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The Work Choices Case: Corporations Power Aspects

By Peter Applegarth SC

The aspect of the *Work Choices Case*[1] that I have been asked to address is the corporations power, particularly how the decision relates to earlier High Court decisions on the power and the implications of the decision for future use of the power.

The decision was greeted by commentators with very different responses. To some, the majority judgment was akin to constitutional heresy. To others, it was the orthodox application of settled principles and predictable. Prominent in the former group was Professor Craven who said that "at the stroke of a pen the High Court was making one of the greatest unauthorised amendments to the constitution in its entire history".[2] By contrast, other commentators concluded that the result was not really surprising, that there was "nothing in the decision that adds to the existing principles of constitutional interpretation or cannons of construction" and that there was "no great leap in constitutional thinking – arguably none at all".[3] Professor Williams stated that, in one sense, the *Work Choices Case* was exactly what was expected, was far from radical and fitted "neatly into a long line of decisions".[4]

The division of opinion about whether the decision reflected or departed from the course of existing authority is interesting since the competing schools of thought must have been reading the same cases. I suspect that, like the parties' competing submissions in the case itself, all commentators were able to find in the course of existing authority statements to support their respective positions and arguments downplaying or explaining statements that did not suit them.

So far as the corporations law aspect of the case is concerned, the parties acknowledged that there was no case in which a majority of the High Court had upheld their respective positions. For instance, the Commonwealth acknowledged:

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1 *New South Wales v Commonwealth of Australia* [2006] HCA 52; (2006) 231 ALR 1; (2006) 81 ALJR 34.

2 "How High Court failed us", *The Australian Financial Review*, 24.11.06, page 82.

3 Clegg, "States' rights are dead and buried for all time", *The Australian Financial Review*, 17.11.06, page 52.

4 "Goodbye to States' rights", *The Age*, 15.11.06.

> "There is no case in which a majority of the court has held that any law that is specifically directed to a constitutional corporation is supported by s.51(xx)."[5]

The States were unable to point to any case in which the distinctive character test had commanded a majority. As a result, the parties engaged in a process of judicial head-counting in an attempt to argue that their position had been favoured by a majority of High Court Justices who had considered the scope of the corporations power, or, at least, that their position had not been rejected by many of the Justices who had had an opportunity to do so.

In circumstances in which the parties were unable to point to any single decision that upheld the position contended for by them, the corporations power aspect of the decision cannot be described as either heretical or entirely predictable. Instead, as the parties in their submissions recognised, two lines of authority competed for acceptance. The first was described for convenience as "the general-power view"[6] that gives the power a broad operation and, in particular, that does not confine it to trading or business activities of the corporations. The competing view, conveniently described as "the distinctive character view", requires that the nature or character of the corporation to which the law relates be significant as an element in the nature or character of those laws.

In the fierce process of judicial head-counting, both sides claimed that the "discriminatory operation" test favoured by Brennan J supported their respective positions. In *Re Dingjan*[7] Brennan J had said:

> "To attract the support of s 51(xx), it is not enough that the law applies to constitutional corporations and to other persons indifferently. To attract that support, the law must discriminate between constitutional corporations and other persons, either by reference to the persons on whom it confers rights or privileges or imposes duties or liabilities or by reference to the persons whom it affects by its operation. A validating connection between a law and s 51(xx) may consist in the differential operation which the law has on constitutional corporations albeit the law imposes duties or prescribes conduct to be performed or observed by others."

The States urged that the approach of Brennan J was not materially different from that of Gibbs CJ in *Fontana Films* and Dawson J in *The Tasmania Dam Case*.[8] The Commonwealth argued[9] that the reasoning of Brennan J in *Dingjan* did not suggest that a law must

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5 Commonwealth submissions, para 97.
6 New South Wales submissions, para 38.
7 (1995) 183 CLR 323 at 336.
8 See, for example, Victorian submissions, paras 35-37; South Australian submissions, paras 28, 29.
9 Commonwealth submissions para 140.

discriminate between corporations and others in relation to a matter that is peculiarly significant to corporations. It argued that it followed from this passage that any law that is specifically directed to constitutional corporations is valid because such a law would have a "differential operation" on constitutional corporations and other persons "by reference to the persons on whom it confers rights or privileges or imposes duties".

A critical issue for the purpose of deciding the validity of many of the impugned provisions of the new Act was whether it is sufficient for a federal law simply to state "a constitutional corporation shall" or "a constitutional corporation shall not". A majority of the Court accepted that it did. More generally, it adopted[10] a passage from the reasons of Gaudron J in *Re Pacific Coal Pty Ltd ; Ex parte Construction, Forestry, Mining and Energy Union*[11] where her Honour said:

> "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 described in that sub-section, 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."

A majority adopted this understanding of the power and accepted, as Gaudron J had stated in *Pacific Coal*, that the legislative power conferred by s.51(xx) "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".[12]

The impugned provisions of the Act which depended upon s.51(xx) were held by the majority[13] to either single out constitutional corporations as the object of statutory command (and in that sense to have a discriminatory operation) or, like the legislation considered in *Fontana Films*,[14] to be directed to protecting constitutional corporations from conduct intended or likely to cause loss or damage to the corporation. The test of distinctive character was rejected. In the result, laws that prescribe norms regulating the relationship between constitutional corporations and their employees and the means by which they are to conduct their industrial relations were held to be laws with respect to constitutional corporations.

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10 [2006] HCA 52 at [178].
11 (2000) 203 CLR 346 at 375 [83]; [2000] HCA 34.
12 ibid.
13 [2006] HCA 52 at [198].
14 *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 ("*Fontana Films*").

Before considering the reasons that led a majority of the Court to this result, and the separate dissenting judgments of Kirby J and Callinan J, it is useful to review the parties' arguments concerning the course of authority on s.51(xx).

The course of authority and the parties' submissions

Ordinary folk might ask why in a hundred years of jurisprudence the High Court had not already answered the question posed for decision in the *Work Choices Case* concerning the scope of the corporations power. The short answer is that it did not have to. In earlier decisions on the corporations power, it had been observed that it was not necessary for the Court either to determine "the full ambit of the power conferred by s 51(xx) or to state definitive tests or criteria by which in every case the question may be determined whether a law is or is not a law with respect to the topic described in that paragraph".[15] Building on that approach, the States argued in the *Work Choices Case* that it was only necessary for the Court to consider what forms of connection with the corporations the subject of s.51(xx) had been held to be *insufficient* to give the law the character of a law with respect to foreign or trading or financial corporations.[16] In the alternative, it was argued that if one was to proceed by means of a positive test (namely one which states what is *sufficient* to give the law the required character) the test that was supported by history, logic and authority was a test which requires the nature or character of the corporation to which the laws relate to be significant as an element in the nature or character of those laws. On either approach, the States submitted that the principal disputed provisions of the Act were not laws with respect to constitutional corporations.

The submissions of the parties were extensive and it is impossible in the scope of this paper to do justice to them. The thrust of the submissions on behalf of the States and Territories concerning the corporations power are generally reflected in the submissions of New South Wales, although each State made additional submissions in relation to the corporations power. It is convenient to set out the following propositions from the written submissions of New South Wales:

> "(a) The key operative provisions of the Act are made to apply to constitutional corporations by virtue of the relevant definitions in ss.5 and 6 without regard to any particular connection to the activities of the corporations (such as whether they are trading activities or

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15 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 ("Strickland") at 515 (Walsh J), agreeing with Barwick CJ at 490-491; also see Gibbs J at 525. See also *Fontana Films* (1982) 150 CLR 169 at 182 (Gibbs CJ); *The Tasmanian Dam Case* (1983) 158 CLR 1 at 241 (Brennan J), at 316 (Dawson J).

16 Victoria submissions, para 19(2) which were adopted by other parties challenging the Act.

activities undertaken for the purpose of engaging in trade), or the significance of what is regulated to the corporations.

(b) These aspects of the Act may only be supported if the corporations power is taken to authorise any law directed to constitutional corporations or those directly engaged in dealing with them (ie the "general-power view").

(c) That view of the power has never been accepted by a majority of this Court.

(d) What does emerge from an examination of the judicial exegesis is the notion that the power is focused on authorising the regulation of constitutional corporations as such, meaning both regulating those characteristics which distinguish them as corporations from other legal persons and, connected to that, regulating their interaction with the public in relation to those characteristics which distinguish constitutional corporations from other types of corporations, namely their trading, financial or foreign character. Those themes have most commonly been expressed as enabling the Commonwealth to regulate the trading or financial activities of constitutional corporations.

(e) The general-power view of s.51(xx) does not pay proper regard to the text of the placitum.

(f) That broad view would create a most peculiar type of federal power enabling unlimited regulation of one class of persons, and those who interact with that class.

(g) The broad view is inconsistent with a wide array of existing High Court authority, for it would mean that any federal law not intended to operate fully and completely according to its terms or not at all would be capable of application, in part, to constitutional corporations.

(h) The general-power view would represent a significant change to the scope of the corporations power compared to what had been accepted over the course of the last century, in circumstances where repeated referenda had been held to extend the relevant scope of Commonwealth powers, which referenda were rejected.

(i) Specific arguments made by Mason J in support of the broad view are, with respect, not to be preferred.

(j) The *Incorporation Case* necessitates the conclusion that the corporations power applies to formed corporations which, to be a meaningful notion, presupposes that corporations have officers and employees (ie human agents). Further, the corporations power is directed, relevantly, to trading or financial corporations, the nature of which is to be assessed by reference to the activities of the corporation, which again presupposes that the corporation is capable of engaging in such activities, presupposing in turn that the corporation already has officers and employees before becoming a subject of Commonwealth power.

(k) To construe s.51(xx) as authorising comprehensive regulation of industrial and employment matters in relation to constitutional

> corporations would be substantially to undermine the careful establishment of the Commonwealth's industrial power in s.51(xxxv), along with the limitations implicit in s.51(xxxii)-(xxxiv). That would be inconsistent with one of the most fundamental principles of construction of legal instruments, which principle is and should be applicable to the Constitution."

I should add a little to a few of these points. The general-power view of the corporations power was said to not pay proper regard to the text of s.51(xx): the argument being that there must have been characteristics of foreign, trading and financial corporations which distinguished them from other types of corporations such as to justify, in the eyes of the framers, a federal power to deal with them and that it was the trading or business characteristics of the corporations that were thought to warrant national regulation.

Another reason for rejecting the general-power view was that s.51(xx) is a person's power, namely a power directed to persons rather than to, for example, a class of legal, economic or social activity and that a distinctive character test was appropriate to such a power. Particular reliance was placed upon the approach of Brennan J in relation to the aliens' power in *Cunliffe v The Commonwealth*:[17]

> "But if and to the extent that the law discriminates between the public at large and the relevant class of persons (whether textually or in its operation), *there is an indicium* that the law is a law with respect to persons of that class. That indicium *may suffice* to give the law the character of a law with respect to persons of that class and, *if the discrimination is in a matter peculiarly significant to that class*, the law will bear that character. In this respect, the aliens power is similar to the corporations power …"

The States argued that, on this view, for a law to be a law with respect to persons of a particular class, it is not sufficient that the law identifies a relevant class as the object of a command. The law must discriminate between the relevant class of persons and other persons "in a matter peculiarly significant to that class" for the law to bear the character of a law with respect to persons of that class.[18]

The Commonwealth's principal submission concerning the corporations power was that any law that is directed specifically to constitutional corporations is valid. It argued that a law is "directed specifically" to constitutional corporations if it provides in its terms that it applies to such corporations, even if the law also provides that it applies to other specific groups. Such a law was said to be properly characterised as a law "with respect to" constitutional

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17 (1994) 182 CLR 272 at 315-316 (emphasis added).

18 Victorian submissions para 37; South Australian submissions para 29.

corporations because one of the elements that attracts the operation of the law is that it applies to constitutional corporations. The connection between such a law and s.51(xx) was submitted to be not "tenuous, insubstantial or distant". As already noted, the Commonwealth acknowledged that the proposition that any law that is directed specifically to a constitutional corporation is valid was not mandated by any decision of the Court. But the Commonwealth argued that it was supported by the majority of recent judicial opinion.

As a further argument, the Commonwealth submitted that s.51(xx) will support any law that has a connection with constitutional corporations that is not "insubstantial, tenuous or distant".[19] The Commonwealth argued that a sufficient connection would exist for:

(a) a law relating to the conduct (in the relevant capacity) of those who control, work for, or hold shares or office in constitutional corporations;[20]

(b) a law relating to the business functions, activities or relationships of constitutional corporations;[21]

(c) a law protecting a constitutional corporation from conduct that is carried out with intent to, and the likely effect of which would be to, cause loss or damage to the business of,[22] or interfere with the trading activities of,[23] a constitutional corporation; and

(d) a law which otherwise, in its practical operation, "materially affect[s]" or has "some beneficial or detrimental effect on" a constitutional corporation.[24]

The Commonwealth further argued[25] that sufficient connection also would exist where the provisions of the law:

(a) relate to conduct that is carried out, or is proposed to be carried out, with intent to cause loss or damage to a constitutional corporation; or

(b) relate to conduct where there is a real (not merely remote) prospect that the conduct will have a material effect on a constitutional corporation;

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19 Commonwealth submissions, para 14, citing *Melbourne Corporation* (1947) 74 CLR 31 at 79; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369 per McHugh J; *Leask v The Commonwealth* (1996) 187 CLR 579 at 601-602 per Dawson J, 621 per Gummow J.

20 *Re Dingjan* (1995) 183 CLR 323 at 369 per McHugh J.

21 *Re Dingjan* (1995) 183 CLR 323 at 364 per Gaudron J (with whose reasons Mason CJ and Deane J agreed), 369-370 per McHugh J. See also *Quickenden v O'Connor* (2001) 109 FCR 243 at 257-258 [38]-[40] per Black CJ and French J, 274-275 [115] per Carr J.

22 *Fontana Films* (1982) 150 CLR 169 at 183 per Gibbs CJ, 195 per Stephen J, 208 per Mason J, 212 per Murphy J, 219 per Brennan J.

23 *Victoria v The Commonwealth* (Industrial Relations Act Case) (1996) 187 CLR 416 at 557 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

24 *Re Dingjan* (1995) 183 CLR 323 at 340 per Brennan J, 365 per Gaudron J, 370 per McHugh J.

25 Commonwealth submissions, para 15.

(c) relate to conduct that is carried out, or is proposed to be carried out, with intent to benefit a constitutional corporation.

As I have noted, the States submitted that the "general-power view" of the corporations law should be rejected for a number of reasons including the fact that it had never been accepted by a majority of the court.[26] Some plaintiffs particularly submitted that a majority of Justices of the court had either rejected or expressly not embraced the proposition that every law which commences "a constitutional corporation shall …" is a valid law.[27] In response, the Commonwealth argued that only Gibbs CJ and Dawson J had rejected that proposition[28] and that there were several statements in the authorities in which the question of whether a law that commences "every constitutional corporation shall …" will necessarily be valid had been left open.

The written submissions of the States cite passages from a number of Justices in previous decisions which were said to indicate forms of limitations on the scope of the corporations power, whereas the Commonwealth sought to explain these qualifications or apparent reservations as involving an understandable desire by the Justices concerned not to decide any more than was necessary in any given case, rather than as positively asserting that such a law would be beyond power. For instance, the plaintiffs placed particular reliance upon the following passage from the judgment of Barwick CJ in *Strickland v Rocla Concrete Pipes Ltd*:[29]

> "… it does not follow either as a logical proposition, or, if in this instance there be a difference, as a legal proposition … that any law which in the range of its command or prohibition includes foreign corporations or trading or financial corporations formed within the limits of the Commonwealth is necessarily a law with respect to the subject-matter of s 51(xx). **Nor does it follow that any law which is addressed specifically to such corporations or some of them is such a law** … But the decision as to the validity of particular laws yet to be enacted must remain for the Court when called upon to pass upon them … I must not be taken as suggesting that the question whether a particular law is a law within the scope of this power should be approached in any narrow or pedantic manner.""

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26 See for example New South Wales written submissions on the course of authorities paras 38-74.

27 See for example Victorian submissions, para 47; Queensland submissions paras 19, 69(a).

28 *Tasmanian Dam Case* (1983) 158 CLR 1 at 314 to 315 (Dawson J); see also 317; *Fontana Films* (1982) 150 CLR 169 at 181-182.

29 (1971) 124 CLR 468 at 489-490 (emphasis added). Menzies J also left the point open at 508.

In the *Tasmanian Dam Case*, Mason J stated that the remarks of Barwick CJ amounted to "a counsel of caution".[30] Mason J noted that Barwick CJ's reservation may have been the result of the erroneous view that, if a law had two characters, one of which was beyond power, it was necessary to identify the true character of the law.

Deane J in the *Tasmanian Dam Case*[31] expressed a similar reservation to that of Barwick CJ in *Strickland* when he stated:

> "It does not necessarily follow from the foregoing that *every* law which commences 'a trading corporation shall' or 'a trading corporation shall not' is a law with respect to trading corporations for the purposes of s.51(xx). That is a question which does not arise in the present case and it is unnecessary to express any view in relation to it."

The States sought to rely upon these and similar reservations to argue that the so-called "object of command" test lacked support amongst Justices of the court who had considered the point and that, more generally, that the course of authority suggested substantial limitations upon s.51(xx).

The Commonwealth responded that the passages relied upon by the plaintiffs were nothing more than a manifestation of the well-accepted approach that the court should not decide more than is necessary in any given case and that the course of authority did not amount to an implicit ruling that the power did not extend further.[32] In short, the Commonwealth argued that the passages quoted by the States, including the important passage from a judgment of Barwick CJ in *Strickland*, did not support the submission[33] that it is *insufficient* for a law to be characterised as a law with respect to trading or financial corporations if the law:

> "confers rights and imposes obligations upon trading and financial corporations, and does so, moreover, by including trading and financial corporations within a range of persons within its command upon whom it imposes those same obligations in a general and uniform manner."

Because the States' insufficiency argument could not be said to have been endorsed by a majority in any case, and dicta apparently supportive of the insufficiency argument were open to debate, the States advanced a positive test, namely the distinctive character test. In doing so, the States were able to draw upon a body of authority supportive of the distinctive character test. Apart from attempting to persuade the court of the virtues of the distinctive

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30 *Tasmanian Dam Case* (1983) 158 CLR 1 at 150.
31 (1983) 158 CLR 1 at 272
32 Compare Queensland submissions para. [24].
33 See, for example, Victorian submissions [48].

character test, the States asserted the vices of the general-power view and, in particular, of the "object of command" test propounded by the Commonwealth. The consequence of accepting the object of command test was said to be that "no limit can be assigned to the exercise of the power". The proposition that the "object of command" test placed no limit on the exercise of the power drew support from obiter remarks of Griffith CJ in *Huddart Parker & Co Pty Ltd v Moorehead*:[34]

> "… the question is whether the power to make laws with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' extends to the governance and control of such corporations when lawfully engaged in domestic trade within the State. If it does, **no limit can be assigned to the exercise of the power**. … In short, any law in the form 'No trading or financial corporation formed within the Commonwealth shall,' or 'Every trading or financial corporation formed, etc, shall', must necessarily be valid unless forbidden by some other provision of the Constitution."

Sir Samuel Griffith's remarks may have been made *in terrorem*, but they have proved to be prescient.

The distinction between external and internal relationships

The States' submissions[35] were that:

> "The mischief to which the power appears to have been addressed is a concern about enabling proper regulation of artificial corporate entities of particular types, especially insofar as they operated in jurisdictions other than the ones in which they have been created, along with a concern about the need to regulate their interaction with the public in the conduct of their business activities, particularly in light of the economic strength and usual limited liability characteristic of such bodies corporate. It was not intended to authorize regulation of industrial and employment matters generally for such corporations. Such would, in any event, be inconsistent with the premise that the power is directed to formed corporations."

The States placed particular reliance upon passages from the judgment of Isaacs J in *Huddart Parker* that the corporations power is directed to regulating "the conduct of the corporations in their transactions with or as affecting the public"[36], that is, "the conduct of the corporations in relation to outside persons".[37]

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34 *Huddart Parker* (1909) 8 CLR 330 at 348 (emphasis added).
35 New South Wales submissions para 138.
36 (1909) 8 CLR 330 at 395.
37 ibid at 395 and 396.

The States submitted that such a conclusion about the scope of the corporations power could be gathered from the Convention Debates, the early text writers, much of the judicial exegeses including, in particular, the *Incorporation Case* and general principles of constitutional construction. In response to the States' reliance upon the observations of Isaacs J in *Huddart Parker*, the Commonwealth submitted that the remarks of Isaacs J had never received any subsequent judicial support and that it was difficult to see why a law controlling the internal affairs, structure and management of those corporations is not a law with respect to them.[38]

As against the remarks of Isaacs J, the Commonwealth was able to cite passages from Justices in more recent cases which supported the proposition that s.51(xx) allows laws to be passed that regulate the conduct of employees, office holders and shareholders. These included the judgment of McHugh J in *Re Dingjan*[39] who stated that:

> "if by reference to the activities or functions of s.51(xx) corporations, a law regulates the conduct of those who control, work for, or hold shares or office in those corporations, it is unlikely that any further fact will be needed to bring the law within the reach of s.51(xx)."

As previously noted, Gaudron J (with whom Mason CJ and Deane J agreed) in *Dingjan* held that s.51(xx) supported "at the very least, a law which is expressed to operate by reference to the business functions, activities or relationships of constitutional corporations."[40]

Further, as Deane J observed in his dissent in the *Incorporation Case*:[41]

> "A careful examination of Justice Isaacs' judgment discloses no acceptable reason for such a strangely distorted construction of the words of the second limb of the paragraph."

His Honour continued:

> "Isaacs J's conclusion that laws with respect to the internal management of local trading or financial corporations were beyond the ambit of a power to make laws with respect to such corporations was largely left as a matter of assertion."[42]

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38 Commonwealth submissions, para. 275 quoting Leslie Zines "The High Court and the Constitution" (Butterworths, 4th ed. 1997) at 105.
39 (1995) 183 CLR 323 at 369.
40 ibid at 365.
41 (1990) 169 CLR 482 at 509.
42 ibid at 509-510.

In the light of the subsequent course of authority, the States were probably optimistic in hoping that the remarks of Isaacs J in *Huddart Parker* would carry the day. They did not. The majority judgment selected the distinction between external and internal relationships as the first principal argument to consider and reject.

The majority judgment analysed the decision in *Huddart Parker* and aspects of the history of s.51(xx) and concluded that the distinction sought to be drawn between the external relationships of a constitutional corporation and its internal relationships did not assist the resolution of the case, and was rooted in choice of law rules that could not be transposed into the area of determining the ambit of a constitutional head of power.[43] The distinction was said to find no support in the Convention Debates or the drafting history of s.51(xx)[44] and was a distinction of "doubtful stability".[45] Finally, the court concluded that if it were to be adopted, there seemed every reason to treat relationships with employees as a matter external to the corporation.[46]

The majority's rejection of the distinctive character test

The distinctive character test has been expressed in a variety of forms. These were conveniently summarized in the written submissions of New South Wales[47] as follows:

> "It may be said that power is directed to authorize the regulation of matters peculiar to constitutional corporations, namely matters going to peculiarly corporate characteristics along with the engagement of foreign, trading and financial corporations in trading or financial (broadly business) activities. That is essentially a way of saying that 'the nature of the corporation to which the laws relate must be significant as an element in the nature or character of the laws'[48], or 'the fact that a law binds constitutional corporations does not make it a law upon the subject of constitutional corporations unless the personality of the persons bound is a significant element of the law itself'[49], or that the law must discriminate by reference to the relevant character of the corporations in question."[50]

The majority rejected the plaintiffs' argument in support of the distinctive character test, and their corresponding arguments against the object of command test, as seeking to build upon statements made in judgments of the court which, read in the context, were said to constitute

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43 [2006] HCA 52 at [66].
44 ibid; and see [96]-[124].
45 ibid at [66].
46 ibid.
47 New South Wales submissions para 139.
48 *Fontana Films* 150 CLR at 182.8 per Gibbs CJ.
49 *Re Dingjan* 183 CLR at 349.4 per Dawson J.
50 ibid at 337 per Brennan J.

no more than an explicit limitation upon what was being decided in the particular case. The "distinctive character test" was said to build largely upon statements made in cases where the laws in question concerned the *trading activities of trading corporations*. The argument based upon the text of s.51(xx) was said to treat the adjectives "foreign", "trading" and "financial" as the considerations upon which the power turns whereas the power was one to make laws with respect to particular persons. As a "person's power", it was not "a power with respect to a function of government, a field of activity, or a class of relationships".[51] Treating the character of the corporations mentioned in s.51(xx) as a consideration upon which the power turns was also said to produce awkward results since the power with respect to foreign corporations focuses upon their status rather than upon their activities. Why should the power with respect to Australian corporations focus upon their *activities*, but the power with respect to foreign corporations focus only upon their *status*? The majority rejected South Australia's argument that the power with respect to foreign corporations was directed to the activities of such corporations in Australia, namely activities that were "foreign activities" for those corporations.[52]

The majority's consideration of the Convention Debates and Federal referenda

The majority considered that the Convention Debates reveal very little about what those who framed the Constitution thought would fall within or outside the corporations power.[53]

Insuperable difficulties were said to arise in the arguing from the failure of a proposal for constitutional amendment to any conclusion about the Constitution's meaning.[54]

The need to limit s.51(xx)

The majority characterized each of the arguments advanced by the plaintiffs as contending that it is necessary to limit the reach of s.51(xx) and involving implicit assertions about federal balance and, in particular, an implicit assertion that to give the ordinary scope to the legislative power with respect to the particular persons mentioned in s.51(xx) could or would distort that balance. The plaintiffs were able to cite statements in support of such a limitation, including the statement of Gibbs J in *Fontana Films*[55] that "extraordinary consequences would result if the Parliament had power to make any kind of law on any subject affecting such corporations". The plaintiffs' explicit or implicit appeals to notions of "federal balance"

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51 [2006] HCA 52 at [144] citing *New South Wales v The Commonwealth* (1990) 169 CLR 482 at 497.
52 [2006] HCA 52 at [171], [172].
53 [2006] HCA 52 at [118].
54 ibid at [131].
55 (1982) 150 CLR 169 at 182.

in determining the scope of s.51(xx) were dismissed. The proposition that the construction of s.51(xx) contended for by the Commonwealth would impermissibly alter the federal balance was said to be made without an attempt by the plaintiffs to define the content of that proposition.[56]

The relationship between s.51(xx) and 51(xxxv)

This aspect will be addressed by other commentators. It is sufficient to record that the majority rejected the various submissions by the plaintiffs that s.51(xxxv) restricts in s.51(xx) with respect to the making of laws for the prevention and settlement of industrial disputes.

More than simply the triumph of the object of command test

The majority decision represents an acceptance of the "object of command" argument advanced on behalf of the Commonwealth and an explicit rejection of the distinctive character test. As a result of the majority's acceptance of the statement of Gaudron J in *Re Pacific Coal*, a number of the impugned provisions of the Act were upheld on the simple basis that they singled out constitutional corporations as the object of statutory command. Others were upheld on the basis that, like the legislation considered in *Fontana Films*, they were directed to protecting constitutional corporations from conduct intended or likely to cause loss or damage to the corporation. Not all of the impugned provisions could be said to be supported on this basis. But they were upheld. The validation of <u>all</u> of the provisions entails the effective triumph of the minority view in *Dingjan*.

This point can be illustrated by reference to s.755 of the Act. It defines the OHS entries to which Division 5 of Part 15 applies. Part 15 deals with the right to enter premises. Division 5 is concerned with "Entry for OHS purposes". An OHS law is defined so that by regulation it includes certain State occupational health and safety laws. Section 756 essentially provides that a union official who has a right under an OHS law must not exercise that right unless the official holds a permit under Part 15 and exercises the right during working hours.

Under s.755(1)(a)(i), Division 5 of Part 15 has effect in relation to a right to enter premises if the premises are occupied or otherwise controlled by a constitutional corporation. The plaintiffs argued that this provision was invalid on the ground that like the law considered in *Re Dingjan* it "does no more than make the activity of a s.51(xx) corporation the condition

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[56] [2006] HCA 52 at [196].

for regulating the conduct of an outsider".[57] This argument was rejected. The fact that the premises were "occupied or otherwise controlled" by a constitutional corporation was held to be a sufficient connection with s.51(xx) whether or not the entry that was regulated concerns a business being conducted on the premises by that corporation. In the result the provision was upheld without a need to show that the right of entry was likely to interfere with the corporation's activities, let alone cause it loss or damage. The right related to the conduct of the corporation simply as an occupier of premises, not because its exercise was likely to have a detrimental effect of it.

The reach of the ruling is further highlighted in the provisions concerning a right to enter premises under a OHS law in respect of contractors providing services for a constitutional corporation.[58] These provide that the Division has effect in relation to a right to enter premises under an OHS law if:

(a) the right relates to requirements to be met by;

(b) the right relates to conduct engaged in, or activity undertaken or controlled by; or

(c) the exercise will have a direct effect on,

a contractor providing services for a constitutional corporation.

Notably these provisions extend beyond a right of entry that relates to requirements to be met by a constitutional corporation, that relates to conduct engaged in, or activity undertaken or controlled by a constitutional corporation or where the exercise of the right will have a direct effect on a constitutional corporation. These were the subject of other specific provisions.[59]

The Commonwealth accepted that the provisions about contractors should be construed as limited in their application to requirements or activities in which the contractor is engaged *in the course of* providing services to a constitutional corporation and the majority accepted this construction. Even so construed, the provisions in relation to the exercise of a right in the circumstances mentioned in connection with a contractor providing services for a constitutional corporation are quite unlike the provisions considered in *Fontana Films* which were directed to protecting constitutional provisions from conduct intended and likely to cause loss or damage to the corporation. The provisions did not relate to the exercise of a right that had a direct effect on a constitutional corporation or even was likely to indirectly affect the corporation's conduct or activities to its detriment. The exercise of the right of

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57 (1995) 183 CLR 323 at 370 per McHugh J; see also Brennan J at 338, Dawson J at 347, Toohey J at 353-4.

58 Section 755(d)(iii), (e)(iii) and (f)(iii).

59 Section 755(1)(d)(i), (e)(i) and (f)(i); upheld in [2006] HCA 52 at [282].

entry against the contractor need have no effect on the constitutional corporation. Despite these features, the majority considered that the provisions of s.755(1)(d)(iii), (e)(iii) and (f)(iii) were valid as being laws with respect to constitutional corporations.[60]

Can this result be reconciled with the views of the majority of *Dingjan*? In that case a law empowered the Australian Industrial Relations Commission to review certain contracts on the grounds that they were unfair, harsh, unjust or against the public interest. The law applied to a contract to which a constitutional corporation is a party, and also to a contract "relating to the business of a constitutional corporation". A majority of the Court held that this aspect of the Act was invalid. Dawson J[61] reiterated the distinctive character approach he had articulated in *the Tasmanian Dam Case*. Brennan J[62] held that to attract s.51(xx):

> "The law must discriminate between constitutional corporations and other persons, either by reference to the persons on whom it confers rights or privileges or imposes duties or liabilities or by reference to the persons whom it affects by its operation."

His Honour stated:[63]

> "But s 127C(1)(b) … applies ss 127A and 127B to contracts that may have no effect on constitutional corporations or on their businesses. It is too wide and therefore invalid. The legislative power conferred by s 51(xx) is not a power to make laws with respect to *things relating to* corporations or *things relating to the businesses of* corporations."

Toohey J said:[64]

> "It is not enough that a law should refer to the subject matter or apply to the subject matter. In the case of s 51(xx) the law must operate on the rights, duties, powers or privileges of corporations in such a way as to evidence a sufficient connection between the law and the corporations. It is not enough to identify corporations as a reference point so as to affect the activities of others."

McHugh J said:[65]

> "Where a law purports to be 'with respect to' a s 51(xx) corporation, it is difficult to see how it can have any connection with such a corporation unless, in its legal or practical operation, it has significance for the corporation. That

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60 [2006] HCA 52 at [286].
61 (1995) 183 CLR 323 at 345-347.
62 ibid at 336.
63 ibid at 339.
64 ibid at 353.
65 ibid at 369.

> means that it must have some significance for the activities, functions, relationships or business of the corporation. … It is not enough, however, to attract the operation of s 51(xx) that the law merely refers to or operates upon the existence of a corporate function or relationship or a category of corporate behaviour. The activities, functions, relationships and business of s 51(xx) corporations are not the constitutional switches that throw open the stream of power conferred by s 51(xx)."

The application of these passages from the majority in *Dingjan* surely would have invalidated the right of entry provisions concerning contractors providing services for constitutional corporations. In terms of characterisation of the laws, the connection between the laws and constitutional corporations was insubstantial or tenuous. The majority judgment in *Work Choices* specifically endorsed the approach of Gaudron J in *Dingjan*, who dissented in that case, concerning the scope of the corporations power. In that case Gaudron J would have upheld the provision which the majority invalidated. According to her Honour, it was sufficient that the contract had as a party "a person who performs the business functions or carries out the business activities of a constitutional corporation or a person who is in a business relationship with that corporation".[66]

The upholding of the right of entry provisions that concern contractors providing services for constitutional corporations illustrates that it is apparently sufficient if the law operates on persons who are acting in the course of a business relationship with a constitutional corporation. These persons need not themselves be performing the corporation's business functions or carrying out its business activities. It is sufficient that they are engaged in providing services to a constitutional corporation.

The reason why the majority upheld these specific provisions as being laws with respect to constitutional corporations was not really explained. Possibly, it was because they regulated those whose conduct "is capable of affecting"[67] the activities, functions, relationships or business of the constitutional corporation to which services are provided. If so, the capacity to affect a constitutional corporation by some such indirect means involves an invitation to extend Commonwealth laws to operate with respect to contractors providing services for a constitutional corporation.

To those concerned about the potential reach of the corporations power, the message is "the devil is in the detail". These are the specific provisions that were upheld which did not single

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66 ibid at 365-366.

67 [2006] HCA 52 at [178].

out constitutional corporations as the object of statutory command or which were directed to protecting corporations from conduct intended or likely to cause them loss or damage. The connection between these provisions and constitutional corporations seems insubstantial or tenuous.

The dissenting judgment of Kirby J

Kirby J noted the expansion of the ambit of s.51(xx) in the 35 years since the *Concrete Pipes* case but saw the real question in the case as whether this expansion "however large it may otherwise grow, is subject to restrictions, or limitations, including those expressed or implied in para (xxxv)".[68] His Honour remarked on the "extremely wide conception of the corporations power which the joint reasons embrace". It was the very amplitude of the power to make laws with respect to constitutional corporations upheld by the majority which was said to oblige the court to face squarely whether the corporations power was completely unchecked or whether it was subject to restrictions suggested by other paragraphs, notably para (xxxv). To Kirby J, the central issue in the proceedings was not the reach of the corporations power, standing alone. His Honour accepted that it was "wide and comprehensive".[69] His Honour stated that "Its exact contours and boundaries need not be defined in order to reach my orders in these proceedings"[70]and postponed what was said to be "larger issues involved in delimiting the scope of the corporations power".[71] His Honour relevantly concluded that the content of the power afforded under s.51(xx) does not extend to a power to make laws that, in truth, relate to industrial disputes.

His Honour's approach was said to be supported by reference to the federal structure and character of the Constitution.[72] I will not attempt to deal with his Honour's discussion of issues of federal balance since they are to be addressed by the next speaker. However, Kirby J identified important implications of the views adopted by the majority and I shall return to these in discussing the implications of the decision for the future use of the corporations power.

The dissenting judgment of Callinan J

Likewise, it is beyond the scope of my allotted topic to address the various reasons of Callinan J in concluding that the Act is invalid. In summary, his reasons were:

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68 [2006] HCA 52 at [447].
69 ibid at [484].
70 ibid.
71 ibid at [545].
72 ibid at [532]–[559].

"(i) The Constitution should be construed as a whole and according to the principles of construction that I have stated in these reasons.

(ii) The Amending Act was presented and enacted as a comprehensive integrated measure containing generally interdependent provisions.

(iii) The substance, nature and true character of the Amending Act is of an Act with respect to industrial affairs.

(iv) The power of the Commonwealth with respect to industrial affairs is a power in relation to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State' and not otherwise (except for Commonwealth employment and other presently not relevant purposes). As the jurisprudence of this Court shows, that power is a very large one. Much can properly be characterized as preventative of a relevant industrial dispute.

(v) The corporations power has nothing to say about industrial relations or their regulation by the Commonwealth. To the extent, if any, that s.51(xx) might otherwise appear to confer such power, it must be subject to the implied negative restriction imposed by s.51(xxxv).

(vi) The corporations power is concerned with the foreign, trading and financial activities and aspects of corporations, the precise limits of which it is unnecessary to decide in this case. In Australia, history, the founders, until 1993 the legislators who have followed them, and this Court over 100 years, as Kirby J has pointed out, have treated industrial affairs as a separate and complete topic, and s.51(xxxv) as defining the Commonwealth's total measure of power over them, except in wartime.

(vii) To give the Act the valid operation claimed by the Commonwealth would be to authorize it to trespass upon essential functions of the States. This may not be the decisive factor in the case but it at least serves to reinforce the construction of the Constitution which I prefer, that industrial affairs within the States, whether of corporations or of natural persons, are for the States, and are essential for their constitutional existence.

(viii) The validation of the legislation would constitute an unacceptable distortion of the federal balance intended by the founders, accepted on many occasions as a relevant and vital reality by Justices of this Court, and manifested by those provisions of the Constitution to which I have referred, and its structure."

I shall confine my remarks to aspects of his Honour's judgment that specifically concerned the corporations power. In general, his Honour accepted the submissions of New South Wales with respect to the effect of the cases in which consideration has been given to the reach of the corporations power. His Honour considered that the cursory attention that the corporations power received during the Convention Debates made it inconceivable that the founders visualized the corporations power as broad as contended for by the Commonwealth, and that if the corporations power was intended to abrogate so much industrial power as would otherwise be within State power, the possibility and desirability of that abrogation would have been of intense concern to the founders.

As to the course of previous authority, his Honour noted that no majority of the Court had read s.51(xx) as extending to each and every aspect of the corporation, its activities and its employees.

Finally, and interestingly, his Honour opined that a consequence of the acceptance of the "object of command" test by the majority was that the *Incorporation Case* may well now be effectively overruled.[73]

Commentary – the decision and the course of earlier authority

It is one thing to say that the course of authority never defined the outer limits of the corporations power. It is quite another to say that the course of previous authority left the power practically unlimited. It did not. The limitations were unclear. One limitation established by *Strickland* was that laws of general application that simply included constitutional corporations in their "range of command" were not laws "with respect to" constitutional corporations. This limitation left open the "object of command" test, although, it must be said that Barwick CJ in *Strickland* and other Justices expressed reservations about that test.

The distinctive character test favoured by Gibbs CJ, Wilson and Dawson JJ and the "discriminatory operation test" favoured by Brennan J involved limitations on the power. The distinctive character test did not enjoy a majority in any decision. But other Justices who did not embrace it alluded to limits on the scope of the corporations power, for instance Barwick CJ's express reservations concerning the object of command test. Practical limits were placed on the exercise of the corporations power by the process of characterisation of laws. For example, the Justices who constituted the majority in *Dingjan* concluded that the relevant provision was not a law "with respect to" constitutional corporations. It is fair to treat the case as turning on the characterisation of the law as having an insufficient connection with corporations, rather than defining the scope of the corporations power. The outer limits of the power were left ill-defined and the process of characterisation was used to limit the exercise of the power.

As Griffith CJ in *Huddart & Parker* effectively pointed out, a subject matter of legislative power than is expressed by reference to persons is not limited in its terms to specified activities undertaken by those persons that are characteristic of those persons. No such limit derived from its text can be assigned to such a power. A "persons power" can be said to

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73 [2006] HCA 52 [897].

literally support any law that issues a command to that person, or that issues a command to third parties whose conduct is likely to affect that person. Because the text of s 51(xx) itself did not limit the power to activities, such as trading activities, limits were alluded to without ever being defined. It was insufficient that a law simply include a constitutional corporation in its range of command. But what if the law was specifically directed to a constitutional corporation? The course of authority did not answer that question. The distinctive character test, the discriminatory operation test[74] and the reservations expressed about the "object of command" test suggested that it was insufficient. But the general-power view favoured by Justices including Murphy, Mason, Deane, McHugh and Gaudron JJ either supported or left open the "object of command" test.

A head-counting exercise reveals the general-power view to be in the ascendancy. Arguably, the *Tasmanian Dam Case* is authority for a proposition that s.51(xx) extended at least to authorise laws that relate to non-trading activities of constitutional corporations undertaken for the purpose of trade. Gaudron J (with whom Mason CJ and Deane J agreed) in *Dingjan* stated that s.51(xx) supports "at the very least, a law which is expressed to operate on or by reference to the business functions, activities or relationships of constitutional corporations".[75]

The majority in *Work Choices* has endorsed the approach of Gaudron J in *Re Dingjan*, as amplified by her Honour in *Re Pacific Coal*. On this approach, the power conferred by s.51(xx) extends to:

(a) the regulation of the activities, functions, relationships and the business of a corporation described in s.51(xx);

(b) the creation of rights and privileges belonging to such a corporation;

(c) the imposition of obligations on it;

(d) in respect of these matters, the regulation of the conduct of those through whom it acts, its employees and shareholders; and

(e) the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.

In circumstances where the outer limits of s.51(xx) had not been defined by a majority in any previous decision, the adoption of this approach is not inconsistent with the ruling in any particular previous decision. Instead, it is inconsistent with passages in previous decisions

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[74] in the sense that the law discriminate between constitutional corporations and other persons "in a matter peculiarly significant to that class".

[75] *Re Dingjan* (1995) 183 CLR 323 at 364; see also McHugh J at 370.

which, in one form or another, sought to limit the scope of s.51(xx) on the basis of a need to preserve a "federal balance".

One can read many of the passages in previous cases relied upon by the States as involving no more than an explicit limitation upon what was being decided in the particular case. This is the way the majority in the *Work Choices Case* treated those statements. But it was also open to read into many of those statements explicit or implicit reservations about the scope of the corporations power, seemingly motivated by the need to constrain s.51(xx) so as to preserve some ill-defined "federal balance". Appeals in the context of s.51(xx) to the "federal balance" were greeted by the majority of the Court in the *Work Choices Case* with about the same enthusiasm as the appeal by Mr Dennis Denuto to "the vibe" in his submissions to the Federal Court judge played by Robyn Nevin in the film *The Castle*.

In summary, the distinctive character test urged by the States as a means of limiting the scope of s.51(xx) in the interests of achieving a "federal balance" had never been endorsed by a majority decision of the Court, or even by a majority of the Justices who had the opportunity over the years to adopt it. Because the previous course of authority never authoritatively defined the outer limits of s.51(xx), the majority in *Work Choices* was able to adopt the view that it did without expressly overruling any previous decision.

The expansive approach taken to the corporations power by the majority in *Work Choices* can be seen in two respects:

(a) its authorisation of the "object of command" test which permitted key provisions of the Act to be upheld;

(b) in the Court's validation of other specific provisions of the Act which did <u>not</u> issue any command to a constitutional corporation but which regulated matters which can be said to have little, if any, effect on the activities, functions, relationships or business of the constitutional corporation. Some of these provisions could not be justified as being of the kind considered in *Fontana Films*, being directed to protecting constitutional corporations from conduct intended and likely to cause loss or damage to the corporation. Provisions relating to right of entry in respect of a contractor providing services for a constitutional corporation exemplify this feature. Presumably they were upheld on the basis that the exercise of a right of entry in respect of a contractor providing services for a constitutional corporation "is capable of affecting its activities, functions, relationships or business", without any requirement that it be likely to materially affect the corporation. Upholding these

> provisions reflects the approach of the minority in *Re Dingjan* about the circumstances in which a law will be characterised as one "with respect to" constitutional corporations.

Implications of the decision

Various descriptions have been given to the implications of the approach adopted by a majority of the Court in *Work Choices*. In 1982 Gibbs CJ described such an approach as involving "extraordinary consequences".[76] In his dissenting judgment, Kirby J elaborated on the "extremely large potential" of acceptance of the Commonwealth's submissions "to exclude State law from operation in areas for more than a century have been occupied in hitherto creative interaction with federal law".[77] His Honour stated:

> "If by the use of definition provisions, as in the Amending Act, comprehensive federal legislation that is really a law with respect to another subject matter (such as the prevention and settlement of industrial disputes and how they are to be resolved) may be dressed in the raiments of legislation with respect to constitutional corporations, a very significant risk is presented to the overall balance envisaged by the constitutional distribution of powers. …"[78]

The upholding of the Commonwealth's submissions was said to have the potential "radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of the States' principal government activities".[79] Such fields were said to include education, health care and activities formerly conducted by State governments which had been privatised or out-sourced or conducted through corporatised bodies in areas such as town planning, security, transport, energy, environmental protection, age and disability services, land and water conservation, agricultural activities, corrective services, gaming and racing, sport and recreation services, fisheries and many Aboriginal activities.

The "radical shift of law making powers" might be achieved by the simple enactment by the Federal Parliament of a law dealing with any of the foregoing subjects but applied to corporations performing functions relevant in some way to such fields. The use of s.51(xx) exhibited in the amending Act was said to carry with it "a very large risk of destabilising the federal character of the Australian Constitution" and was said to involve a shift to a kind of "opportunistic" federalism "in which the Federal Parliament may enact laws in almost every sphere of what is hitherto been a State field of lawmaking by the simple expedient … of

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76 *Fontana Films* (1982) 150 CLR 169 at 182.
77 [2006] HCA 52 at [537].
78 [2006] HCA 52 at [537].
79 ibid [539].

enacting a law on the chosen subject matter whilst applying it to corporations, their officers, agents, representatives, employees, consumers, contractors, providers and others having some postulated connection with the corporation".[80]

Callinan J was of a similar view in concluding that the validation of the legislation constituted "an unacceptable distortion of the federal balance intended by the founders, accepted on many occasion as a relevant and vital reality by Justices of this Court, and manifested by [the] provisions of the Constitution … and its structure".[81]

Some commentators on the judgment used less restrained language than judges use even in strongly-worded dissenting judgments. Professor Craven described the decision as:

> "the greatest constitutional disaster to befall the States in 80 years. In terms of fallout, it is the constitutional equivalent of a dirty bomb".[82]

Any number of labels can be used to describe the implications of the decision. Consequences that are described as "extraordinary" by jurists such as Gibbs CJ can be described by others as predictable and inevitable in the light of the role that corporations play in all aspects of daily life and in the national economy. Leaving labels to one side, it is hard to disagree with the observations of Kirby J about the practical implications of the decision. The *Work Choices* legislative template can be used to enact federal legislation on a chosen subject matter by applying the law to a s51(xx) corporation, to regulate the conduct of those through whom it acts and also to regulate those whose conduct is or is capable of affecting its activities, functions, relationships or business. The decision permits the operation of "parallel laws" of the kind thought impossible by text writers at the start of the twentieth century such as Harrison Moore.[83] Gibbs CJ in *Fontana Films*[84] stated:

> "… having regard to the federal nature of the Constitution, it is difficult to suppose that the powers conferred by pars. (xix) and (xx) were intended to extend to the enactment of a complete code of laws, on all subjects, applicable to the persons named in those paragraphs."

But the decision in *Work Choices* establishes that the Parliament has power to enact "a complete code of laws" applicable to constitutional corporations.

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80 ibid para [543].
81 ibid para [913].
82 *The Australian*, 16.11.2006, page 10.
83 The Constitution of the Commonwealth of Australia (2nd ed, 1910) page 470.
84 (1902) 150 CLR 169 at 181.

It is possible to select any area currently on the political agenda and to envisage the use of the Work Choices legislative template to regulate corporations operating in those fields or proposing to enter those fields, to regulate the conduct of others who deal with those corporations or whose conduct is capable affecting those corporations. Nuclear power legislation directed specifically to constitutional corporations can regulate the activities and businesses of those corporations, and also the conduct of those whose conduct is "capable of affecting" them. For instance, the Commonwealth law might state:

> "A constitutional corporation shall conduct a nuclear power facility in accordance with the Montgomery Burns Code of Safety Practice"

and expressly override the operation of State and local laws governing the conduct of the facility. Subject to whatever protection the implied freedom of communication about government and political matters may provide, it also is open to the Parliament to enact a law:

> "No person shall make a statement which is likely to detrimentally affect the business of a constitutional corporation that conducts a nuclear power facility in accordance with the Montgomery Burns Code of Safety Practice."

If a future Commonwealth government wishes to enact a regime for carbon trading, then the corporation's power provides it with a basis to do so.

Matters that are not currently on the political agenda such as the regulation of payments to owner drivers in the road transport industry would be able to be regulated by use of the Work Choices legislative template. For instance, such a law might provide "a constitutional corporation shall pay owner drivers in accordance with the Schedule of Rates prescribed by regulation". Some might regard the enactment of federal legislation in such a field as distorting the "federal balance". But if the mischief to which the corporation's power was addressed was a concern about enabling proper regulation of corporations in their dealings with members of the public or "outside persons", then such a law would reflect rather than distort the "federal balance". If the corporations power supports laws prohibiting exploitation by constitutional corporations of suppliers and consumers, it is hard to see why it should not support laws preventing exploitation by constitutional corporations of suppliers of labour, whether they be employees or independent contractors.

The potential use of the corporation's power extends beyond laws enacted to prevent exploitation by constitutional corporations of members of the public with whom they have

dealings. It authorises the enactment of laws specifically directed to communications made by constitutional corporations in the course of their businesses and, for instance, permits the enactment of Commonwealth laws governing defamation by constitutional corporations and those who work for them. This is not an idea which has emerged since the *Work Choices* decision. It preceded it when the then Attorney-General, Mr Ruddock, threatened to enact the Commonwealth's own Defamation Act. That threat led to the enactment by the States and Territories of uniform national laws. It remains open to the Commonwealth Parliament to restrict or liberalise those defamation laws so far as they apply to constitutional corporations by enacting in the future its own Defamation Act, or to make piecemeal reforms, such as restoring the right of constitutional corporations with ten or more employees to sue for defamation.

In conclusion, the Court's endorsement of an object of command test, the support it gives to laws that regulate the activities of constitutional corporations, and the expansive approach which it adopted to the validity of laws that regulate those whose conduct is or "is capable of affecting" the activities, functions, relationships or business of a constitutional corporation equips the Commonwealth with power to regulate across an enormous range of subject matters, given the ubiquitous role of corporations in our daily lives.

The issue is not whether the Commonwealth has the constitutional power to regulate, but whether it has the political desire and will to do so. The Commonwealth's recent threat to enact uniform defamation laws is an example of political brinkmanship whereby the threat of Commonwealth legislation results in uniform national laws. The *Work Choices* decision means that we should expect more of the same.