Chapter 2

Creating a national workplace relations framework

2.1 Provisions for the transition from a federal to a national system of workplace regulation is perhaps the most significant feature of the Work Choices Bill. The bill will move Australia towards a national workplace relations system which is vital if Australia is to maintain its current level of economic prosperity. For over 100 years the federal framework for workplace relations has been based on the conciliation and arbitration power of the Australian Constitution.[1] The Commonwealth Workplace Relations Act is primarily, but not exclusively, based on section 51 (xxxv) of the Constitution, which provides that:

> The Parliament shall … have power to make laws for the peace, order, and good government of the Commonwealth with respect to: … conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

2.2 The inclusion of the conciliation and arbitration power was provoked by bitter memories of the strikes of the early 1890s. It was argued that this conflict, extending as it did beyond the borders of a single state, required the exercise of Commonwealth laws for protection of the national interest. Agreement, by a narrow majority, to the use of compulsory conciliation and arbitration powers to prevent and settle future conflict, and avoid its disruptive effects, resulted in the form of words contained in section 51 (xxxv).

2.3 By the time of federation, all states had established conciliation and arbitration tribunals or wages boards to deal with industrial disputes. However, delegates to the Constitutional Conventions of the 1890s considered that the states were poorly equipped to deal with interstate disputes, such as those that had occurred during the 1890s. It was felt that the Commonwealth should establish machinery to deal with such matters, subject to limitations, and without prejudice to the powers to be held concurrently by the states. Thus, the wording of the provision has been interpreted by the High Court to impose the following limitations:

- the Commonwealth Parliament cannot directly legislate on workplace relations, but can provide for third party tribunals;
- the tribunals set up by the Commonwealth can only use particular mechanisms (conciliation and arbitration) for particular resolutions

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1 Apart from quoted sources, this chapter has been informed by a number of published sources, most notably *Breaking the Gridlock: Towards a Simpler National Workplace Relations System*, Commonwealth of Australia, October 2000, Discussion Papers 1-3, available at http://www.workplace.gov.au/NR/rdonlyres/48BB420E-C218-4676-B713-98C2C2030DA0/0/breakingthegridlock_casechangecase.pdf

(prevention and settlement) to particular types of disputes (which must be both 'industrial' and 'interstate' in character); and

- the Commonwealth's power is not comprehensive, and overlaps with that of the states.[2]

2.4 The limitations inherent in the provision have resulted in a number of undesirable outcomes, insofar as the Commonwealth is obliged to legislate alongside the states, giving no jurisdiction an opportunity to provide for a comprehensive, efficient and integrated system. One of the primary drawbacks has been the difficulty in ensuring widespread and effective safety net coverage and compliance.

Inconsistency of result

2.5 Concurrent powers have resulted in employees coming within either the Commonwealth or state jurisdiction in regard to awards and dispute resolution processes. Employees and employers can change from one award jurisdiction to another, if it is to the advantage of either. Problems arising from a multiplicity of awards are compounded by the multiplicity of systems and tribunals. This has meant that the field of workplace relations in Australia has been divided between interstate matters, which are the province of the Commonwealth, and intrastate matters, which by and large cannot be dealt with by the Commonwealth and must be dealt with by each state

2.6 Unsurprisingly, the existence of more than one body regulating the same broad subject matter is likely to bring about different outcomes. This situation can result from the nature of the submissions made, the guiding principles used or the perceptions and values of different parties, both presiding over and appearing before the body. The different outcomes can result in workplace relations difficulties, most notably unequal treatment of those appearing before the body, or at least the impression of this, and declining confidence in the overall system.

2.7 The practical effect of this disharmony between systems is that, within one workplace, it is not uncommon to find federal awards applying to some employees while state legislation and industrial awards apply to other workers. This creates added administrative expense for the employer, and makes the propagation of a united and harmonious workplace much more difficult to achieve, which in turn is harmful to productivity.

Duplication, complexity and cost

2.8 The obverse of this is the duplication and complexity involved in the operation of multi-jurisdictional systems. There are currently over 130 pieces of industrial legislation and almost 4000 awards across state and federal jurisdictions. It is therefore self evident that the maintenance of dual systems involves additional costs

2 George Williams, *Labour Law and the Constitution*, The Federation Press, Sydney, 1998, p.43

for taxpayers. According to figures provided by the Department of Employment and Workplace Relations, the various state industrial relations systems cost the following amounts to maintain per year:

NSW:	$39,146,000	(2004/05)
Qld:	$33,228,000	(2002/03)
WA:	$18,162,000	(2002/03)
SA:	$16,351,000	(2003/04)
Tas:	$2,075,000	(2002/03)

Based on these figures, around $109,000,000 per year is spent on state systems which replicate the role of the federal system.

2.9 Businesses face higher costs where they have to deal with multiple jurisdictions. Duplication and overlap adds to complexity and confusion. This undermines the effectiveness of the award safety net and creates difficulties for agreement making.

2.10 Determining which award applies to which employee requires an employer to be able to determine which of a number of overlapping factors prevails in law. These factors can include:

- geographic location of employment;
- class of occupation of the employee;
- industry basis of the employment;
- whether or not the employer has been roped into a federal award, for all or part of their workforce;[3]
- whether there is an applicable state or territory common rule award; and
- whether the employer is a member of a relevant employer association.

2.11 The conciliation and arbitration power is also built on the outdated notion that employers and employees must be in dispute before they can work out arrangements that best suit them. It creates non-existent disputes by legal fictions, in order to then solve them. For instance, the conciliation and arbitration power requires that there be a dispute (or at least a potential dispute) to settle, and this had led the parties to contrive disputes (known as 'paper disputes') in order to come within the federal system.

2.12 Professor Andrew Stewart has described the consequences in this way:

> …while the federal award system has assumed a much greater coverage than might have been expected by the framers of the Arbitration power, its

3 'Roping in' involves an order being made by the Australian Industrial Relations Commission with the express purpose of extending the coverage of an existing award. A roping in award may be a mirror image of the original award, or may vary the original award by adding to the list of respondents

> reach will always be limited if based only on that power. Since interstate disputes rarely occur spontaneously, federal award coverage is constantly dependent on unions manufacturing appropriate paper disputes. With some unions content to have state awards for some or all of the occupations or industries they cover, the result is a patchwork of regulation which causes particular inconvenience for employers who have workers covered by both federal and state instruments.[4]

2.13 Critically, the concept of arbitration, which is central to this power, requires that there be *identified parties* to a dispute. The practical consequence of this is that it has not been possible to make Commonwealth 'common rule' awards—awards which would bind every employer in an industry, whether named in the award or not. The inability to make common rule awards under the conciliation and arbitration power has created a range of significant problems. Most seriously, it has compromised the availability of safety net arrangements, and has also necessitated costly roping-in exercises, which can be bewildering to those unfamiliar with the system.

2.14 The existence of Commonwealth and state systems inevitably raises jurisdictional issues, which can be costly and difficult to resolve, and can result in delays in handling the real issues in dispute. The operation of more than one tribunal can also encourage 'forum shopping', where parties seek to gain from another tribunal what they have been denied or refused in their traditional area of industrial coverage. Such moves are also commonly associated with costly legal argument about jurisdictional issues.

2.15 Despite the progress that has been made, the workplace relations system remains very complex and further reform to make the system simpler, more accessible and more effective is hamstrung by reliance on the conciliation and arbitration power. Reliance on that power prevents the achievement of a more coherent national framework of laws. It also limits the Commonwealth government's ability to deliver an effective safety net with broader coverage. It is for this reason that the government relies predominantly on the corporations power as the basis for the legislation currently under examination by this committee.

The corporations power

2.16 In the *Pacific Coal* case Gaudron J said that she had 'no doubt' that the corporations power:

> … 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. [5]

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4 Professor Andrew Stewart, 'Federal Labour Law and New Uses for the Corporations Power', in ACIRRT Working Paper Series, and in papers from Industrial Relations Forum Proceedings, Business Council of Australia, Melbourne, 17 October 2000, p.32

5 *Re Pacific Coal; Ex Parte CFMEU* (2000) 203 CLR 346, [at 83]

2.17 In the *Electrolux* case, Kirby J (in dissent) referred to the capacity of the corporations power to provide a basis for regulating workplace relations under the current Workplace Relations Act, and said:

> Even more important is the signal given in s.170LI(1) that the relationship in question is one between an employee and an 'employer who is a constitutional corporation'. This makes it clear that the Parliament had decided to cut the Act loose from the controversies arising in the past from implied limitations considered inherent in the notions of an 'industrial dispute', as that phrase is used in s 51 (xxxv) of the Constitution, and to substitute new and additional reliance on the relationships of an employee with a corporation qualifying as envisaged by s 51 (xx) of the Constitution. In a stroke, a new constitutional foundation for federal regulation is created. It is no longer necessary to read into the resulting employment 'relationship' limitations, broad or narrow, adopted for constitutional reasons in past cases such as *Portus* and *Re Alcan*. The Parliament has thus embraced a new constitutional paradigm.[6]

2.18 Under the Government's proposal, it was estimated that around 800 000 employees not currently regulated by the federal system will be brought within an award system for the first time, and as many as 85 per cent of all employees will be covered by the national system. It was estimated by the Department of Employment and Workplace Relations in 2000, that under a system as proposed in the bill before the committee, the federal jurisdiction could expand from an estimated 30 per cent of employees to an estimated 80 per cent, or about 1.9 million employees, with the jurisdiction of states likely to contract to about 20 per cent (466 000 employees). It is estimated that South Australia would see 79 per cent of all employees the federal system, while about 76 per cent of Queensland employees, 80 per cent of Western Australian employees and 72 per cent of Tasmanian employees would, it was estimated, be covered by the new system.[7]

2.19 It was further estimated that over 90 per cent of employees in the industries of mining, manufacturing, wholesale trade, transport and storage, communication services, finance and insurance, and property and business services could be drawn into the proposed system. The new system will cover an estimated 6.1 million of Australia's 7.15 million (non-farm) employees. This is 85 per cent of the total population of (non-farm) employees. Of this, around 800,000 will be employees who are currently award or agreement free. This will leave approximately 15 per cent of employees under one of the remaining state jurisdictions, with the majority of those being in New South Wales and Queensland.[8]

2.20 Of course it would be open to states to follow the lead of Victoria and refer workplace relations powers to the Commonwealth, enabling the Commonwealth to

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6 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 209 [at 216]

7 *Breaking the Gridlock*, op cit.

8 See also Department of Employment and Workplace Relations, *Submission* 166, p.12

include all businesses and employees in the state in the one national system.[9] This would have the obvious effect of amplifying the benefits of a national system which have been outlined in this section. The committee notes that the transfer of state powers in Victoria by the Kennett Liberal Government was not reversed by the Labor Government which was elected in 2001. The resistance of state governments to the national system, and their apparent determination to challenge the legislation in the High Court probably owes more to the machinations of state political organisations than to anything else.

2.21 Importantly, the new national system will cover all employees of constitutional corporations, based on the status of the employer, rather than on the fact that an interstate dispute, actual or contrived, has arisen between an employer and employee. Instead, it will depend on the legal character of the employer, as a constitutional corporation, and the relationship of employees with the corporation. As a result after the transitional period employers and employees will, under the legislation, be located in either the federal system (corporations), or in the state system (non-corporations). A summary of the effect of the bill on both incorporated and unincorporated employers operating a under a variety of employment arrangements is contained at Appendix 6.

2.22 Another important benefit of a system based on the corporations power is in the capacity of the Commonwealth to legislate directly about minimum terms and conditions of employment. Essentially, the High Court has found that under the conciliation and arbitration power, the Commonwealth can only establish tribunals to arbitrate on terms and conditions between the parties. The Commonwealth cannot itself establish such conditions using that head of power. That function has to be performed by a third party. The corporations power is different. Using that head of power, the Commonwealth parliament will, under the legislation, directly legislate for the setting by the Australian Fair Pay Commission of minimum and award wages and the conditions of employment of all employees of constitutional corporations through the Australian Fair Pay and Conditions Standard.

2.23 The concepts of paper disputes, roping in and the ambit of a dispute, so bewildering to many employers and employees (especially in small business), will be rendered obsolete. The problems associated with the need to have identified parties to a dispute (and thus to an award) will disappear. In the longer term, awards will be capable of being made on a common rule basis. That is, they could be made to operate, not so they bound a list of thousands of employers and the thousands of employer members of a handful of employer associations, but so they bound all employers in an industry.

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9 At least one witness considered this a likely possibility. See, for example, Mr Peter Hendy, *Committee Hansard*, 15 November 2005, p.49

The question of constitutionality

2.24 Use of the corporations power in the industrial arena is now largely uncontentious and was approved by the High Court in connection with industrial matters in the 1990s in two leading cases involving challenges to the (then) Industrial Relations Act.

2.25 The *Workplace Relations Act 1996* relies on the corporations power and the 'constitutional corporation' concept, including in relation to freedom of association, the making of certified agreements and the institution of unfair dismissal claims.

2.26 The corporations power was used to underpin Enterprise Flexibility Agreements (EFAs) in the *Industrial Relations Reform Act 1993*. This move was supported by the ACTU, who also supported the Keating government's expansion of enterprise bargaining in this way, with the caveat that it was opposed to the introduction of non-union enterprise agreements.

2.27 In his second reading speech for the *Industrial Relations Reform Act 1993*, Laurie Brereton said that:

> Selective use in the federal jurisdiction of the corporations power will allow any matter pertaining to the employment relationship to be covered by agreement … [T]he operation of enterprise flexibility agreements will be supported by the use of the corporations power. This removes the requirement for an interstate dispute and makes the arrangements more accessible.[10]

2.28 In a country of Australia's size operating in the international economy it is utterly and profoundly irrational, not to say inefficient to seek to maintain six different systems of workplace regulation.

10 Hon. Laurie Brereton, Minister for Industrial Relations, *House Hansard*, 28 October 1993, p.2777