

Industrial Relations Alert

November 2006

Work Choices legislation valid

On 14 November 2006, the High Court of Australia delivered its judgment on the constitutional validity of the *Workplace Relations Act 1996* as amended by the *Workplace Relations Amendment (Work Choices) Act 2005*. The outcome was a ruling, by a 5 to 2 majority, that the legislation is in all respects valid.

The Constitution – the corporations power

The Commonwealth Parliament may enact laws with respect to various heads of power set out in section 51 of the Constitution. The main head of power upon which the Commonwealth Parliament has historically relied to enact industrial legislation has been the power with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

The *Workplace Relations Act 1996* now has virtually no reliance on that power. Instead, it relies principally upon the power of the Commonwealth Parliament to make laws with respect to trading, financial or foreign corporations. The Act now establishes a system of workplace relations which both regulates and protects employers which are such corporations (or Commonwealth entities) and their employees.

The constitutional challenge mounted by the States and certain unions centred principally upon the validity of use of the corporations power in this way. The challenge was rejected.

The decision

In a joint judgment of Chief Justice Gleeson and Justices Gummow, Hayne, Heydon and Crennan, the majority ruled:

- There is no substance in the proposition advanced by the States that the corporations power only permits Commonwealth laws made with respect to *external* relationships of corporations, not their internal relationships such as with employees;
- It is not correct, as the States contended, that a law could only be validly made by reference to the corporations power if the nature of the corporation is significant as an element in the nature or character of the law enacted – in particular, a law enacted under the corporations power need not be concerned only with the trading or financial or foreign activities or nature of a corporation;
- The operation of the corporations power is not confined by reference to the particular, and in some respects more limited, scope of the conciliation and arbitration power concerned with prevention and settlement of industrial disputes extending beyond the limits of one State.

The majority endorsed the proposition that the corporations power permits laws regulating:

- the activities, functions, relationships and business of a financial, trading or foreign corporation;
- the creation of rights and privileges belonging to the corporation;

- the imposition of obligations upon the corporation.

In respect of these matters, the corporations power also permits the regulation of conduct of those through whom the corporation acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting the corporation's activities, functions, relationships or business.

It follows, the majority said, that the corporations power permits legislation which will extend 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.

The Court rejected specific challenges on the provisions of the Act establishing, amongst other things, the Australian Fair Pay and Conditions Standard, establishing various types of workplace agreements and

awards, dealing with industrial action, dealing with transitional treatment of State employment agreements and awards, dealing with right of entry and freedom of association, and providing for the incorporation and regulation of registered organisations of employers and employees.

The Court also upheld the general validity of section 16 of the *Workplace Relations Act 1996*, a provision which excludes any operation for a wide range of State or Territory industrial laws.

Dissenting judgments were delivered by Justices Kirby and Callinan, but the joint judgment of the balance of the Court prevails.

Significance of the decision

This decision is likely to confirm the primacy of the Commonwealth in the establishment and management of a

national workplace relations system for many years to come. It must raise the question whether the States and Territories (like Victoria some years ago) will in time refer additional powers to the Commonwealth so that unincorporated employers are brought within the national system.

The decision has significance well beyond industrial relations. Given the centrality of corporations, directly and indirectly, to the economic and social life of the country, the decision points to the capacity of the Commonwealth Parliament to regulate affairs, and exclude State laws, in many areas which hitherto have been routinely regarded as within the domain of the States.



BDW Contact Details:

Sydney	Ken Brotherson	(02) 9258 6351	Melbourne	Steven Amendola	(03) 9679 3628
	Lea Constantine	(02) 9258 6446		Richard Bunting	(03) 9679 3597
	Jan Dransfield	(02) 9258 6533		Vince Rogers	(03) 9679 3522
	David Lloyd	(02) 9258 6442	Brisbane	Steve Bennett	(07) 3259 7015
	Jennie Mansfield	(02) 9258 6400	Ian Humphreys	(07) 3259 7180	
Perth	Helen McKenzie	(02) 9258 6096	Tony Davies	(08) 9366 8767	
	Adrian Morris	(02) 9258 6025	David Parker	(08) 9366 8019	
	Stephen Nettleton	(02) 9258 6026	Canberra	Paul Vane-Tempest	(02) 6234 4036
	Stephen Woodbury	(02) 9258 6444			

This publication is authorised by Blake Dawson Waldron. The firm can be contacted by emailing marketing@bdw.com
 Subscription Maintenance – If you would like to unsubscribe or modify your electronic subscription please go to www.bdw.com/subscriptions
 Privacy Policy – You can find our Privacy Policy on our website at www.bdw.com

This publication is intended only to provide a summary of the subject matter covered. It does not purport to be comprehensive or to render legal advice. No reader should act on the basis of any matter contained in this publication without first obtaining specific professional advice.
 © 2006 Blake Dawson Waldron

www.bdw.com