



# *Worth Noting*

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*Worth Noting is the journal of research and conferences company L21. It is focused on social, economic, political and international issues of relevance and interest to senior executives.*

The Howard Government's Industrial Relations (IR) reforms are the basis for one of the most contentious and radical changes to take place in decades. Supported by many business groups but opposed by many other stakeholders, and despised by unions, 'Work Choices' is seen as the defining legacy of the Howard years in a future time.

With the Coalition controlling both Houses of Parliament, the legislation enabling these changes was recently passed in the Lower and Upper Houses. With the parliamentary battle over, the legal one has just begun. Labor controlled State Governments are preparing to launch a legal challenge in the High Court against these IR reforms and the outcome is far from clear.

The substantive changes that will occur have been well documented and analysed on many fronts. In this edition of *Worth Noting*, we thought we would summarise what legal experts say about the constitutional challenge since this is now the main front against these reforms taking place.

## **Our Federal System**

We would have heard countless times that we exist in a 'Federal System.' This means, among other things, that jurisdiction and power is shared between the State and Commonwealth Governments. This is enshrined in our Constitution.

Since Federation in 1901, there has been a general trend toward granting more and more executive and legislative power to the Commonwealth Government.

However, while States are sometimes quite happy to cede jurisdiction to the Commonwealth in some matters, in others they have fought tooth and nail to retain jurisdiction. Quite often the dispute will be political in the sense that States might challenge growing Commonwealth power due to differences in ideology between the Governments of the time. The courts are just another avenue in a clash of ideologies, beliefs or values.

### **Possible legal basis for the new IR regime**

The key to challenging the new IR regime is all about State versus Commonwealth jurisdiction. Does the Commonwealth (the Howard Government) have the legal right under the Constitution to override State IR laws and pass the 'Work Choices' IR laws? If so, the IR reforms could be applied to about 85% of employees that work, and only exclude those that work for partnerships and sole traders. If not, the IR reforms would barely touch most workers and defeat the broader purpose of initiating such reforms.

According to the Constitution, the Commonwealth can pass laws in 40 different areas which are listed under s.51. However, 'workplace relations' or 'industrial relations' are not explicitly mention as one of them.

The Commonwealth subsequently has two avenues. First, they might rely on s.51(35) 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."***

The problem with using the 'conciliation and arbitration' power is that this power has been interpreted extremely narrowly and extends only to conciliation and arbitration for particular resolutions (prevention or settlement) to particular disputes which must be both industrial and interstate. There would be no legal prospect of basing a whole Federal IR regime on this power.

The second and more realistic avenue is to rely on the power in s.51(20) to make laws with respect to:

***"Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."***

In combination with other Constitutional Commonwealth powers over interstate trading and commerce, the Howard Government will try to defend the validity of their reforms which will cover over 85% of workers.

Essentially, if Howard's lawyers can convince the High Court that the IR changes can come under s.51(20), then it will be a simple matter of pointing out that under s.109 of the Constitution:

***“When a law of the State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency be invalid.”***

### **The legal challenge to ‘Work Choices’**

There are instances of the Commonwealth passing laws that technically infringe on State jurisdiction. However, unless challenged by the States in the courts, these laws remain as they generally exist with the co-operation of the States.

These current new IR laws are different – they do not exist with the co-operation or blessing of the states.

The upcoming case will hinge on whether the s.51(20) ‘Corporations power’ will allow the imposition of a Federal IR system against the State's wishes. Importantly, there are two relevant limitations on the power.

First, the power only pertains to ‘foreign, trading and financial corporations’ as opposed to partnerships and sole traders. If we extrapolate from the bulk of High Court decisions, most corporations will fall into this category. So the Commonwealth Government is likely to jump through this first hoop.

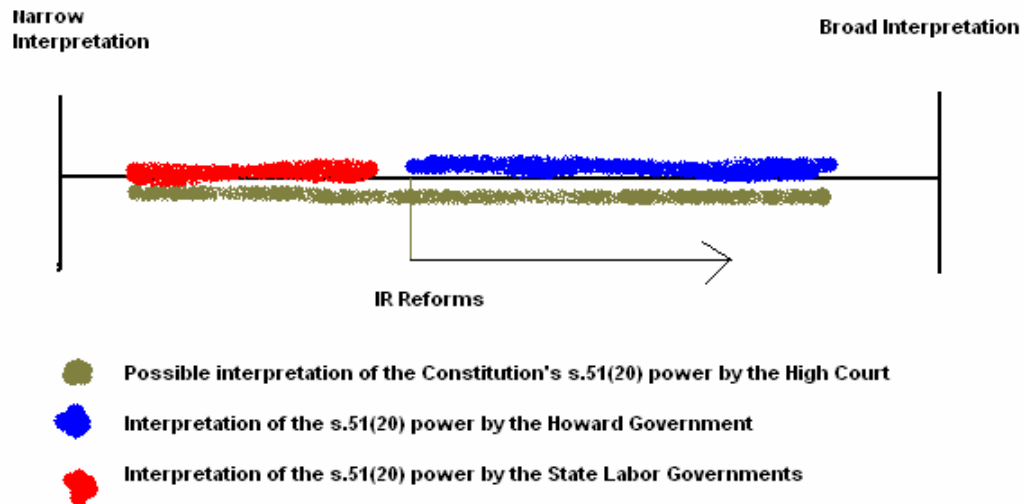
Second, it is far from clear what kind of activities of these corporations can be regulated by the Commonwealth. This is where legal opinion differs and where members of the High Court stand on this will be all important.

According to constitutional expert Professor George Williams, at one end, there is the narrow view. In this view, only the ‘trading activities’ of a corporation could be regulated by the Commonwealth. Other activities and relationships (such as between the corporation and its employees) would be off limits.

The broad view is that there are no limits at all in terms of the kind of activities of corporations under s.51(20) that the Commonwealth can regulate. As long as the corporation comes under s.51(20), the legal pathway for Howard would be clear.

It is obvious that the High Court will come somewhere in between these two extreme positions. Whether the legal challenge will succeed depends on two interrelated factors: 1. Where on this spectrum the High Court decides; and 2. Whether Howard's *Workplace Relations Act* will be seen to be drafted in such a way as to be acceptable to the High Court's subsequent interpretation of s.51(20).

**Range of interpreting the power to the Commonwealth to regulate the activities of corporations granted under s.51(20)**



Source: L21 Analysis

Although what the High Court will decide is not clear, we are not completely in the dark about what might happen. Interpretation of the law tends to 'evolve' from past decisions (although instances of Judges plucking a decision from thin air do occur from time to time.)

Back in 1983, in the case of the Tasmanian Franklin Dam (*Commonwealth v Tasmania*), the majority of the High Court held that s.51(20) at the very least allows the Commonwealth to regulate the activities of corporations undertaken 'for the purpose' of the trading activities of that corporation. Another High Court decision in 1995 (*Re Dingjan; Ex parte Wagner*) stated that s.51(20) extends, at the very least, to the business functions and activities of constitutional corporations and to their business relationships."

Lawyers and lay people are probably asking: are we really any clearer based on these decisions? The problem is that these cases tell us that *at the very least*, the Commonwealth has power to regulate certain activities (that are within the nebulous definition of 'for the purpose' of that corporation,) some of which are certain employer-employee relationships.

*However, whether the Commonwealth has power to regulate the full range of IR matters has never been considered.*

There is also the further uncertainty that the Judges that sat on the High Court during these past decisions have retired. Moreover, most of the current High Court Justices have not yet been asked to deliver judgments on s.51(20) so it is not clear how broadly or narrowly they would interpret the extent of the Commonwealth's power.

### **The human element of 'justice' – the High Court's composition**

Much of law is *interpretation* of statutes and previous law. The legal validity of Howard's IR reforms depend on how narrow or broad the High Court Justices interpret s.51(20) to be in terms of the activities of corporations that can be regulated under this power.

Despite some black letter lawyers telling you otherwise, this is where the human element comes into play. Remember that past case law and High Court opinion has only stated what s.51(20) should cover *at the very least*. There is no precedent for what should be allowed under s.51(20) *at the very most*. Hence, where precedent is ambiguous, the Justices will have to decide where to draw the line on the spectrum between narrow and broad interpretations.

If you want more evidence about the ambiguity of the law, consider that in the *Dingjan's Case* above in 1995, the High Court looked at the question of the extent of the power in s.51(20) and gave six separate answers. The Court was ultimately split 4:3 and delivered six separate judgments. It is an understatement to say that they did not provide a consistent answer to the power of the section.

Where they draw the line might depend on analogous legal precedent in other areas but it might also depend upon their social and political views as to the extent of Commonwealth power in the modern age (*vis-à-vis* State powers), whether the role of law and various provisions of the Constitution should serve to restrain or facilitate Commonwealth political will, and indeed their personal beliefs about political ideologies, what is fair entitlement and where they stand personally on contrasting rights of different groups (e.g., employee versus employer rights.) In other words, where the law is ambiguous, the likelihood that personal and political beliefs of Justices will dictate how they decide inevitably increases.

Five of the seven High Court Justices have been appointed by the Howard Government. This is a result of the obvious fact that judges retire and Howard who has been in Government for a long time has been called upon to make new appointments.

Few people in the legal community have serious problems with any of the appointees. Fortunately, in Australia, High Court Justices tend to have excellent

credentials even if some in the past are appointed following extremely close connections with politicians and political parties.

For example, Sir Garfield Barwick was a Liberal Attorney General who subsequently became Chief Justice and is perhaps best remembered for his role in advising Governor General Kerr that it was proper to sack Prime Minister Whitlam. Justice Evatt was also the Labor Opposition leader at one stage. Justice McHugh who retired last year is the husband of Labor Senator Janette McHugh. And Justice Lionel Murphy was Whitlam's Attorney General before being appointed to the High Court.

The current High Court Justices are not seen to be overly close to either political party but the fact that Howard has appointed five of them lead some to speculate that the Court will generally be a (politically) right leaning one when heavily politicized issues such as IR arise.

Certainly, it is unlikely that Howard would knowingly choose appointees who vehemently disagree with his side of politics. That is the prerogative of the Prime Minister and if there is a conservative High Court in this current period that is arguably a justifiable reflection of the political will of this present political age.

For our purposes, there is speculation that the current High Court are more likely to look favourably on most or all of Howard's IR reforms than High Court's of the past. As mention, few 'political' issues have arisen for the present Justices for any reading into their personal persuasions to be more than speculation. Moreover, so-called 'right leaning' Justices can sometimes be 'left leaning' on some issues, and vice versa. As in life, it can be problematic to pin down the sum of a Judges' personal beliefs somewhere on the right-left spectrum.

Much also depends on whether Howard's advisors have looked so far ahead as to predict where the Justices stood on various Constitutional issues before their appointment to the High Court. There is no evidence either way as far as we know.

Howard's advisors were certainly very confident that the laws would withstand High Court scrutiny. Much of the battle, in their eyes, would be won with the legal skill of drafting of the legislation and this is something we will not get into.

Needless to say, the answer really is unclear. The old adage holds true here: Ask two lawyers and you will get two if not three different answers.