

The Australian Constitution and the Shaping of our Federal and State Labour Laws¹

**By
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Beyond the Centenaries, Rethinking Labour Relations
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Good morning ladies and gentlemen. It is indeed a great honour to have been asked to open this 46th annual convention of the Industrial Relations Society of New South Wales. As a member of the Industrial Relations Society, first in Victoria and now in New South Wales, it is my pleasure to support this society which has always upheld industrial relations teaching, research and scholarship.

The Australian Constitution which embodies our federal compact is of central importance because it sets forth the manner in which our parliaments, courts and cabinets operate within the Australian polity. To this end, our Constitution establishes our federal form of Government, and its first three chapters set forth the Commonwealth's legislative, executive and judicial powers respectively.

This morning, I wish to focus upon the manner in which the Constitution divides up the power to make laws between our federal, State and Territory governments because an understanding of this legislative division of powers is essential in order to fully comprehend the operation of our federal and State labour laws. Put briefly, our Constitution divides up the legislative power by specifying a list of subjects on which the Australian Parliament may enact laws. Any subjects which fall outside this list are exclusively available to the State parliaments. The major subjects on which the Australian Parliament may enact laws are set out in section 51 of the Constitution. However, the subjects enumerated in section 51 are not exclusively within the domain of the Australian Parliament. Rather, they are concurrent in the sense that the State parliaments may make laws on any of the section 51 subjects, but by virtue of section 109 of the Constitution, any federal laws will trump any existing State Laws. In constitutional parlance, a federal law will override any inconsistent State laws and the High Court of Australia has given a broad interpretation to inconsistency in its jurisprudence.

We are all very aware of the nature of the legislative divide between the Commonwealth and the States. We know that marriage, divorce, immigration and taxation are subjects on which the Commonwealth has enacted laws, and we also appreciate that the rules of the road, the buying and selling of property and the general criminal laws are within the legislative provinces of the States. However, I suspect that we are far less aware of the manner in which the very wording of the specified federal legislative powers actually shape the laws enacted in reliance on these powers. Put briefly, the listed federal legislative powers can be likened to a form of DNA. Just as we pass on our DNA to our children, the words of every specified

¹ This paper is dedicated to my friend and mentor Professor Emeritus Harry Glasbeek whose 1970 industrial law classes at Melbourne's Monash University charted my life's course as a labour law teacher and writer.

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head of federal power shape the laws enacted in reliance on it. As I shall more fully explain in a few moments, the wording of the labour power which is set out in section 51 of the Constitution, has shaped federal labour law by its focus on industrial disputes and by its requirement that their settlement must occur either through conciliation or arbitration. My argument this morning is that the enumerated heads of legislative power which are chosen by the current Government to expand its labour law jurisdiction after July this year, will have consequences on the shape and nature of these new federal labour laws. In particular, if the Howard Government seeks to establish one national labour law regime through primarily relying upon the corporations power, this will in the fullness of time, inevitably lead to labour law becoming a sub-set of corporations law. In truth, we will be witnesses to the corporatisation of our labour laws.

All of us in this room know that for the past century the legislative powers to enact labour laws have been divided between the Commonwealth and State parliaments, and this is why we currently have six labour law regimes operating in Australia. This divided labour law jurisdiction has flowed from the fact that the labour power which is set out in section 51(xxxv) of the Constitution only gives the Australian Parliament limited powers over labour relations, and as presently interpreted by the High Court of Australia the power cannot regulate Australia's entire workforce. Section 51(xxxv) of the Constitution, enables the federal Parliament to enact laws with respect to "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". Shortly put, the labour power limits the Commonwealth's legislative powers to the establishment of machinery possessing powers of conciliation and arbitration to prevent and to settle interstate labour disputes. As the labour power has been the major power on which the Australian Parliament has relied when enacting its labour laws, the jurisdiction over labour law has been necessarily a divided one because industrial disputes which are not interstate in character come within the realms of the States. It is important to appreciate that for most of the last century, the High Court of Australia interpreted the labour power whereby industrial disputes were confined to disputes where the employees and employers were engaged in an industry. This notion of industry connoted either manual labour or some connection to an industrial process. This meant that large areas of white collar employment, as well as school, college and university teaching could not come within federal jurisdiction. It was not until 1983 that the High Court of Australia overturned this unnecessarily restrictive interpretation of the labour power in the Australian Social Welfare Union Case. In large part, this is why for the first 90 years of the twentieth century the Australian Parliament was content to share with the States the regulation of labour relations.

What was perhaps not so apparent in the first 90 years of the previous century when the federal and State labour regimes were remarkably similar, was the manner in which the labour power did shape labour law regulation in our nation. When established in the early 1900's, the federal and most of the State systems had as their centrepieces courts of compulsory conciliation and arbitration which were later replaced by industrial relations commissions. Either industrial disputes were initiated or demands were made by trade unions which were resolved when conciliation failed by final and binding interest arbitration. The labour courts and tribunals used award regulation mainly on an industry basis to bestow wage rates and terms and conditions of employment on employees. After 1990 when our federal and State labour law mechanisms began to diverge, the manner by which federal labour laws had been shaped by the words of the labour power became clearer. The labour power requires the existence of an industrial dispute, or at the very least a situation which might give rise to an industrial dispute. Labour peace must be achieved by agreement, perhaps after conciliation, and independent arbitration is the only method of ending deadlocks. Furthermore, the 1956

and 1957 decisions of the High Court of Australia and the Privy Council in the Boiler-Makers Case meant that under federal labour law arbitral and judicial functions had to be undertaken by separate institutions. In brief, the Boiler-Makers rulings prohibited federal courts which exercise federal judicial powers from at one and the same time exercising arbitral powers of an administrative character. However, it is essential to appreciate that the focus of the labour power on securing industrial peace has always meant that the terms and conditions of employment of employees are at its very heart.

1. Expanding Federal Labour Law Jurisdiction

Over the last one hundred years, but more especially in the last decade and a half, the Australian Parliament has endeavoured to increase the breadth of its labour law powers as embodied in the labour power by relying on other heads of constitutional power. For example, the trade and commerce power has long been used to enact labour laws covering sailors, waterside workers and airline crews. These special labour laws were constitutionally supported because the terms and conditions of these employees and employers was regarded as an aspect of interstate and overseas trade and commerce. In these areas of regulation, the trade and commerce power was used as an ancillary power because it could enable tribunal regulation without the jurisdictional requirement of an interstate labour dispute and it still supports regulation of these industries pursuant to the Workplace Relations Act 1996. The trade and commerce power when used in this manner, did not alter the shape of our federal labour laws which remained focused upon the resolution of group contests through conciliation and arbitration which lead to award regulation.

In 1993, the Keating Labour Government sought to dramatically broaden its labour law powers by utilising its power to make laws with respect to external affairs. This head of power enables the Commonwealth Parliament to legislate about the subject-matter of a treaty or convention which has been signed or ratified by the Australian Government. Prime Minister Keating called in aid various International Labour Organisation conventions as a means of expanding federal labour law jurisdiction. The Keating Government chose to rely upon the external affairs power because it could use International Labour Organisation conventions to reshape federal labour law. After all, these conventions were collectivist in nature, they strictly adhere to the principal of trade union participation in labour relations matters and they would enhance various collectivist aspects of federal labour law. As is well known, in order to establish an unfair dismissal regime which could potentially cover the Australian workforce, the Keating Government chose the International Labour Organisation 1982 Termination of Employment Convention on which to base these laws. However, this convention which was designed to make it more difficult for employers to shed labour during economic downturns, was a wholly inappropriate vehicle for these laws which in the end were unsuited and unsatisfactory for Australia. In my view, the community dissatisfaction with these unfair dismissal laws was one of the reasons why the Keating Government lost office in March 1996.

In late 1996, the Howard Government relied on the reference of powers clause to take over the vast bulk of the labour law regime of the State of Victoria. Under the reference of powers provision which is set out in section 51(xxxvii) of the Constitution, the Commonwealth Parliament may legislate on the subject-matter of any powers which a State has referred to it. In this instance, the Kennett Victorian Government referred the vast bulk of its labour law private sector powers to the Commonwealth Parliament. In this instance, however, the Howard Government enacted separate laws to govern these Victorian workers which had been brought within its realm, and actually specified minimum terms and conditions of

employment which were less favourable than those which federal labour law bestowed on employees under general award regulation. Although this two tiered arrangement was done away with by January this year, this ill-advised strategy was, I venture to think, one of the reasons why the Kennett Government of Victoria lost office in late 1999. I would be surprised if any State decided to proceed down this path on its own in the near future, unless it could ensure that the federal Parliament would not in any way differentiate between workers under its general labour laws and these newly acquired employees. However, references of powers are not uncommon, and currently references of powers by the States support the federal Corporations Act 2001 together with aspects of the federal family law regime. If used as an aspect of a cooperative federal and State plan to unify aspects of labour law, such references of powers would be a useful tool.

As the corporations power is on everyone's lips, it is worthy of a more detailed examination. The power of the Australian Parliament to enact laws with respect to "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth" which is set out in section 51(xx) of the Constitution has also been used to increase federal labour law power. In 1971, the High Court of Australia revised its previously narrow interpretation of the corporations power and decided that it would support laws directly applying to corporations and to persons engaging in conduct with corporations. In 1977, the Fraser Government used this power to outlaw trade union secondary boycott activities against corporations. In 1993, the Keating Government used the corporations power as an ancillary measure to establish non-union collective agreements known as enterprise flexibility agreements. It was obliged to use the corporations power because the labour power could not support such non-union agreements which are not related to industrial disputes initiated by federally registered trade unions. As the labour power remained at centre stage, this 1993 use of the corporations power did not significantly reshape federal labour law.

Finally, in 1996 the Howard Government made extensive use of the corporations power to uphold aspects of the Workplace Relations Act 1996. The corporations power currently upholds laws granting remedies for unfair dismissals by incorporated employers, enabling incorporated employers to enter into collective agreements either with or without trade unions and which permit incorporated employers to make statutory agreements between employers and individual employees which are known as Australian workplace agreements. While the corporations power has been extensively used for these purposes since 1996, the labour power still plays an important role in upholding our labour laws, in the main because it validates the laws which empower the Australian Industrial Relations Commission to promulgate minimum wages and other minimum terms and conditions of employment which make up its award-based employee safety net. I venture to think, however, that one of the reasons why the Howard Government moved significant aspects of labour regulation from the labour power to the corporations power was because of the manner in which the labour power has shaped our labour laws. After all, the labour power requires for all practical purposes the involvement of trade unions in settling labour disputes, whereas the Howard Government wished to reshape federal labour law by emphasizing individual bargaining and direct bargaining between employers and their employees without intervention from trade unions.

2. One National Labour Law System

There are strong arguments in favour of the establishment of one truly national labour law regime for Australia with its relatively small population. Suffice to say that the pressures of economic globalization coupled with advances in information technology, mean that we

should work towards developing one national labour law regime in the next decade. However, the problems and inconveniences in having federal and State labour law mechanisms operating simultaneously, is not a major handicap which is slowing down labour productivity. I venture to believe that the immediate dissolution of our dual labour law mechanisms is not of such an urgent nature which would require the use by our federal Parliament of extraordinary legislative and constitutional measures. After all, under our current federal labour laws, any employers which are trading or financial or foreign corporations, that is the vast bulk of incorporated employers, may already enter into union and non-union certified agreements or conclude Australian workplace agreements with their employees. The fact that very many incorporated employers still choose to operate under State labour laws, puts the lie to any urgency in this matter.

There is much life left in the labour power which can be utilized when developing a cooperative national labour law system. In the Industrial Relations Act Case of 1996, for example, the High Court of Australia upheld enterprise bargaining between single business employers and trade unions pursuant to the labour power. In 2000, the High Court of Australia handed down its decision in the Pacific Coal Case. This decision upheld the Howard Government's award simplification process through a flexible and pragmatic reading of the labour power. In my view, what is required is cooperation between the federal, State and Territory governments to enact one system for all Australian employees. Therefore, federal and State cooperation is by far the best method of bringing about a truly national labour law. Unfortunately, insufficient efforts have been made by either level of government on this front and Australian employees and business enterprises deserve much stronger efforts in this regard from our politicians.

3. The Corporatisation of Australian Labour Law

Instead of adopting a cooperative approach with the States to create a truly national labour law regime, it is my surmisation that some in the Howard Government wish to "go it alone" and to use the corporations power to enact a national set of labour laws which would override the labour laws of the States at least with respect to incorporated employers. Put another way, an extensive use of the corporations power could cover approximately three quarters of the private sector workforce. From my reading of the jurisprudence of both the High Court of Australia and the Federal Court of Australia, the corporations power would support national laws governing certified agreements, protected and unprotected industrial action, Australian workplace agreements, unfair dismissals, minimum wage rates and minimum terms and conditions of employment, at least for incorporated employers.

If the federal Government decided to travel down this road, the major head of constitutional power upholding these laws would be the corporations power. The labour power would play a speedily diminishing ancillary role in such a regime. Just as the words of the labour power shaped twentieth century federal labour law, it would be the words of the corporations power which would inevitably shape the labour laws of this current century. Within a relatively short space of time, Australian labour law would become little more than a sub-set of corporations law, and this will inevitably lead to the corporatisation of Australian labour law.

It may be conceded by some in the audience that the detailed prescription which is to be found in the words of the labour power concerning the prevention and settlement of industrial disputes etc has shaped federal labour law. However, they may ask how can the broad words of the corporations power shape the laws which rely upon it for their validity. In other words, how can the words "Foreign corporations, and trading or financial

corporations formed within the limits of the Commonwealth", shape a host of enacted laws and any forthcoming labour laws. My answer to this question lies in the very nature of the corporations power. Most of the enumerated heads of legislative power in the Constitution are purposive in nature. For example, the Australian Parliament may enact legislation for the purposes of trade and commerce, for the purposes of taxation, for the purposes of the defence of Australia, for the purposes of preventing and settling interstate industrial disputes etc. However, the corporations power is not purposive in nature. Rather, the corporations power may more aptly be described as an object power because for a law to be valid it must fasten upon the object of the corporation. Put another way, the corporations power does not permit the Australian Parliament to enact laws for the purposes of corporations generally. According to the case law, the corporations power will only support laws which apply directly to corporations, or to persons and bodies who engage in conduct with corporations. In other words, a law which merely prescribed a minimum wage for employees per se would not be a valid law under the corporations power because the law is of general application. On the other hand, a law which prescribed a minimum wage which incorporated employers were bound to pay their employees would be valid because it specifically related to the obligations of corporations and to the rights of their employees who engage in conduct with corporations through their employment relationship.

Last month in the Kingsley Laffer lecture which I delivered at the University of Sydney, I used the following playful example to illustrate how the corporations power shapes laws enacted in reliance upon it. Suppose, I said, that section 51 of the Constitution contained a head of legislative power enabling the federal Parliament to make laws with respect to "Men". We might call this power the men's' power which like the corporations power would be an object power. This power would, I suggested, uphold laws enabling men and women to enter into, or to dissolve marriages with one another. These laws would be valid because they related to men specifically, and they would be valid with respect to women because in marrying and divorcing men, women would be engaging in conduct with men. As I further explained in the Kingsley Laffer lecture, we would find that just as marital laws based on a men's' power would be unbalanced in nature, so in time would labour laws be unbalanced in a similar manner.

To some this example may appear to be frivolous, however, I have used it to make a serious point which is that laws based upon the corporations power will be centred around corporations to the detriment of flesh and blood persons who interact with corporations. Wholesome labour laws seek to balance the rights, duties and obligations of employers and employees as equal legal actors in the processes of work and production. However, general labour laws of broad application which would be required to found a national labour regime, which were enacted in reliance upon the corporations power could not for long maintain this balance between employers and employees. In the fullness of time, these labour laws will become little more than a sub-set of corporations law because inevitably they will fasten upon the economic needs of corporations and their employees will be viewed as but one aspect of the productive process in our globalized economy.

In conclusion, may I leave you with the following thought. Economic globalization has increased the fragility of nation states like Australia because they are more vulnerable to the economic pressures of trans-national capital than was previously the case. In truth, nation states like Australia have to share economic power with corporations and especially with trans-national corporations. As government coffers shrink in size through cuts in direct and indirect taxation, the social slack is being taken up by the corporate sector. Not only are corporations engaged in government projects concerning construction and related industries

where public private partnerships have mushroomed, but in traditional public sectors like the management of unemployment and social security, to the running of prisons including our immigration detention centres. If corporate power is further unleashed owing to the reshaping of our labour laws into the image of corporate economic productivity, the corporate sector will obtain a huge increase in power and influence to the great detriment of the Australian nation and especially to the long-term disadvantage of working women and men.

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