australian Workplace Agreements and industrial action.

36. The arbitral branch, to resolve disputes and make awards, was vested in the Commonwealth Conciliation and Arbitration Commission, today the Australian Industrial Relations Commission.

37. Historically, the effect of the splitting in *Boilermakers* has been to introduce a more legal and adversarial and less industrial system with less self help remedies.[42]

Work Choices – The Judgment

38. Two leading workplace relations law academics, Stewart and Williams have written:

> *For the States, the Work Choices case was lost as far back as the Engineers decision.*[43]

39. The *Work Choices Act* relied upon the corporations power under section 51(xx) of the Constitution to create a scheme of regulation of workplace relations between corporations and their employees.

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[42] Solomon, The Political High Court, pages 142-144.
[43] A. Stewart & G. Williams, Work Choices. What the High Court Said (Leichhardt: The Federation Press, 2007) page 8.

Although it was not the only power utilised to support the *Work Choices Act*, it was the primary power utilised. Thus the *Work Choices Act* did not rely upon the conciliation and arbitration power as its primary focus. Utilising the corporations power to apply its provisions to employees of corporations Australia-wide, the *Work Choices Act* established:

(a) key minimum entitlements relating to basic rates of pay and casual loading;

(b) maximum ordinary hours of work; and

(c) various types of leave and related entitlements,

most of which matters had formerly been dealt with by awards handed down by the Australian Industrial Relations Commission. The Australian Industrial Relations Commission's functions were reduced by the establishment of the Australian Fair Pay Commission to deal with many functions previously performed by the Australian Industrial Relations Commission in relation to setting wages. Further, the *Work Choices Act* provided for workplace agreements between employers and employees or involving unions which are registered organisations. It also dealt with industrial action and bargaining in respect of agreements.

40. The central question in *Work Choices* was the capacity of the corporations power to validate the *Work Choices Act.* Section 51(xx) provides that the Commonwealth may make laws "with respect to", "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."

41. The *Work Choices Act* applied to an employee employed by an "employer", defined to mean "a constitutional corporation, so far as it employs, or usually employs, an individual"[44] that is a corporation to which the corporations power applies.

42. By a 5-2 majority the High Court rejected the plaintiff States and unions challenge to the *Work Choices Act*, and, in particular, upheld the

[44] *Work Choices Act*, s.6(1) definition of "employer".

Commonwealth's reliance on the corporations power. The conciliation and arbitration power was held not to be a law about employees or employment or minimum conditions but a law about the use of conciliation and arbitration to resolve interstate industrial disputes. The corporations power was summarised in *Work Choices* in exactly the same manner as Dixon J had summarised *Engineers* in *Melbourne Corporation*, as a power to legislate with respect to a given subject matter (in *Work Choices,* corporations) which enables the Commonwealth Parliament to make laws which, upon that subject, affect the operations of States and their agencies.

43. The plaintiff States and unions in *Work Choices* argued that the power conferred by the corporations power was restricted to power to regulate dealings of constitutional corporations with persons external to the constitutional corporation, but not with employees, or, seemingly, prospective employees. The majority in *Work Choices* said that the distinction between external and internal relationships of corporations when considering limitations to the corporations power was "an inappropriate and unhelpful distinction".[45] The majority found no support for that distinction in the Convention Debates or drafting history of the corporations power, and said that the distinction was "in any event...unstable".[46] To adopt the distinction would "distract attention from the tasks of construing the constitutional text, identifying the legal and practical operation of the impugned law, and then assessing the sufficiency of the connection between the impugned law and the head of power."[47]

44. To the extent that the plaintiffs said that a test of distinctive character or discriminatory operation ought to be adopted the High Court said that

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[45] *Work Choices* CLR at 121 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; HCA at para. 197 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.
[46] *Work Choices* CLR at 121 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; HCA at para. 197 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.
[47] *Work Choices* CLR at 121 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; HCA at para. 197 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

the provisions of the *Work Choices Act* depended upon the corporations power singling out as the object of statutory command (and in that sense having a discriminatory operation) or being directed to protecting constitutional corporations from conduct intended and likely to cause loss or damage to the corporation. In that sense the *Work Choices Act* was a law which prescribed "norms regulating the relationship between constitutional corporations and their employees, or affecting constitutional corporations"[48] in relation to the prescription of industrial rights and obligations of those corporations and their employees and the means by which they are to conduct their industrial relations, and were therefore laws with respect to constitutional corporations.[49]

45. This broad view of the corporations power followed from the adoption of the views of the minority in *Re Dingjan & Ors; Ex parte Wagner & Anor*[50] where the minority took a broad view of the reach of the corporations power. In particular the High Court in *Work Choices* made reference to the reasoning of Gaudron J, saying that:

> *Her Honour's reasoning proceeded by the following steps. First, the business activities of corporations formed within Australia signify whether they are trading or financial corporations, and the main purpose of the power to legislate with respect to foreign corporations must be directed to the business activities in Australia. Secondly, it follows that the power conferred by s.51(xx) extends 'at the very least' to the business functions and activities of constitutional corporations and to their business relationships. Thirdly, once the second step is accepted, it follows that the power "also extends to the persons by and through whom they carry out those functions and activities and with whom they enter into those relationships.*[51]

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[48] *Work Choices* CLR at 121 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; HCA at para. 198 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

[49] *Work Choices* CLR at 121-122 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; HCA at para. 198 per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ. In so finding the majority of the High Court upheld what was said by Gaudron J in *Re Pacific Coal; ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375; [2000] HCA 34 ("*Pacific Coal*").

[50] (1995) 183 CLR 323 ("*Dingjan*").

[51] *Work Choices* CLR at 114 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at para. 177 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ, citing from Gaudron J's judgment in *Dingjan* CLR at 365.

46. The majority of the High Court in *Work Choices* then went on to specifically adopt the understanding of the corporations power set out by Gaudron J in *Pacific Coal* where Her Honour said:

> *I have no doubt that power conferred by s.51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.* [52]

47. The majority of the High Court in *Work Choices* said "this understanding of the [corporations] power should be adopted."[53] From that it followed, as Gaudron J had said in *Pacific Coal*, "that the legislative power conferred by s.51(xx) 'extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations'."[54]

48. The plaintiff States and unions also submitted that the corporations power should be read down, or restricted in its operation, by the conciliation and arbitration power, which conferred power on the Commonwealth Parliament to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

49. The majority of the High Court in *Work Choices* indicated that the relevant test was whether the conciliation and arbitration power contained a positive prohibition or restriction of a particular or general application that would require the corporations power to be construed as subject to the limitation. Reading the conciliation and arbitration power

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[52] *Pacific Coal* CLR at 375 per Gaudron J; HCA at para. 83 per Gaudron J.
[53] *Work Choices* CLR at 115 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at para. 178 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ.
[54] *Work Choices* CLR at 115 Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at para. 178 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ, citing *Pacific Coal* CLR at 375 per Gaudron J; HCA at para. 83 per Gaudron J.

as a whole the majority concluded that it contained no element of positive prohibition or restriction by reason of which the corporations power was to be construed as subject to such positive prohibition or restriction.[55]

50. The majority in *Work Choices* also indicated that a passage by Gleeson CJ in *Pacific Coal* ought now be accepted and followed.[56] In that passage Gleeson CJ noted that it had often been pointed out that the conciliation and arbitration power did not empower the Commonwealth Parliament to legislate directly to regulate conditions of employment, but found that there was no negative implication, and no prohibition, on the Parliament relying upon some other power conferred by s.51 of the Constitution to legislate in relation to conditions of employment, and because there was no direct prohibition, it could do so indirectly.[57]

51. It was also argued that the conciliation and arbitration power operated to restrict the capacity of Parliament to enact a law which could be characterised as a law with respect to the prevention and settlement of industrial disputes. The majority rejected this contention indicating that the course of authority in the High Court denied to the conciliation and arbitration power a negative implication of exclusivity which would deny the validity of laws with respect to other heads of power which also had the character of laws regulating workplace relations in a fashion other than is required by the conciliation and arbitration power. The High Court noted that it had upheld the validity of laws pertaining to the relationship between employers and maritime employees supported by the trade and commerce power under s.51(i) of the

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[55] *Work Choices* CLR at 127 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at para. 221 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ.
[56] *Work Choices* CLR at 130 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at para. 130 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ.
[57] *Work Choices* CLR at 228 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at para. 130 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ, citing Gleeson CJ in *Pacific Coal* CLR at 359-360; HCA at para. 29, wherein reference was also made to the use of the defence power to regulate conditions of employment in *Pidoto v Victoria* (1943) 68 CLR 87 ("*Pidoto*").

Constitution in *Re Maritime Union of Australia; ex parte CSL Pacific Shipping Inc.*[58] The High Court also noted:

(a) *Pidoto* where the defence power had been used to regulate terms and conditions of employment; and

(b) the use of the power under s.51(v), the broadcasting and telegraph power, to enable the then Conciliation and Arbitration Commission to prevent or settle industrial disputes in respect of the Australian Telecommunications Commission Service under that legislative head of power rather than under the conciliation and arbitration power.[59]

52. The plaintiffs also sought to argue that the legislation upset the "federal balance" because of its potential effect upon the concurrent legislative authority of the States. Noting that no party sought to challenge the approach to constitutional construction in *Engineers*, and in particular the rejection of the doctrines of implied immunities and reserved powers, the High Court said that the federal balance could therefore only apply to that which might affect the continued existence as independent entities of the central government and the State governments separately organised.[60] Seemingly, the plaintiffs' argument failed because they were unable to establish that there was any content to the federal balance argument, and the "plaintiffs' proposition...stops well short of asserting that the favoured construction must be adopted lest the States could no longer operate as separate governments exercising independent functions".[61]

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[58] (2003) 214 CLR 397.
[59] *R v Staples; ex parte Australian Telecommunications Commission* (1980) 143 CLR 614 at 627 per Stephen, Mason and Wilson JJ.
[60] *Work Choices* CLR at 118 and 119-120 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at paras. 190 and 194 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; and see *Melbourne Corporation* at 82 per Dixon J.
[61] *Work Choices* CLR at 120-121 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ; HCA at para. 196 per Gleeson CJ, Gummow, Hayne, Hayden and Crennan JJ.

Work Choices – Effects and the Future

53. *Work Choices* had immediate effects. In particular:

(a) it validated the corporations power as the constitutional foundation of current federal workplace relations laws;[62]

(b) by validating the comprehensive use of another head of power to enact workplace relations laws, and firmly indicating that it is legitimate to do so with respect not only to the corporations power but other heads of power, it has effectively consigned the conciliation and arbitration power to the historical dustbin,[63] unless for political reasons there is seen to be some advantage in its future utilisation; and

(c) the long-standing State conciliation and arbitration systems have been "invalidated", at least "to the extent that they would otherwise apply to employers and employees covered by the federal system".[64]

54. The influence of *Work Choices*, and the reliance upon the corporations power in the area of workplace relations, can also be seen in other events. These include:

(a) the passage of the *Independent Contractors Act, 2006* (Cth) relating to the freedom of independent contractors to enter into services contracts, the prevention of interference with the terms of genuine independent contracting arrangements, and the recognition of independent contracting as a legitimate form of work, primarily commercial,[65] based upon the corporations power;

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[62] Justice G Giudice, "The Constitution and the national industrial relations system" (2007) 81 ALJ 584 at 599 ("Giudice, National Industrial Relations System").
[63] Giudice, National Industrial Relations System at 599.
[64] Giudice, National Industrial Relations System at 599. One need only look at the daily newspaper lists for the hearings of matters by the State Industrial Tribunals pre and post *Work Choices* to see the decimation in workload of those tribunals.
[65] *Independent Contractors Act 2006* (Cth), s.3.

(b) the revival of the debate as to whether there ought to be a single national workplace relations system;[66] and

(c) the revival of debates as to whether there ought to be a single national systems for workplace associated matters such as:

i. workers' compensation;[67] and

ii. occupational health and safety.[68]

55. It is trite to observe that the effect of *Work Choices* goes much further than workplace relations with respect to the scope for the use of the corporations power by the Commonwealth Parliament to enact valid federal legislation.[69]

Fair Work Bill 2008

56. The *Fair Work Bill 2008*[70] encapsulates the current Federal Government's workplace relations policy in proposed legislative form, apart from the abolition of workplace agreements, already achieved

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[66] See, for example, J. Gillard, "Forward with Fairness", Speech to the ALP National Conference, 28 April 2007, www.alp.org.au/media/0407/speir 280.php committing to "a single uniform national system for the private sector"; I. Salusinszky & B. Norington, "Julia Gillard's industrial relations vision draw nearer", The Australian, 13 June 2008.

[67] See *Attorney-General (Vic) v Andrews* (2007) 81 ALJR 729; [2007] HCA 9, where a private sector employer, being a national telecommunications provider, was declared eligible for a licence which enabled it to choose it own insurer, or to self-insure, for workers' compensation payments, thereby removing it from the ambit of the relevant Victorian State legislation which compelled it to obtain workers' compensation insurance from a Victorian statutory authority.

[68] On 4 April 2008, the Minister for Employment and Workplace Relations, the Hon Julia Gillard MP, announced a national review into model Occupational Health and Safety (OHS) Laws to report to the Workplace Relations Ministers' Council on the optimal structure and content of a model OHS act that is capable of being adopted in all jurisdictions: www.nationalohsreview.gov.au/.

[69] That potential was pointed up by Kirby J in *Work Choices* in the following paragraph: "*The States, correctly in my view, pointed to the potential of the Commonwealth's argument, if upheld, radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of the States' principal governmental activities. Such fields include education, where universities, tertiary colleges and a lately expanding cohort of private schools and colleges are already, or may easily become, incorporated. Likewise, in healthcare, where hospitals (public and private), clinics, hospices, pathology providers and medical practices are, or may readily become, incorporated. Similarly, with the privatisation and out-sourcing of activities formerly conducted by State governments, departments or statutory authorities, through corporatised bodies now providing services in town planning, security and protective activities, local transport, energy, environmental protection, aged and disability services, land and water conservation, agricultural activities, corrective services, gaming and racing, sport and recreation services, fisheries and many Aboriginal activities. All of the foregoing fields of regulation might potentially be changed, in whole or in part, from their traditional place as subjects of State law and regulation, to federal legal regulation, through the propounded ambit of the corporations power*": CLR at 224 per Kirby J; HCA at para. 539 per Kirby J.

[70] "*FW Bill*".

under previous legislation. One of the objects of the *FW Bill* is however to ensure that statutory individual employment agreements can never be part of a fair workplace relations system.

57. The *FW Bill* is centred on six key policy areas:

(a) new legislated minimum National Employment Standards;[71]

(b) modern awards;

(c) a new bargaining framework;

(d) expanded unfair dismissal arrangements;

(e) revised provisions concerning industrial action and right of entry; and

(f) a new institutional framework.

NES

58. The NES are intended to provide a safety net of minimum employment standards to apply to all employees covered by the Federal workplace relations system with effect from 1 January 2010. Minimum wages are not included in the NES. It is intended that wages will be provided for in modern awards.

59. There are ten NES. They are:

(a) maximum weekly hours of work;

(b) requests for flexible working arrangements;

(c) parental leave and related entitlements;

(d) annual leave;

(e) personal/carer's leave and compassionate leave;

(f) community service leave;

(g) long service leave;

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[71] "NES".

(h) public holidays;

(i) notice of termination and redundancy pay; and

(j) fair work information statement.

Maximum weekly hours of work

60. The maximum weekly hours of work remain the same for full-time employees: that is 38 ordinary hours of work. For employees under a modern award or enterprise agreement these hours may be averaged. An employee not covered by a modern award or enterprise agreement may agree in writing to average hours over six months or less.

61. The major change is where additional hours worked are averaged they will be subject to reasonableness factors, which will include the averaging provision or arrangement itself.

Requests for flexible working arrangements

62. This is a new entitlement. Parents with, or having responsibility for the care of, a child under school age will be able to request a change in working arrangements to assist with the care of the child. The only basis on which an employer may refuse this request is on reasonable grounds, and the employer's decision is not subject to review.

Parental leave and related entitlements

63. The entitlements provided for are maternity, paternity and adoption leave. The existing standard provisions will be expanded by the NES providing for:

(a) both parents being given the right to separate periods of up to 12 months unpaid parental leave; and

(b) alternatively, one parent having the right to request an additional 12 months leave, with employers only able to refuse on reasonable business grounds.

64. There are two other significant changes:

(a) the NES increases the amount of concurrent leave able to be taken by both parents from one to three weeks; and

(b) extends parental leave entitlements to same sex couples for the first time.

Annual leave

65. The coverage and quantum of annual leave entitlement does not change under the NES. The NES will however provide for modern awards to supplement the NES in a non-detrimental way. This may include allowing employees to take extended periods of annual leave on half pay, or the cashing out of annual leave, subject to a remaining entitlement balance of four weeks.

66. The NES also proposes a simplified system of accrual and credit for payment of annual leave, namely that paid annual leave accrues and is taken on the basis of an employee's ordinary hours of work.

67. Modern awards will be allowed by the NES to provide for additional leave for shift workers and for cashing out of annual leave with appropriate safeguards.

Personal/carer's leave and compassionate leave

68. There is no change to the quantum of entitlement to personal/carer's leave and compassionate leave under the NES.

69. The NES does however:

(a) extend unpaid compassionate leave to casual employees;

(b) remove the cap of 10 days paid carer's leave per year; and

(c) allow employees (other than those not covered by modern awards or enterprise agreements) to cash out personal/carer's leave and compassionate leave, provided a balance of at least 15 days is maintained.

70. The NES also simplifies the rules for the provision of notice and giving of evidence for taking personal/carer's leave and compassionate leave.

Community service leave

71. There is no current minimum national standard entitlement to community service leave.

72. The NES will enable employees to take unpaid leave for community service such as jury service or voluntary emergency management.

73. For full and part-time employees undertaking jury service for a period of up to 10 days the NES contains provisions for employers to provide make-up payments at the base rate of pay for ordinary hours of work.

74. This is an area where, currently, payment for jury service is regulated by State or Territory legislation, or by Federal or State awards and agreements. However, only Victoria and Queensland currently require employers to pay a make-up payment to employees for jury service.

Long service leave

75. There will be no change to long service leave entitlements because under the NES long service leave entitlements will be determined by current State and Territory arrangements.

76. However, the Federal Government intends to work with State and Territory Governments to develop nationally consistent long service leave entitlements, presumably under the NES.

Public holidays

77. The NES continues the entitlement of an employee to be absent on prescribed public holidays.

78. The NES provides for payment of public holiday absences at the base rate of pay for ordinary hours.

79. Under the NES an employer may make a reasonable request to an employee to work on a public holiday, but an employee may refuse to work if the employee has reasonable grounds.

Notice of termination and redundancy pay

80. Under the NES an employer must now provide written notice of termination and redundancy pay. There is also a new entitlement to redundancy pay, depending on the level of continuous service by an employee. This NES does not apply to employees of a small business (one employing less than 15 employees).

81. The entitlement to redundancy pay is on a sliding scale from a minimum of four weeks for an employee with at least one years service to a maximum of 12 weeks for at least 10 years service.

82. NES redundancy entitlements may be increased under the provisions of modern awards.

Fair work information statement

83. From 1 January 2010 employers will be required to give all new employees the Fair Work Australia Information Statement.

84. The Statement must contain information about the following:

(a) the NES;

(b) modern awards;

(c) agreement making;

(d) the right to freedom of association; and

(e) the role of FWA and the Fair Work Ombudsman.

Reasonable business grounds

85. What constitutes "reasonable business grounds" for the refusal of a request under the NES? No definition or guideline is provided in the

Bill. Reasonableness is left to the assessment of the employer in the circumstances of each case.

86. The Explanatory Memorandum does however provide some examples of what are said to be, or might comprise, "reasonable business grounds". These are:

- *the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;*
- *the inability to organise work amongst existing staff; or*
- *the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.*[72]

Modern Awards

87. The award modernisation process is already under way as a consequence of the passage of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* and a request pursuant to s.576C(1) of the *WR Act* for the Australian Industrial Relations Commission to prepare modern awards to take effect from 1 January 2010.

88. The aim of the award modernisation process is to create comprehensive awards which:

(a) are simple to understand and easy to apply;

(b) with the NES, provide a fair minimum safety net of enforceable terms and conditions of employment for employees;

(c) are economically sustainable and promote flexible modern work practices and the efficient and productive performance of work;

(d) are in a form that promotes collective enterprise bargaining; and

(e) result in a certain, stable and sustainable modern award system.[73]

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[72] Explanatory Memorandum, page xii.
[73] *WR Act*, s.576A.

89. Modern awards will not apply to employees earning over $100,000 a year (indexed). These employees will be free to agree to their own pay and conditions without reference to awards. The NES will still apply to these employees.

90. There are presently ten matters that may be dealt with by modern awards. These are:

(a) minimum wages and classifications;

(b) types of employment;

(c) arrangements for when work is performed;

(d) overtime rates;

(e) penalty rates;

(f) annualised wage or salary arrangements;

(g) allowances;

(h) leave related matters;

(i) superannuation; and

(j) procedures for consultation, representation and dispute settlement.

91. The award modernisation request requires the AIRC to include the following matters in modern awards:

(a) an award flexibility term;

(b) a dispute resolution term;

(c) terms providing ordinary hours of work;

(d) terms about rates of pay for piece workers – where necessary;

(e) terms identifying shift workers eligible for five weeks of annual leave under the NES; and

(f) terms facilitating the automatic variation of allowances.

92. Modern awards are not to include terms:

(a) that breach freedom of association provisions;

(b) about right of entry;

(c) that are discriminatory; and

(d) that contain State based differences.

93. Award flexibility clauses are designed to enable employers and employees to agree on flexible arrangements varying how modern awards work in particular workplaces. This is designed to ensure that the needs of employers and employees in those workplaces are met, and to assist employees in balancing work and family responsibilities and to assist employers by improving retention and participation of employees in the work force.

94. Modern awards will be reviewed every four years by FWA, and it is intended that this be the main vehicle for varying modern awards, except as to minimum wages. It is intended that the first review take place in 2014. Such reviews will be guided by criteria taking into account public, social interest and economic aspects when considering whether and how to vary the content of modern awards.

95. Four yearly reviews apart, there will be limited power to vary awards vested in the FWA. Power will exist to vary an award to remove ambiguity, uncertainty and discriminatory terms, and the ability to apply to have an award varied in exceptional circumstances will exist. FWA will also be able to adjust awards for work value reasons.

96. There will be annual minimum wage reviews which require any adjustment to take effect on 1 July each year. Minimum wages in modern awards will take the place of the existing Australian Pay and Classification Scales. It seems clear, and fair to observe, that minimum wages under modern awards will prescribe clearly enforceable legally certain minimum wage levels.

Bargaining Framework

97. Significant changes are made to the collective bargaining framework on the premise that it will be simpler than the current system. The changes include:

    (a) the introduction of good faith bargaining;

    (b) regulation concerning agreement content;

    (c) a single stream of agreement making;

    (d) streamlined processes for agreement approval; and

    (e) facilitated bargaining for the low paid.

Types of Agreement

98. There will be a single stream of collective enterprise agreements able to be made between an employer or employers and employees, with no distinction between union and non-union agreements.

99. A union entitled to represent an employee's industrial interests and which was a bargaining representative for a proposed agreement may give written notification to FWA that it wants to be covered by the agreement. This will give it additional entitlements, including the ability to enforce the agreement.

100. Greenfields' agreements for new enterprises will still be able to be made. However those agreements must be made with one or more unions that would be eligible to represent employees employed in the enterprise.

The content of agreements

101. Enterprise agreements can be made about any one or more of the following:

    (a) matters pertaining to the relationship between an employer or employers and employees covered by the agreement;

(b) matters pertaining to the relationship between an employer or employers and an employee organisation or employee organisations covered by the agreement.

(c) deductions from salary for any purpose authorised by an employee covered by the agreement; and

(d) how the agreement will operate.

102. The intention appears to be that by use of the "matters pertaining" formulation matters that clearly fall within managerial prerogative, but are outside the employer's control or unrelated to employment arrangements are not subject to bargaining (or industrial action). It is also clear that the formulation means to include (where agreed to) matters such as:

(a) union consultation clauses;

(b) leave to attend union training clauses; and

(c) payroll deductions, including deductions for union fees (but not union bargaining fees).

103. Whilst there will be no concept of prohibited content there will be unlawful content, the inclusion of which will preclude the approval of enterprise agreements by the FWA. Unlawful content will include provisions inconsistent with or which seek to override legislative provisions related to freedom of association, unfair dismissal and industrial action. Hence, matters such as:

(a) payment of union bargaining fees;

(b) contracting out of unfair dismissal protection; and

(c) provisions purporting to allow industrial action during the currency of an enterprise agreement,

will be unlawful content precluding approval of the agreement.

104. In addition, enterprise agreements must include:

(a) individual flexibility arrangements;

(b) consultation clauses in relation to major change; and

(c) a procedure for the FWA or another independent person to settle disputes about matters arising under the agreement, and in relation to the NES.

Approval of agreements

105. Enterprise agreements must be lodged with FWA for approval prior to their commencing operation. Once an agreement has received employee approval the role of the FWA is to ensure that:

(a) there is genuine agreement;

(b) the group of employees covered by the agreement was fairly chosen;

(c) the agreement passes the "Better Offer Overall Test";[74]

(d) the agreement contains a nominal expiry date (no later than four years after the date of operation) and a dispute settlement clause;

(e) there are no terms contravening the NES; and

(f) there are no terms containing unlawful content.

Good faith bargaining

106. Where there is a refusal by an employer to bargain collectively with employees the FWA will have power to issue bargaining orders requiring representatives to bargain in good faith.

107. FWA bargaining orders cannot be made in relation to the content of the agreement. Bargaining orders will relate to procedural matters only. These are specifically listed as:

(a) requiring attendance and participation in meetings at reasonable times;

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[74] "BOOT".

(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

(c) responding to proposals made by other bargaining representatives in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives and providing reasons for responses to those proposals; and

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

108. These provisions are designed to improve communication, and therefore reduce the likelihood of industrial action and protracted disputes concerning enterprise bargaining.

109. Bargaining representatives who believe that other bargaining representatives are not negotiating in good faith must give notification to the alleged offender and give a reasonable time for a response. FWA will not be able to make bargaining orders unless this notification process has been complied with.

110. Where FWA considers there have been serious and sustained breaches of bargaining orders by a bargaining representative and those breaches have significantly undermined bargaining for the agreement FWA will be able to make a workplace determination, provided it is satisfied that all other reasonable alternatives to reach agreement have been exhausted and that no agreement would be able to be reached in the foreseeable future.

111. Where bargaining representatives cannot agree regarding agreement content the choices are:

(a) to jointly abandon the bargaining process;

(b) to take protected industrial action; or

(c) jointly seek FWA's assistance in determining a settlement, or assistance through mediation or conciliation.

Facilitated bargaining for the low paid

112. Multi-employer bargaining for low paid employees will be able to be facilitated by the FWA. This is an endeavour to overcome the lack of access to the benefits of collective bargaining for various groups of low paid employees.

113. The FWA will have the ability to:

(a) call compulsory conferences of parties; and

(b) require third party attendance at conferences (including the attendance of head contractors who sometimes determine the terms and conditions of employment to apply).

114. Bargaining representatives may also apply on behalf of employers or employees for a low paid authorisation which will allow the FWA to facilitate bargaining for a specified list of employers.

115. In determining if the proposed bargaining is in the public interest the FWA will consider a range of factors including:

(a) the history of bargaining in the industry concerned;

(b) whether bargaining authorisation will assist in identifying improvements to productivity and service delivery;

(c) the view of employers and employees to be covered by the agreement; and

(d) the extent to which the applicant is prepared to respond reasonably to the needs of an individual employer.

116. The FWA will also be able to make good faith bargaining orders in low paid bargaining negotiations. Protected industrial action will not be available.

117. In the event that the parties are unable to reach agreement, a workplace determination may be sought by the consent of employee representatives and one or more employers. The FWA will also have the capacity to make a workplace determination on the application of only one party. In such cases, the FWA will have to determine whether the arbitration should proceed by having regard to criteria including:

(a) whether the parties have genuinely tried to reach agreement; and

(b) whether making a workplace determination will promote productivity and efficiency in the enterprises concerned.

118. The provisions with respect to enterprise bargaining reflect the fact that collective bargaining at an enterprise level is at the heart of the workplace relations system to be introduced under the new legislation.

119. BOOT will simplify agreement processing. Assessments can be made on the papers against modern awards on a point in time basis to determine whether or not the employees will be better off overall.

Unfair dismissal

120. New qualifying periods have been introduced which must be met before an unfair dismissal claim can be made. For employees of businesses with fewer than 15 employees the employee must have been employed for 12 months before an unfair dismissal claim can be made. For employees in businesses with 15 or more employees the employee must have been employed for 6 months before an unfair dismissal claim can be made.

121. Casual employees may also make unfair dismissal claims, but on the basis of the same qualifying period as permanent employees, provided they have been employed on a regular and systematic basis for the requisite period and had a reasonable expectation of continuing employment by the employer.

122. Certain employees will be excluded from making an unfair dismissal claim, namely:

(a) employees not covered by a modern award or employed under collective agreements whose remuneration exceeds the high income threshold of $100,000 for a full-time employee, indexed from 27 August 2007, and adjusted in July each year in line with annual growth in average weekly ordinary time earnings for full-time adult employees;

(b) employees dismissed due to genuine redundancy;

(c) employees employed under a contract of employment for a specified period of time, for a specified task or for a specified season, where their employment ends on the completion of the specified period, task or season; and

(d) an employee to whom a training agreement applies and whose employment is limited to the duration of that training agreement, where the employment ends on completion of the training agreement.

123. Applications alleging termination was harsh, unjust or unreasonable must be lodged with FWA within seven days of the termination, although FWA will have a discretion to accept late applications in exceptional circumstances.

124. For small businesses there will be a Small Business Fair Dismissal Code, compliance with which will render a dismissal fair.

125. The FWA will act in an informal and inquisitorial manner in determining issues such as whether the employee has completed the minimum qualifying period or whether the employer has complied with the Small Business Fair Dismissal Code. If there are contested facts then the FWA will be required to either hold a conference or conduct a hearing. Conferences will be informal without necessarily requiring

formal written submissions or cross-examination. The FWA will only have full public hearings where it is considered appropriate, and in determining whether it is appropriate will have regard to:

(a) the views of the parties; and

(b) whether a hearing would be the most efficient and effective way to resolve the application.

126. Legal representation will only be allowed where the FWA deems it to be appropriate, otherwise parties will be able to be supported by a non-legal representative or agent.

127. The preferred remedy where a dismissal is unfair will be reinstatement. Pay lost may also be ordered to be repaid where the employee is reinstated. Compensation may be ordered in lieu of reinstatement where it is not in the interests of the employee or the employer's business to reinstate the employee. Compensation will be capped at the lesser of 6 months pay or half the high income threshold.

128. The factors for determining compensation are specified, as follows:

(a) the effect of the order on the viability of the employer's enterprise;

(b) the length of the person's service with the employer;

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed;

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal;

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation;

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that FWA considers relevant.

129. The seven day time limit for applications is designed to promote quick resolution of claims and to increase the feasibility of reinstatement as an option. This is consistent with the intention that the new unfair dismissal scheme be simpler and easier for all parties to use, and that the FWA be able to make binding decisions following conferences, without the need for a formal, public hearing.

130. If the new unfair dismissal provisions work as intended it will result in a scheme which is less adversarial and speedier in its resolution of claims.

131. Some unions and professional bodies have criticized the seven day limit upon the making of applications following dismissal, and suggested that it be increased to 21 days, particularly so as to allow employees to obtain advice. That criticism, with respect, misses the point: an employee will generally know whether or not they think they have been unfairly dismissed. They can lodge the application setting out their reasons, and obtain advice afterwards, if it is required. It also needs to be borne in mind, in any event, that under the pre *Work Choices* unfair dismissal provisions approximately four in 20 applications were withdrawn, 15 in 20 settled, and only one in 20 reached a full hearing.

Industrial action

132. Protected industrial action will be available during negotiations for an enterprise agreement with the requirement to hold a mandatory secret ballot authorising the industrial action. There are pre-conditions to the taking of protected industrial action, namely that:

(a) participants are genuinely trying to reach agreement; and

(b) participants are complying with any good faith bargaining orders in place.

133. There will still be an exception to industrial action for a refusal to work out of a reasonable concern for an employee's health or safety. The reverse onus of proof, requiring the employee to first prove the existence of the reasonable concern for health and safety, has been removed, and the reasonableness of the concern will now be required to be established as a defence to any claim by an employer in relation to industrial action.

134. Applications for secret ballots in relation to protected industrial action will still require the applicants to be genuinely trying to reach an agreement. Protected action ballots can be conducted by either the Australian Electoral Commission or an alternative approved ballot agent. Protected action ballot orders will no longer be able to be stayed on application by an employer. This is designed to reduce delays in the protected action ballot process and prevent parties from having to re-apply for ballot orders that have expired during a challenge.

135. Industrial action is protected if taken within 30 days after the result of the ballot has been declared. The period may be extended by up to 30 days upon application to the FWA by the applicant.

136. Protected action ballot orders will now be subject to civil penalties, not criminal proceedings, and may be enforced by a wider range of persons including FWA inspectors.

137. Applications for protected action ballot orders can be made up to 30 days prior to the nominal expiry date of an enterprise agreement.

138. Employer industrial action, defined as a lock out, will only be protected where the employer locks out employees in response to employee industrial action.

139. The rules with respect to strike pay are altered.

140. For unprotected industrial action employers will be required to withhold four hours pay for any incident of unprotected industrial action up to and including four hours duration. If the unprotected industrial action is longer than four hours, the withholding of pay will be required for the total duration of the action.

141. Where there is protected industrial action and a complete withdrawal of labour employers will be required to withhold pay for the actual period of industrial action taken.

142. Where protected industrial action involves partial work bans or restrictions, employers will have a choice of actions with respect to strike pay. They include:

(a) accepting partial performance by employees and continuing to pay full salary; or

(b) refusing to accept partial performance and (where the agreement or contract allows) standing the employees down until they are prepared to perform all of their duties; or

(c) issuing a "partial work notice" and apportioning pay according to work performed; or

(d) locking out employees.

143. Where an employer decides to accept partial performance and issue a partial work notice the written notice to the employees accepting partial performance must specify the proportion of the employee's wages to be deducted that are reasonably attributable to the work which is the subject of the ban. The deduction relates to the employee's portion of work not performed, not the damage suffered by the employer's business as a consequence of the non-performance of that work.

144. Disputes concerning the proportion of wages that should be deducted will be able to be settled by the FWA.

145. The FWA will also be required to order industrial action to end if it is causing or may cause significant harm to the Australian economy or to the safety or welfare of the community. The FWA will also have discretion to end industrial action and determine a settlement where industrial action is protracted and significant economic harm has been caused to, or is imminent for, both of the bargaining parties.

146. The Minister may terminate industrial action by order where the industrial action is in relation to essential services.

Institutional framework

147. Save for the constitutionally necessary isolation of judicial decision making,[75] the *FW Bill* seeks to streamline the arbitral and administrative processes by the establishment of FWA. Although there will be a separate independent statutory agency, the Office of the Fair Work Ombudsman, headed by a Fair Work Ombudsman, its day to day operations will be practically integrated with FWA. Fair Work inspectors will be appointed by the Fair Work Ombudsman.

148. The Government intends to create new Fair Work divisions of the Federal Court and the Federal Magistrates Court, but the establishment of those divisions is not the subject of the *FW Bill*, and will be subject to later amending legislation.

149. FWA will replace a number of industrial relations bodies, namely:

(a) the Australian Industrial Relations Commission;

(b) the Australian Industrial Registry;

(c) the Australian Fair Pay Commission;

(d) the Workplace Authority;

(e) the Workplace Ombudsman,

[75] *Boilermakers.*

from 1 January 2010, and with effect from 1 February 2010 it will also replace the Australian Building and Construction Commission.

150. FWA's key functions will include:

(a) minimum wage setting and adjustment by a specialist Minimum Wages Panel to be established within FWA;

(b) award variation;

(c) ensuring good faith bargaining;

(d) facilitating multi-employer bargaining for the low paid;

(e) dealing with industrial action;

(f) approval of agreements; and

(g) resolution of disputes and unfair dismissal matters.

151. It is intended that the FWA deal with matters in a more informal way than is presently the case. It is envisaged that in most cases legal representation will be unnecessary. FWA will have the ability to decide matters "on the papers", or in informal conference proceedings. Appeals against single member decisions of the FWA will be by leave, but only if the FWA considers it in the public interest for leave to be granted.

152. Fair Work inspectors will investigate and enforce safety net entitlements and breaches of safety net entitlements, modern awards and enterprise agreements. These will be enforceable before the Federal Court and the Federal Magistrates Court. There will be an extension of the existing small claims mechanism so as to allow the Fair Work division of the Federal Magistrates Court to deal with small claims which will include claims of up to $20,000. In dealing with these claims the Federal Magistrates Court will be able to act informally, will not be bound by formal rules of evidence, and may act without regard to legal technicality and form. The Federal Magistrates Court will have discretion to allow a person to be represented by a lawyer, but the intention of the legislation is that in most cases this will be unnecessary.

The effect on State and Territory Laws

153. There are extensive provisions dealing with State and Territory laws, and also the interaction between State and Territory laws and modern awards and enterprise agreements in the *FW Bill*. In relation to national system employers and their employees the *FW Bill* is intended to cover the workplace relations field by excluding the application of State and Territory industrial laws. This is consistent with the High Court's approach in *Work Choices*. However, the *FW Bill* does not seek to exclude State and Territory laws that impose obligations on national system employers and employees in relation to matters outside the central area of workplace relations.

Exclusion of State and Territory Laws

154. Under the *FW Bill* State and Territory industrial laws are excluded from applying to national system employers and national system employees. State and Territory Industrial laws include general State industrial laws, and for Western Australian purposes, that includes the *Industrial Relations Act, 1979* (WA). Also excluded are State or Territory laws that apply to employment generally and having the main purpose, or one or more main purposes, as follows:

(a) regulating workplace relations (including industrial matters, industrial activity, collective bargaining, industrial disputes and industrial action);

(b) providing for the establishment or enforcement of terms and conditions of employment;

(c) providing for the making and enforcement of agreements (including individual agreements and collective agreements), and other industrial instruments or orders, determining terms and conditions of employment;

(d) prohibiting conduct relating to a person's membership or non-membership of an industrial association;

(e) providing for rights and remedies connected with the termination of employment; or

(f) providing for rights and remedies connected with conduct that adversely affects an employee in her or her employment.

155. These provisions exclude the application to national system employers and national system employees of named State Industrial Relations Acts as well as present or future State or Territory industrial laws within their scope. Additionally, State or Territory laws that:

(a) apply to employment generally and deal with leave, other than long service leave or leave for victims of crime;

(b) provide for State tribunals or courts to make equal remuneration orders, or to vary or set aside unfair contracts; or

(c) provide rights of entry for trade unions,

are excluded.

156. State legislative instruments made under the excluded State or Territory laws, or prescribed by Commonwealth regulation, are also excluded.

157. A law or an Act of a State or Territory applies to employment generally if, subject to constitutional limitations, it applies to all employers and employees in a State or Territory, even though:

(a) for constitutional reasons, the law does not apply to some employers and employees (for example, national system employers); and

(b) some classes of employers and employees are excluded from the law's scope by reference to industry sectors or classifications for example:

(i) the law applies to other persons (for example, independent contractors); or

(ii) an exercise of power under the law does not affect all employers and employees.

State or Territory industrial laws that are not excluded

158. Certain State or Territory laws are not excluded under the *FW Bill*, and it is made clear that they are not part of the field covered, and that they can apply to national system employers and employees. Those saved include State or Territory laws dealing with:

(a) discrimination and/or equal employment opportunities;

(b) laws prescribed by regulations;

(c) non-excluded matters set out; and

(d) rights and remedies incidental to any of these laws.

159. These laws are not however saved to the extent that they, or are contained in, State or Territory industrial laws (for example, the *Industrial Relations Act, 1979* (WA)). Thus, persons terminated for, or subject to adverse treatment, for discriminatory reasons under a State or Territory law relating to equal opportunity can exercise the rights and remedies under the State or Territory equal opportunity legislation.

160. There is also a list of specifically non-excluded matters as follows:

(a) superannuation;

(b) workers' compensation;

(c) occupational health and safety;

(d) matters relating to out-workers;

(e) child labour;

(f) training arrangements, except in relation to terms and conditions of employment to the extent that those terms and conditions are provided for by NES or may be included in a modern award;

(g) long service leave, except in relation to an employee whose long service leave is determined under a federal award or enterprise agreement;

(h) leave for victims of crime;

(i) attendance for service on a jury, or for emergency service duties;

(j) declaration, prescription or substitution of public holidays, except in relation to the rights and obligations of an employee or employer in relation to public holidays;

(k) the following matters relating to provision of essential services or to situations of emergency:

(i) directions to perform work (including to perform work at a particular time or place, or in a particular way); and

(ii) directions not to perform work (including not to perform work at a particular time or place, or in a particular way);

(l) regulation of any of the following:

(i) employee organisations;

(ii) employer organisations; and

(iii) members of employee organisations or of employer organisations;

(m) workplace surveillance;

(n) business trading hours;

(o) some claims for enforcement of contracts of employment; and

(p) any other matters prescribed by regulations.

Modern awards and enterprise agreements

161. The *FW Bill* provides that modern awards or enterprise agreements will prevail over State or Territory laws to the extent of any inconsistency. State or Territory law cannot operate in relation to persons in their capacities as national or system employers and employees to the extent that it prescribes rights and obligations that are inconsistent with the rights and obligations set out in a modern award or enterprise agreement. However, modern awards can only include terms and conditions required to provide a minimum safety net of terms and conditions of employment and enterprise agreements can only contain permitted matters.

162. Modern awards or enterprise agreements are subject to any saved State or Territory law, as well as any State or Territory laws prescribed by regulations. Thus, modern awards or enterprise agreements cannot diminish, but may supplement, rights and obligations under those laws. Regulations may prescribe State or Territory laws to which modern awards or enterprise agreements are not subject.

163. Where no express provision is made about the relationship between the *FW Bill* and State or Territory laws and instruments, other provisions of the *FW Bill* might nevertheless, by implication, leave no room for the operation of a State or Territory law or instrument; and, the existence of the inconsistency provisions does not affect the drawing of such an implication, so that the provisions of the *FW Bill* are not a complete statement of the circumstances in which laws of the States or Territories or instruments made under those laws will be excluded.

Comment re provisions concerning interaction with State and Territory laws

164. The provisions of the *FW Bill* dealing with the interaction with State and Territory laws are similar to the equivalent provisions contained in the

Work Choices Act[76]. The constitutional basis for these provisions in the *FW Bill* is the same as that under the *Work Choices Act*, namely the corporations power, and the legislative extent of the exercise of the corporations power - that is to employees of employers who are constitutional corporations - is also the same as that under the *Work Choices Act*. It will be limited only to the extent to which, as a matter of fact, any corporation does not constitute a constitutional corporation.[77] The limiting effect of the requirement to be a constitutional corporation is likely to be minimal. Thus, the effects of the provisions in the *FW Bill* dealing with State and Territory laws is that the States and Territories will be left to deal with workplace relations for the less significant private employers: minor corporations and unincorporated bodies such as partnerships and sole traders, as well as the most senior parts of the State public sectors.

Conclusion

165. The provisions of the *FW Bill* represent a further expansion of federal jurisdiction over workplace relations. Conceptually, the constitutional and legislative basis for the *FW Bill* is the same as that underpinning the *Work Choices Act*. Whilst the thrust of the *FW Bill* is altogether different: moving the system from a focus on individual statutory employment contracts to collective bargaining and collective enterprise agreements, the constitutional basis underpinning the relevant provisions remains the corporations power as it was with the *Work Choices Act*.

166. The *FW Bill* also expands of federal coverage of particular areas of workplace relations traditionally covered by the States, and in particular:

    (a) many of the areas of the NES are areas traditionally covered by the States, or to the extent that they were parts of earlier

[76] See ss.16-18 of the *WR Act*.
[77] See *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* [2008] FCA 1268.

minimum employment standards under federal workplace relations legislation, they have been further expanded;

(b) the provision for redundancy payments; and

(c) the extension of unfair dismissal provisions.

167. Viewed as part of a legal and historical continuum, the *FW Bill* is a part of the continuing expansion of federal jurisdiction over workplace relations, underpinned by the watershed constitutional judgments in *Engineers* and *Work Choices.*