AUSTRALIAN ASSOCIATION OF CONSTITUTIONAL LAW SEMINAR

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THE FUTURE OF THE FEDERATION

Introductory Remarks

On 14 November 2006 the High Court handed down its much anticipated decision in *New South Wales v The Commonwealth of Australia* [2006] HCA 52. Each of the States of New South Wales, Victoria, Queensland, Western Australia and South Australia were plaintiffs in the matter as well as two union organisations. In addition the Attorneys-General of Tasmania, the Northern Territory and the Australian Capital Territory intervened in support of the plaintiffs. As Kirby J pointed out at [490]:

> "The intergovernmental unity amongst the States and self-governing Territories indicates a clear recognition of the very great significance of the outcome of the proceedings for the future of the governmental powers of those States (and possibly the territories), if the Commonwealth's submission on the ambit of s 51(xx) were to prevail."

It did prevail.

The majority judgment was a joint judgment of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ. The decision confirmed the constitutionality of the *Workplace Relations Amendment (Work Choices) Act 2005* ("the Act") which principally relied on the corporations power, placitum (xx) of s 51 of the Constitution, rather than the industrial relations power, placitum (xxxv). It also dismissed the

argument that the Act impermissibly impaired the capacity of the States to function as governments.

The method used for reciting the Act into constitutionality was to define an employer in such a way that the definition fell within various placita of s 51 or within the power of the Commonwealth to control its own employees or those employed within a territory. Section 6(1)(a) of the Act includes in the definition of employer, "a constitutional corporation". That is defined to mean a corporation to which s 51(xx) of the constitution applies. No question arose in this case as to what corporations fall within or without that definition. The majority said at [81] "there was, therefore, no occasion to debate in argument, and there is no occasion now to consider, what kinds of corporation fall within the constitutional expression 'trading or financial corporations formed within the limits of the Commonwealth'. Any debate about those questions must await a case in which they properly arise." The breadth of the power will therefore depend on whether trading and financial corporations are given a wide or narrow definition.

The majority adopted the statement as to the width of the corporations power in the dissenting judgment of Gaudron J in *Re Pacific Coal Pty Ltd; ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at [83]

> "I have no doubt that the power conferred by s 51 (xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation … 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."

Her Honour said that the legislative power conferred by s 51(xx) "extends to law prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations."

It does seem that the prognostications of Griffiths CJ and Higgins J in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 that no limit could be assigned to the exercise of the power of the Commonwealth over corporations may well have come to pass. In fact the statement by Griffiths CJ to that effect appears to have been used by the majority to bolster its decision in favour of accepting that placitum (xx) was a valid basis for the exercise of power by the Commonwealth as exercised in the Act. The decision also seems to bear out the remarks of Gibbs CJ in *Fontana Films* (1982) 150 CLR 169 at 182 that

> "Extraordinary consequences would result if the Parliament had power to make any kind of law on any subject affecting such corporations."

Kirby and Callinan JJ dissented. There were two principal bases for doing so, although both were sourced in the view that the Constitution must be read as a whole. The first was the effect of placitum (xxxv) on the power given by placitum (xx) and the second, related matter, the nature of the federal compact.

Kirby J regarded the central issue in these proceedings as (paragraph [458]) whether the corporations power is completely unchecked and plenary, and disjoined from other powers granted by the constitution to the Federal Parliament; or whether (as past

history, and experience and authorities suggests) that power is subject to restrictions suggested by other placita of s 51, notably placitum (xxxv). In His Honour's view to read placitum (xx) without regard to the qualifications in placitum (xxxv) would be to fail to read the Constitution as one coherent instrument of government. His Honour also expressed the view that the federal character of the Constitution pervades its entire provisions.

The majority, however, held that references to the "federal balance" carry a misleading implication of static equilibrium.

Kirby J said at [583] that the formulation of the power given by s 51(xx) by the majority carries with it a very large risk of destabilising the federal character of the constitution. He said

> "In effect, the risk to which I refer is presented by a shift in constitutional realities from the present mixed federal arrangements to a kind of optional or 'opportunistic' federalism in which the Federal Parliament may enact laws in almost every sphere of what has hitherto been a State field of lawmaking by the simple expedient (as in this case) of enacting a law on the chosen subject matter whilst applying it to corporations, their officers, agents, representatives, employees, consumers, contractors, providers and others having been postulated connection with the corporation."

His Honour saw defending the checks and balances of governmental powers in the constitution as a "central duty" of the High Court (paragraph [596]).

The different approach to the history of the convention debates is instructive. While the majority looked only at the convention debates on placitum (xx), Callinan J examined the debates on placitum (xxxv) in great detail. Callinan J pointed out that it was clear from the convention debates that any federal power in relation to industrial affairs was to be confined to those of an inter-State character and that the former colonies were to retain power over internal industrial disputes. Kirby and Callinan JJ dealt in great detail with the understanding of placitum (xxxv) which followed throughout the twentieth century. Kirby J drew attention to the long history of litigation exploring the restrictions and limitations in placitum (xxxv) which determined the different areas of power of the Commonwealth and the States with regard to industrial relations.

Callinan J referred to the centrality of the federal nature of the Constitution and observed at [815]:

> "The framers of the Constitution and the people who endorsed it by a popular vote could not have been unaware of the problems, and the frustrations, to which the division of powers in a federation may give rise. Nor would they have been ignorant of the aversion that those who exercise power generally have to any sharing of it. The legislation which is in question here, if valid, would subvert the Constitution and the delicate distribution or balancing of powers which it contemplates. To say that the powers are distributed, or that they are carefully balanced, is not to suggest that they ever were, or are now in a state of static equilibrium."

Callinan J observed at [659] that this was "one of the most important cases with respect to the relationship between the Commonwealth and the States to come before the Court in all of the years of its existence". He observed "if the legislation is to be upheld the consequences for the future integrity of the federation as a federation, and the existence and powers of the States will be far reaching."

To discuss these issues for the future of our federation may I introduce our two eminent speakers, Peter Applegarth SC and Sue Brown.

PETER APPLEGARTH SC, BA, LLB (1st class Hons), BCL (Oxon)

Peter Applegarth has practised as a barrister for 20 years in a range of civil, commercial and public law cases. He was appointed Senior Counsel in 2000. His appearances in the High Court include *Theophanous v Herald & Weekly Times Ltd / Stephens v West Australian Newspapers Ltd* and *APLA Ltd v Legal Services Commissioner (NSW)*. He has been a Part-Time Member of the Queensland Law Reform Commission and is a Vice President of the Queensland Council for Civil Liberties.

SUE BROWN BA LLB (1st class Hons) LLM (Hons) (Cantab)

Sue Brown was a solicitor with national and international experience before she became a barrister in June 1998. As a barrister she has predominantly worked on a variety of commercial disputes and was one of the junior counsel acting on behalf of the State of Queensland in the Work Choices case.

They will address you for about 15 minutes each and then there will be time for discussion and questions.