Rearranging Workplace Relations: Revolution or Evolution?

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An explicit priority of the Federal Coalition government upon taking office early in 1996 was the reform of Australian industrial relations. The Workplace Relations Act 1996, passed later the same year, was intended to bring that reform about. The following article examines the nature, likely impact and significance of some of the changes introduced by the statute.

INDUSTRIAL relations reform has become, for better or worse, one of the dominant public policy issues of the 1990s in Australia.[1] No jurisdiction in this country has been spared attempts at the restructuring of long-established institutional arrangements, ostensibly undertaken in response to the many fundamental social and industrial changes being brought about by the rapid and increasing internationalisation of the Australian economy. At the Federal level, the extent and intensity of recent legislative activity in this area has been greater than at any time since the passage of the original Commonwealth Conciliation and Arbitration Act in 1904. In this context, the statutory initiatives taken by the present Government within just months of winning office in March 1996 — although unquestionably very important — are most unlikely to be the final chapter in this particular story.

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1. See H Emy *Remaking Australia* (Sydney: Allen & Unwin, 1993); S Bell *Ungoverning the Economy* (Melbourne: Oxford UP, 1997); Employee Relations Study Commission *Working Relations: A Fresh Start for Australian Enterprises* (Melb: Business Library, 1993).

In opposition the Coalition parties had made it clear that, if elected, they would pursue policies aimed at achieving a more deregulated and decentralised labour market. The general strategy they proposed for addressing alleged existing 'rigidities' and 'inflexibilities' in Federal awards and collective agreements made under Labor's Industrial Relations Act 1988 had two central elements. The first was a radical reduction in the scope and content (and thus the attraction for organised labour) of arbitrated awards. The second was a liberalisation of the restraints on, as well as the range of, registrable agreements available to employers and employees as alternatives to orthodox award regulation.[2] Once in office, however, the actual implementation of these deregulatory and decentralising policies proved to be more difficult than had been expected. The principal problem the Government encountered was not so much resistance by the union movement — although that was not to be underestimated — as an inability to secure a majority in the Senate to support the passage of the necessary legislative changes.[3]

In the event the new Government was forced, as a matter of practical politics, to negotiate a series of amendments to its proposed legislative scheme with the Australian Democrats, the party holding the balance of power in the Federal upper house.[4] The result of this compromise is a statutory arrangement that appears to satisfy none of the major stakeholders and which, in its likely deregulatory impact, certainly falls well short of the objectives set by some of the Coalition's strongest supporters in opposition, including the small business lobby.[5]

LEGISLATIVE OBJECTS

The differences in terminology and emphasis between the principal objects clause in the Workplace Relations Act 1996 ('WRA 1996')[6] and the equivalent clause in the predecessor Industrial Relations Act 1988 ('IRA 1988'),[7] appropriate allowance having been made in each case for the obvious rhetorical purposes such clauses are at least in part intended to serve, happen in this instance to be peculiarly revealing. Unsurprisingly perhaps, both statutes seek to promote 'the economic

2. See the report of the speech by Mr John Howard, then leader of the Opposition, in *The Australian* 9 Jan 1996, 1.
3. M Pittard 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 Aust Journ Lab Law 62, 63-64.
4. Ibid.
5. In consequence, the small business lobby is now among the Government's most vocal critics on industrial relations policy.
6. S 3.
7. S 3.

prosperity and welfare of the people of Australia'. However, whereas under the IRA 1988 this was to be pursued through the provision of a framework for preventing and settling industrial disputes by collective enterprise agreements and awards,[8] under the WRA 1996 the relevant framework is explicitly premised on a model of *co-operative workplace relations* and places a premium on the development of a flexible labour market in which 'the primary responsibility for determining matters affecting the relationship between employers and employees rests with employers and employees [rather than unions] at the workplace or enterprise level'.[9] Moreover, and very importantly as we shall see, employers and employees are to be encouraged and enabled 'to choose the most appropriate form of agreement for their particular circumstances, *whether or not that form is provided for by this [Workplace Relations] Act*'.[10]

Although both statutes explicitly endorse enterprise or workplace level agreements as the preferred means of regulating wages and conditions of employment, the WRA 1996 suggests that in the final analysis the precise legal character of those agreements, including whether or not they are the creatures of Federal or of State legislation or involve registered unions, is secondary in importance to their being the product of direct negotiation between employers and their own employees (acting either collectively or individually).[11] In so doing the WRA 1996 manifests as its key underlying policy a much more rigorous minimisation of so-called third-party involvement in the industrial relations process than was ever pursued by Labor. This is to be implemented by curbing the power and standing of registered organisations of employees and by further confining the role and authority of the Australian Industrial Relations Commission, already considerably diminished by the previous Labor Government's reforms.[12]

It is in its unambiguous embrace of this policy and these means that the 1996 Act can most clearly be seen both to build on and yet also to depart significantly from the principles which informed the earlier statutory framework. The discussion which follows endeavours briefly to describe and explain the nature and likely implications of some of the more important features of the new regime.

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8. See the introductory words of IRA 1988 s 3.
9. See the introductory words of WRA 1996 s 3.
10. S 3(c) (emphasis added).
11. See infra p 110.
12. See generally Aust Journ Lab Law (Special Issue, April 1997) devoted to the analysis of the WRA 1996. The underlying philosophy was earlier expounded in the BCA sponsored report *Working Relations* supra n 1 and is discussed by J O'Brien 'McKinsey, Hilmer and the BCA: The "New Management" Model of Labour Market Reform' (1994) 36 Journ Ind Rel 468.

BACKGROUND: THE 1993 REFORMS

Insofar as the new legislation continues to make the negotiation of agreements between employers and employees at the level of the enterprise or workplace the primary method of regulating industrial relations, it preserves and confirms the fundamental shift in regulatory policy initiated by Labor in 1993 with the introduction of the Industrial Relations Reform Act.[13] That statute, which substantially amended the then IRA 1988, sought to move the focus of the Federal industrial relations system away from compulsory conciliation and arbitration to a modified form of collective bargaining.[14] The particular version of agreement-making regime it introduced through Part VIB of the Act, whilst according a limited role to the Commission, set out to encourage the parties to determine their own arrangements concerning wages and conditions of employment free from many of the major constraints traditionally associated with arbitration and awards, including the long-standing disapproval of the use of industrial action. Although making some concession to the fact that levels of unionisation in the private sector have for many years been low and falling, Labor's 1993 regulatory regime was substantially premised on a continuance of the central representative role of trade unions/registered organisations of employees and the maintenance of a comprehensive and industrially relevant award structure.[15]

The scheme established by Part VIB of the IRA 1988 was built around two forms of regulatory instrument, namely Certified Agreements[16] and Enterprise Flexibility Agreements.[17] Certified Agreements were far and away the more important of the two. They were based on the Federal industrial disputes power[18] and were quite deliberately made available only to employers and unions.[19] Enterprise Flexibility Agreements, on the other hand, were intended to accommodate the reasonable requirements of non-unionised enterprises, but because they were based primarily on the corporations power[20] they could only be utilised by employers who were incorporated — thus excluding most of small business.[21]

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13. R Naughton 'The New Bargaining Regime Under the Industrial Relations Reforms Act' (1994) 7 Aust Journ Lab Law 147.
14. J Ludeke 'The Structural Features of the New System' (1994) 7 Aust Journ Lab Law 132.
15. Naughton supra n 13.
16. IRA 1988 Part VIB, Div 2.
17. Ibid, Div 3.
18. Cth Constitution s 51 (xxxv).
19. S 170MA.
20. Cth Constitution s 51 (xx).
21. S 170NA. For these purposes a 'constitutional corporation' was defined in s 4 to include the Commonwealth as an employer.

The object of the 1993 reforms being to facilitate and encourage enterprise bargaining — and more specifically the making and putting into effect of enterprise agreements, preferably covering only single businesses — their defining feature was the extent to which the Commission's capacity to exercise any significant direct influence, much less coercive authority or control, over the actual content of those agreements was curtailed. Having explicitly freed Part VIB agreements from the constraints of the public interest test set out in section 90,[22] and thus from the disciplines of the wage-fixing principles which otherwise applied to the conduct of all aspects of compulsory conciliation and arbitration, the statute proceeded to require the Commission to certify or approve the implementation, in the terms submitted by the parties, of memoranda of agreements which met certain stipulated conditions.[23] The majority of those conditions, few in number in any event, were concerned with procedural matters rather than substantive terms of employment, and were directed primarily to ensuring that reasonable steps were taken during the negotiation of an agreement to consult, inform and explain its content to those employees whose employment it was proposed to cover.[24]

The most important exception to this focus on issues of process were the provisions mandating the application by the Commission of a 'no disadvantage' test designed to protect employees from arrangements which impermissibly undermined their terms and conditions of employment.[25] No agreement could be certified or approved if it disadvantaged the employees concerned, where 'disadvantage' was defined to mean a reduction of any entitlement or protection under a relevant award or law — Federal or State — which the Commission considered to be 'in the context of their terms and conditions of employment considered as a whole', a reduction that was contrary to the public interest.[26] The purpose, of course, was not permanently to entrench all existing award conditions by prohibiting any modification diminishing a benefit, but rather to insist that the general content of an agreement which did effect a reduction in one or more otherwise applicable award entitlements or protections was subject to close scrutiny and assessment by the Commission prior to certification or approval.[27]

Although the nature of that test, including and in particular its public interest

22. S 170LA(3).
23. S 170MC.
24. S 170MC(1)(e) and (f)
25. S 170MC(1)(b) and (2). The test focussed on *award* entitlements, rather than *actual* conditions of employment which, of course, are often above the prescribed minima.
26. S 170MC(2).
27. *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Tweed Valley Fruit Processors* (1995) 61 IR 212.

element, generated some controversy and a measure of confusion, the evidence does not suggest that in practice it often proved to be a major obstacle to the certification or approval of agreements by the Federal tribunal.[28] On the other hand, the requirements it imposed no doubt strengthened the hand, and probably the resolve, of many unions and employees anxious to negotiate wage increases but reluctant to trade off important existing *award* entitlements and protections.[29]

In its emphasis on the making of single business enterprise agreements the statute did not attempt to rule out entirely the conclusion of multi-employer arrangements, but it did quite deliberately make their formal endorsement somewhat less straightforward — in particular by authorising the Commission to refuse to certify such agreements if it thought that certification 'would be contrary to the public interest'.[30] Again, as with the use of the concept in relation to the no-disadvantage test contained in sections 170MC and 170NC, public interest in this context seemed of necessity to refer to considerations other than those contained in section 90 of the Act.[31]

The entire scheme of Part VIB, then, was premised on the desirability of minimising the Commission's functions in relation to determining the substantive content of Certified Agreements and Enterprise Flexibility Agreements, largely by denying it the ability to arbitrate on differences between the parties during the course of negotiations.[32] The Commission, however, was given potentially very important responsibilities in relation to the manner and conduct of those negotiations.[33] Division 5 provided that its coercive powers of conciliation, including the particular powers set out in section 111, were to be available to assist the parties to reach agreement in the same way as they applied to the processes of preventing and settling disputes under Part VI.[34] Moreover, section 170QK explicitly authorised the Commission to issue orders under section 111(1)(t) for the purpose of ensuring that the parties negotiated efficiently and 'in good faith' — a concept imported from foreign jurisdictions but not further defined or explained in the Act — going so far as to identify a number of specific matters which the Tribunal had to consider in deciding whether and how that general power should be exercised in any given situation.[35]

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28. See eg the decision of the AIRC Full Bench in *Aust Federation of Air Pilots v Sky West Aviation Pty Ltd* (1996) 67 IR 397.
29. Eg *Tweed Valley Fruit Processors* supra n 27.
30. S 170MD(1)(b).
31. In view of s 90 being rendered inapplicable to Part VIB agreements by s 170LA(3).
32. Part VIB, Div 5.
33. Div 5, Subdiv B.
34. S 170QJ; also s 170QK(1) and (2).
35. S 170QK(3).

As between Certified Agreements and Enterprise Flexibility Agreements, the Act did not specify any order of preference when both were otherwise available to be used by the parties.[36] The recognition that was given by Part VIB to the role of trade unions, however, practically guaranteed the pre-eminence of Certified Agreements.[37] This was hardly surprising in the circumstances, especially given Labor's close connections with the organised trade union movement. Certified Agreements could only be made with registered organisations of employees and various of the provisions governing the process required not only that every Federal union which was a respondent to an award with a relevant employer had to have the opportunity to participate in the negotiations.[38] Moreover any registered employee organisation entitled to represent the industrial interests of members employed by the employer was entitled to be heard in proceedings for the certification of an agreement.[39]

Even the provisions governing Enterprise Flexibility Agreements — the form of regulatory instrument ostensibly designed for non-unionised workplaces — privileged the role of employee organisations to some degree.[40] Whilst not actually requiring employers proposing to utilise this type of agreement to notify and negotiate with all 'eligible unions', defined in section 170LB to mean essentially unions which were parties to awards binding the employer concerned, the Act nevertheless offered a powerful incentive to them to do so by permitting the Commission to refuse to approve the implementation of an agreement where the employer had failed to give relevant unions that notification and opportunity.[41]

In a radical break with past practice, Division 4 of Part VIB authorised the parties negotiating a Certified Agreement, subject to certain important qualifications, to resort to or engage in protected industrial action where this was being undertaken 'for the purpose of supporting or advancing' industrial claims made by either a union or an employer.[42] The limited immunity from civil liability conferred in relation to such industrial action could only be enjoyed by parties who were seeking to negotiate a Certified Agreement in circumstances where the Commission had found an industrial dispute to exist and where all or some of the employees concerned were employed by the employer in a single business.[43] Further, in addition to requiring

36. *Enterprise Flexibility Agreements Test Case* (1995) 59 IR 430.
37. See especially ss 170MC(1)(a), (1)(g) and (4), 170MB and 170MD(7).
38. S 170MC(1)(g).
39. S 170MB.
40. Ss 170ND(7) and 170NB.
41. S 170ND (7)-(9).
42. S 170PG.
43. S 170PC.

that certain procedural conditions be strictly observed for the immunity to apply,[44] the Commission was empowered to terminate the protection accorded by the Act, and to proceed (if necessary) to arbitrate, where one or more of the parties misconducted themselves or where a continuation of the industrial action threatened 'to endanger the life, the personal safety or health, or the welfare' of a part of the population or 'to cause significant damage to the Australian economy or an important part of it'.[45]

In affirming that Part VIB agreements were to be the preferred means of regulating terms and conditions of employment, the Act provided that not only should the Commission's functions and powers in relation to awards be henceforth performed in a way that encouraged the prevention and settlement of industrial disputes by the making of such agreements,[46] but that the Tribunal could (and should) refrain from determining applications for ordinary award *variations* until satisfied that there was 'no reasonable prospect' of the parties themselves successfully negotiating an outcome.[47]

Finally, once an agreement had been concluded and had come into force its terms prevailed over the terms of an award or order of the Commission issued under Part VI.[48] And although the statute made limited provision for agreements to be varied or terminated during their nominated period of operation (and even extended beyond that period) this was made subject to the satisfaction of specified conditions.[49] Importantly, however, agreements which continued in force for more than three months after the period of operation specified in the agreement, without being replaced by a new agreement between the parties, attracted the operation of section 148 and so continued in force in the same way as arbitrated awards.[50]

FOREGROUND: THE 1996 LEGISLATION

The Coalition's 1996 legislation[51] makes wholesale amendments to the IRA 1988, including changing the name of that statute to the WRA 1996. Although many of these amendments are either cosmetic or concerned with matters of detail, the significance of some of the changes should not be underestimated. Nor in this

44. Ss 170PD and 170PE.
45. S 170PO.
46. S 88A(e).
47. S 113(4A).
48. S 170MK.
49. Ss 170MJ-170MN.
50. S 170MI(3) and (4).
51. Workplace Relations and other Legislation Amendment Act 1996 (Cth).

regard should the extent to which the legislation preserves and builds on central elements of the previous structure be overlooked. The 'new' Part VIB arrangements for collective enterprise agreements illustrate this point very well.[52]

Enterprise Flexibility Agreements are re-named and made simply a second category of Certified Agreements ('Division 2 Agreements').[53] They continue to be based on section 51(xx) of the Constitution and are thus still only available to the Commonwealth and to constitutional corporations.[54] Labor's original form of Certified Agreement for employers and registered organisations of employees is retained (but now re-numbered as 'Division 3 Agreements') with the same constitutional foundation as before, namely the industrial disputes power.[55] In both instances — Division 2 and Division 3 Agreements — the Commission's role, conciliation aside,[56] remains minimal in relation to determining the content of agreements.[57] Important changes, however, have been made to a number of other aspects of the scheme. These include changes to the nature of the no-disadvantage test,[58] to the process requirements for concluding agreements,[59] and also to the various entitlements which were enjoyed by unions under the earlier arrangements.[60]

Perhaps even more important than these changes, though, is the introduction, through Part VID of the Act, of an entirely new form of regulatory instrument called an Australian Workplace Agreement ('AWA').[61] These agreements are only available to the Commonwealth and constitutional corporations as employers and to their individual employees.[62] Although subject to the same no-disadvantage test as Division 2 and Division 3 Certified Agreements,[63] primary responsibility for processing and approving AWAs is vested in a new statutory officer, called the Employment Advocate,[64] whose functions and powers are set out in Part IVA of the Act.

The critical feature of AWAs, aside from their focus on the individual employment relationship,[65] is not so much their separation for general administrative

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52. For a detailed discussion of those provisions: see Pittard supra n 3.
53. See especially ss 170LH and 170LI.
54. S 170LI(1)(a).
55. S 170LN.
56. S 170NA.
57. See especially ss 170N, 170NL and Div 4.
58. Part VIE, especially s 170XA.
59. Div 3 and ss 170LJ, 170LK, 170LR and 170LT(7).
60. Ss 170LJ and 170LO.
61. For a discussion of Part VID agreements: see R McCallum 'Australian Workplace Agreements: An Analysis' (1997) 10 Aust Journ Lab Law 50.
62. S 170VC. See also, however, s 170VE which provides for so-called collective agreements.
63. S 170VPB.
64. Part VID, Div 4 and Div 5 (especially Subdiv B).
65. S 170VP; cf s 170VE.

purposes from the jurisdiction of the Commission as their particular relationship to and effect upon other regulatory instruments.[66] The Act establishes that they are to operate to the complete exclusion of State and Federal awards[67] and, in a wide range of circumstances, Certified Agreements as well.[68] This confirmed the Coalition's clear preference for the contractualist paradigm[69] — as pioneered in the industrial jurisdictions of New Zealand,[70] Victoria,[71] and more recently Western Australia[72] — rather than the long-established collective model of labour relations which has hitherto underpinned Australian conciliation and arbitration.

The modified no-disadvantage test which is to be applied to certified agreements of both kinds and to AWAs is now contained in Part VIE of the Act. In its present form the test was designed to address the most serious of the criticisms levelled at the previous formulation by employers and employer organisations, many of whom alleged that its operation merely perpetuated award-based inflexibilities and rigidities (ie, work practices they regarded as inefficient or otherwise undesirable), whilst at the same time meeting the Government's election promise that under the Coalition's proposed arrangements employees would not be 'worse off'.[73] As now written the relevant provision in Part VIE provides, subject to certain specified exceptions, as follows:

Section 170XA. When does an agreement pass the no-disadvantage test?

(2) ... an agreement disadvantages employees in relation to their terms and conditions *only* if its approval or certification would result, *on balance*, in a reduction in the *overall* terms and conditions of employment of those employees under:
(a) relevant awards or designated awards; and
(b) any other law of the Commonwealth or of a State or Territory

66. Part VID, Div 6.
67. S 170VQ (1) and (4); cf s 170NQ(5).
68. S 170VQ(6).
69. See R McCallum 'The New Millenium and the Higgins Heritage' (1996) 38 Journ Ind Rel 294.
70. Employment Contracts Act 1991 (NZ); see R Ryan & P Walsh 'Common Law v Labour Law: The New Zealand Experience' (1993) 6 Aust Journ Lab Law 230.
71. Employee Relations Act 1992 (Vic); see R Naughton 'The Institutions Established by the Employee Relations Act 1992 (Vic)' (1993) 6 Aust Journ Lab Law 121; B Creighton 'Employment Agreements and Conditions of Employment Under the Employee Relations Act 1992' (1993) 6 Aust Journ Lab Law 140.
72. Workplace Agreements Act 1993 (WA); see W Ford 'Reinventing the Contract of Employment: The Workplace Agreements Act 1993 (WA)' (1996) 9 Aust Journ Lab Law 259.
73. See the speech by Mr John Howard supra n 2; see also McCallum supra n 61, 59.

> that the Employment Advocate of the Commission (as the case may be) considers relevant.[74]

This modification amounts in substance to a statutory adoption of the approach to the earlier test contained in the IRA 1988 espoused and applied by Commissioner Redmond in the *Tweed Valley Fruit Processors* case,[75] but which was subsequently disapproved and overturned, on appeal, by the Full Bench of the Australian Industrial Relations Commission.[76] Under the Coalition's new test the requirement that the Commission make a determination concerning the proposed agreement in terms of the public interest is no longer triggered by *any* reduction in an existing award entitlement. Instead the statute now provides that the initial assessment of the agreement is to be limited to a global, rather than a 'line by line', evaluation of the proposed package. The public interest determination only becomes relevant and applicable where an agreement receives, on that basis, an adverse *global* evaluation. It is in this respect that the present no-disadvantage test is significantly less protective of award conditions of employment than was the version of the test contained in the IRA 1988 — a conclusion which is supported by the discussion of the earlier form of the test in the reasons for judgment of the members of the Industrial Relations Court of Australia in the *Tweed Valley* case.[77]

Furthermore, in a subtle change in emphasis the Act provides that agreements which do not pass this remodelled no-disadvantage test may nevertheless still be certified by the Commission if it is satisfied that to do so 'is *not contrary* to the public interest'[78] — going on to give as one such example a situation where making the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the single business concerned.[79]

In relation to AWAs, although the no-disadvantage test certainly applies, these agreements are to be evaluated in terms of disadvantage *by the Commission* only where the Employment Advocate 'has concerns about whether the AWA passes' the statutory test which are not able to be resolved by an appropriate written undertaking by the employer or by some other action by the parties.[80] Even where, on any such referral by the Employment Advocate, the Commission itself

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74. S 170XA(2) (emphasis added).
75. *Re Tweed Valley Fruit Processors Enterprise Flexibility Agreement* (16 August 1995).
76. *Tweed Valley Fruit Processors* supra n 27.
77. *Tweed Valley Fruit Processors v Ross* (1996) 137 ALR 70.
78. S 170LT(3) (emphasis added).
79. S 170LT(4), adopting observations of the Full Bench of the AIRC made in the *Enterprise Flexibility Agreements Test Case* supra n 36, 457.
80. S 170VPB.

shares those concerns it must proceed to approve the agreement if it considers that to do so would not be contrary to the public interest.[81]

The right to take protected industrial action in connection with single enterprise union Certified Agreements under Part VIB is continued[82] and extended to employers and (in theory, anyway) to employees negotiating Division 2 (non-union) agreements and AWAs.[83] In practice, however, that right has been significantly restricted by other important amendments. These include the insertion of a new and highly contentious power to issue orders to stop or prevent industrial action which is being taken or threatened 'in relation to' industrial disputes, Division 2 Certified Agreements or 'work regulated by an award or a certified agreement'.[84] In addition, the Act now expressly and comprehensively proscribes the making (or acceptance by employees) of payments 'in relation to a period during which the employee engaged ... in industrial action'.[85] A contravention of this latter provision, although not constituting an offence, may attract fines and orders for compensation as well as appropriate injunctive relief.[86] Not surprisingly, in view of the re-inclusion of sections 45B and 45E in the Trade Practices Act 1974 (Cth), secondary boycotts are also unprotected forms of industrial action.[87]

Neither form of collective agreement under Part VIB is able to be certified by the Commission unless it has first been endorsed — 'genuinely approved' in the case of Division 3 Agreements[88] and 'genuinely made' in the case of Division 2

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81. S 170VPG. Note also that s 170VPE requires that a protocol providing 'general guidance' to the Employment Advocate for AWA referrals be established by the AIRC President 'as soon as practicable after the commencement' of the section.
82. Part VIB, Div 8 (especially s 170MI(1)).
83. Part VID, Div 8. Although strictly speaking unions are not excluded from being parties to Div 2 of Part VIB agreements (s 170LJ) — indeed are increasingly acquiescing in the choice of that form of agreement by employers — it is clear that the principal purpose of Div 2 of Part VIB is to permit employers the option of concluding agreements directly with their employees rather than with unions: see A Coulthard 'Non-Union Enterprise Bargaining: Enterprise Flexibility Agreements' (1996) 38 Journ Ind Rel 339 which makes this particular point in relation to the corresponding provisions (Div 3) of the IRA 1988.
84. S 127. The significance of this particular new power is well illustrated by, and explained in, two recent but as yet unreported decisions. The first is the decision of the Full Bench of the AIRC in *Coal and Allied Operations Ltd v AMWU* (unreported) AIRC 20 Jun 1997 Print P2071. The second, highlighting the nature of the relationship between s 127 and the common law as well as the conditional character of the protection afforded by Part VIB, Div 8 (and, by parity of reasoning, Part VID, Div 8), is the unanimous decision of the Full Court of the Supreme Court of Victoria in *National Workforce Pty Ltd v AMWUI* (unreported) Vic Sup Ct 6 Oct 1997 no 7001. This general topic merits an article in itself but is beyond the scope of the present discussion.
85. S 187AA; see generally Part VIIIA.
86. S 187AD.
87. S 170MM.
88. S 170LT(5).

Agreements[89] — by a 'valid majority of persons employed at the time whose employment would be subject to the agreement'.[90] And although the Act does not actually prescribe a vote or formal poll of relevant employees this would appear to be the procedure which is likely usually to be used, and perhaps even expected, by the tribunal.[91] In relation to Division 3 Agreements the requirement of a valid majority means that non-unionists are entitled to participate in the process of approving, or disapproving, arrangements negotiated with the employer by one or more unions notwithstanding, it seems, that they cannot be parties to or technically bound by those arrangements.[92] This is a most unsatisfactory situation so far as registered organisations of employees are concerned, being perceived by them as having the potential seriously to undermine an important part of the value of union membership.[93]

SOME CONSITUTIONAL CONSIDERATIONS

The WRA 1996 draws on much the same range of constitutional powers as did Labor's Industrial Relations Reform Act 1993, including those powers dealing with trade and commerce,[94] external affairs,[95] Commonwealth public service[96] and the Territories.[97] Its key provisions[98] have been enacted in reliance upon the industrial disputes power[99] and the corporations power.[100] The most obvious difference, therefore, from a constitutional point of view, between the new Act and its predecessor is the greatly reduced significance the statute accords the external affairs power[101] and the greatly increased importance it accords the corporations power.[102]

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89. S 120LT(6).
90. S 170LT.
91. As became the practice with Part VIB agreements under the IRA 1988.
92. S 170MA; see G McCarry 'Some Problems with Industrial Agreements Certified Under Commonwealth Legislation Present and Proposed' (1996) 15 Aust Bar Rev 33.
93. The response by some unions has been to prefer agreements certified under s 170LJ.
94. S 51(1).
95. S 51(xxix).
96. S 52.
97. S 122.
98. In relation, in the present context, to the making of certified agreements and AWAs.
99. S 51 (xxxxv).
100. S 51.
101. S 5 (xxi).
102. See W Ford 'The Constitution and the Reform of Australian Industrial Relations' (1994) 7 Aust Journ Lab Law 105; 'Reconstructing Australian Labour Law: A Constitutional Perspective' (1997) 10 Aust Journ Lab Law 1.

In both statutes the disputes power has been central to the validity of the exclusively union stream of Certified Agreements. Labor's successful use of that power to enact amendments to the IRA 1988, shifting the primary focus of that legislation from arbitration to negotiation at the enterprise level,[103] continues to be reflected in the provisions governing agreements between unions and employers under the present Division 3 of Part VIB.[104] This is not at all surprising. In large part the explanation is to be found in the fact that when drafting Part VIB the Coalition had the benefit not only of Labor's legislative arrangements for Certified Agreements but also the High Court's decision in *Victoria v Commonwealth*[105] upholding their validity.

The crucial constitutional question in relation to these arrangements concerns the competence of the Federal parliament to make laws mandating the certification by the Commission of agreements negotiated between parties to industrial disputes or situations which, once certified, acquire the legal status and force of awards, notwithstanding that they have been made without the participation or assistance of the tribunal.[106] The question involves at least three separate constitutional issues, namely whether section 51(xxxv) supports legislation which (i) expands the jurisdiction to include industrial situations (ii) gives agreements the same effect as awards and (iii) permits unions and employers to engage in legally protected industrial action. All three of these issues were the subject of explicit, and favourable, consideration by the High Court in *Victoria v Commonwealth*.[107]

In enacting the relevant provisions of Part VIB of the Industrial Relations Act 1988 the then Labor Government had relied heavily on the comparatively neglected legislative authority of the Commonwealth parliament, pursuant to section 51(xxxv), to make laws with respect not merely to the settlement of industrial disputes but to their prevention as well.[108] This in itself marked a significant departure from past practice.

Under the IRA 1988, subject only to the satisfaction of the prescribed statutory requirements as to content,[109] Certified Agreements could be made by employers and unions if, as parties to an 'industrial situation', they were able to agree on terms for preventing that situation from giving rise to an industrial dispute between

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103. See R Naughton supra n 13; J Ludeke supra n 14; W Ford ibid.
104. See especially s 170LP and the provisions of Div 4.
105. (1996) 138 ALR 129.
106. Ibid.
107. Supra n 105.
108. See WB Creighton, W Ford & R Mitchell *Labour Law: Text and Materials* 2nd edn (Sydney: Law Book Co, 1993) ch 20.
109. S 170MC.

them.[110] An industrial situation was defined by the statute to mean:

> A situation that, if preventive action is not taken, may give rise to:
> (a) an industrial dispute of the kind referred to in paragraph (a) of the definition of 'industrial dispute' [in section 4(1) of the IRA 1988]; or
> (b) a demarcation dispute of the kind referred to in that definition.[111]

Some appreciation of the significance of the extension in jurisdiction claimed by this amendment can be gained from the fact that paragraph (a) of the existing definition of 'industrial dispute' in the Act already provided that for relevant purposes such a dispute included 'a threatened, impending or probable' industrial dispute extending beyond the limits of any one State.[112] In relation to the certification of agreements, therefore, the amendment held out the prospect of reducing to almost vanishing point — and certainly to near irrelevance — the twin requirements of dispute and 'interstateness' which had always previously conditioned the exercise of the Commission's statutory powers.[113] Employers and unions, apparently, were to be able to make agreements which could then be certified, and thus given the force of awards, without there first having to exist circumstances of likely or probable — much less actual — interstate disagreement. It sufficed for the Tribunal to be satisfied that the state of affairs which obtained at the time of certification was such that a statutory dispute might arise were preventative action not taken.[114]

This innovation, which has been continued by the WRA, meant that in practice there was no serious jurisdictional barrier to the making and certifying of agreements involving an employer and one or more Federally registered organisations of employees. The Commission will almost always be able to be satisfied that the presence and participation of a Federal union in the proceedings establishes the situation to be one where, failing certification by the Tribunal of the memorandum of agreement between the parties, an industrial dispute extending beyond the limits of one State *might* well occur.[115] After all, subject to the requirement of genuineness, such a dispute could always be initiated in these circumstances by the mere service, in another State, of an appropriate log of claims.[116]

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110. S 120MA(2).
111. S 4.
112. Ibid.
113. Eg Creighton et al supra n 108, chs 15-16.
114. *Victoria v Cth* supra n 105, 155.
115. Eg *R v Turbet, ex parte Australian Buildling Construction Employees and Building Labourers' Federation* (1980) 144 CLR 335, Mason J 345-346. Cf *A-G (Qld) v Riordon* (1997) 146 ALR 445.
116. Eg *R* v *Ludeke, ex parte QEC* (1985) 159 CLR 178; *A-G (Qld) v Riordan* ibid.

In mandating the certification of agreements which meet the stipulated conditions precedent,[117] the statute gives those arrangements the effect of awards notwithstanding that the agreements are arrived at without the intervention of an independent third party and so, on the face of it, involve neither conciliation nor arbitration.[118] Of the equivalent provisions in the IRA 1988 the Court had said that they did:

> no more than allow that, instead of submitting their differences to conciliation and arbitration, the parties to an industrial dispute or an industrial situation may, subject to the matters specified in that Division, agree on a settlement of the matters in issue, conditional upon the terms of their agreement having the legal effect as an award of the Commission. In so doing, it marks out a feature of the system of conciliation and arbitration adopted by the Parliament for the prevention and settlement of industrial disputes. And it marks out what may well be thought to be a necessary or indispensable feature of any system that might properly have been adopted pursuant to section 51(xxxv). Whether or not that is so, the provisions ... are so closely connected with conciliation and arbitration for the prevention and settlement of interstate industrial disputes as to be properly regarded as ancillary or incidental thereto. They are, thus, validly enacted pursuant to section 51(xxxv) of the Constitution. [119]

In relation to the 1993 provisions dealing specifically with the limited immunity for industrial action taken by unions and employers negotiating Certified Agreements under Part VIB,[120] the Court had held that (independently of any authority otherwise derived from the external affairs power and the various international covenants and conventions referred to in section 170PA of the statute[121]) the industrial disputes power sufficed to give them validity:

> It is well settled that section 51(xxxv) 'carries with it authority to make such provisions as are incidental to the effectuation of the purpose described by the express words of the power'.... It was open to the Parliament to form the view that disputes might more readily be resolved by conciliation and arbitration if the parties to a dispute who so wish are first provided with an opportunity to negotiate the matters in the dispute freed from the prospect of civil litigation in the event of direct industrial action. The view is also open that limited immunity

117. S 170LT.
118. *Victoria v Cth* supra n 105.
119. Ibid, 188.
120. IRA 1988 Part VIB, Div 4.
121. In particular the International Covenant on Economic, Social and Cultural Rights; the Freedom of Association and Protection of the Right to Organize Convention 1948; the Right to Organize and Collective Bargaining Convention 1949; and the Constitution of the ILO: see W Ford 'The Constitution and the Reform of Australian Industrial Relations' supra n 102, 117-130.

> of the kind conferred by section 170PM has the capacity to assist in the resolution of the dispute by conciliation and arbitration if negotiations fail and it becomes necessary for the Commission to exercise its powers in that regard. Thus section 170PM has a substantial connection with conciliation and arbitration for the prevention and settlement of interstate industrial disputes. It follows that...the provisions of [the then] Div 4 of Pt VIB are validly enacted pursuant to section 51(xxxv) of the Constitution. [122]

Understandably, then, in formulating the present arrangements for Division 3 the Coalition government chose to rely substantially upon the constitutional foundations of the earlier structure. By contrast the introduction of Australian Workplace Agreements[123] and the extension to those agreements,[124] as well as to Division 2 Certified Agreements (previously EFAs),[125] of the same general entitlement to protected industrial action as enjoyed by parties to Division 3 Agreements, required significantly more in the way of innovation.[126] These particular changes have involved much greater reliance on the corporations power than did the 1993 amendments — although even in this regard the new legislation has been able to build on important aspects of the previous statutory scheme. The critical question, of course, is whether the scope of that power is broad enough to support these new arrangements.[127] Recent decisions of the High Court, in particular *Re Dingjan, ex parte Wagner*[128] and *Victoria v Commonwealth*,[129] suggest that it is.

CONSTITUTIONAL CORPORATIONS

Certainly since *Actors and Announcers Equity Association v Fontana Films Pty Ltd*,[130] if not the *Rocla Concrete Pipes* case[131] in the early 1970s, it has been clear that the reach of the corporations power, whatever its true limits, extends beyond laws regulating the *trading* activities of foreign, trading and financial

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122. *Victoria v Cth* supra n 105, 196-197.
123. WRA 1996, Part VID.
124. Part VID, Div 8.
125. Part VIB, Div 8 (especially S 170MI).
126. As indicated above, limited immunity for industrial action in relation to certified agreements under the IRA 1988 had been based on the industrial disputes power (s 51(xxxv)) as well as the external affairs power (s 51(xxxix)). The Coalition's general reluctance to utilise the latter power forced it to explore other 'exotic' heads of power.
127. See L Zines *The High Court and the Constitution* 3rd edn (Sydney: Butterworths, 1996).
128. (1995) 183 CLR 323.
129. Supra n 105, 155.
130. (1982) 150 CLR 169.
131. *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.

corporations.[132] In *Re Dingjan*, however, not only did the members of the Court emphatically endorse this view, all of them accepting the competence of the parliament to legislate to protect, enhance or constrain the general *business* activities of constitutional corporations,[133] they gave every indication that statutory provisions of the kind now included in the Workplace Relations Act 1996 also come within its scope.

The actual decision in *Re Dingjan* concerned a challenge to the validity of sections 127A, 127B and 127C of the Industrial Relations Act 1988.[134] Those particular provisions of the Act conferred upon the Commission the power to review a contract for services that was binding on independent contractors and related to the business of a constitutional corporation on the grounds that the contract concerned was harsh, unfair or against the public interest. Although the Court (by a bare majority) held the relevant sections of the statute to be unconstitutional,[135] this conclusion was based squarely on the fact that, in requiring no more than that the relevant contract 'relate to' the business of a constitutional corporation, the provisions in question were too broad and so failed to ensure that the exercise of the power being conferred on the Tribunal would affect constitutional corporations in some direct or material way.[136] The comments of the justices on the scope of the constitutional grant, however, come very close to putting beyond doubt the validity of the new provisions of the WRA.

Without here analysing each separate judgment, what emerges very clearly from *Re Dingjan* is a near unanimous acceptance of the view that a law which regulates the relationship between a constitutional corporation and persons — including of course employees and independent contractors — who provide work to the corporation for the purposes of its business activities is a law with respect to section 51(xx).[137] Sufficiently representative for present purposes are the observations of McHugh J who, in treating as the litmus test for establishing the necessary connection between the grant and any impugned law the significance for the corporation of the conduct covered by the law, commented:

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132. *Actors Equity Assoc* supra n 130, Mason J 207. Cf *Cth v Tasmania* (1983) 158 CLR 1, Mason J 49. This issue is discussed in detail in W Ford 'Reconstructing Australian Labour Law' (1997) 10 Aust Journ Lab Law 1.
133. Supra n 128.
134. These provisions have been significantly identified in the WRA 1986.
135. The Court divided 4:3 on the question (Brennan, Dawson, Toohey, McHugh JJ; Mason C J, Deane and Gaudron JJ dissenting).
136. *Re Dingjan* supra n 128.
137. Ibid.

> Although laws that regulate the activities, functions, relationships or business of corporations are clearly laws with respect to corporations, the power conferred by section 51(xx) also extends to any subject that affects the corporation. As long as the law in question can be characterised as a law with respect to trading, financial or foreign corporations, *the Parliament of the Commonwealth may regulate many subject matters that are otherwise outside the scope of Commonwealth legislative power....*
>
> Where a law purports to be 'with respect to' a section 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 means that it must have some significance for the activities, functions, relationships or business of the corporation. If a law regulates the activities, functions, relationships or business of a section 51(xx) corporation, no more is needed to bring the law within section 51(xx). That is because the law, by regulating the activities, etc, is regulating the conduct of the corporation or those who deal with it. Further, if, by reference to the activities or functions of section 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 section 51(xx)....*
>
> Thus, laws that regulate conduct that promotes or protects the functions, activities, relationships or business of such corporations or laws that regulate conduct conferring benefits on those corporations are laws with respect to section 51(xx) corporations even though they are also laws with respect to that conduct.[138]

Gaudron J, with whom Deane J concurred,[139] was even more emphatic as to the extent of the Commonwealth's relevant legislative authority:

> When section 51(xx) is approached on the basis that it is to be construed according to its terms and not by reference to unnecessary implications and limitations, it is clear that, 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 is a law with respect to those corporations. In this regard, it is sufficient to note that, although the business activities of trading and financial corporations may be more extensive than their trading or financial activities, those corporations, nonetheless, take their character from their business activities....
>
> As their business activities signify whether or not corporations are trading or financial corporations and the main purpose of the power to legislate with respect to foreign corporations must be directed to their business activities in Australia, it follows that the power conferred by section 51(xx) extends, at the very least, to the business functions and activities of constitutional corporations and to their business relationships. And those functions, activities and relationships will, in the ordinary course, involve individuals, *and not merely individuals through whom*

138. Ibid, 370 (emphasis added).
139. Ibid.

> *the corporation acts....*
>
> Once it is accepted that section 51(xx) extends to the business functions, activities and relationships of constitutional corporations, *it follows that it also extends to the persons by and through whom they carry out those functions and activities and with whom they enter into those relationships....*[140]

Short of a decision dealing directly with the issue of the constitutionality of the new provisions it would be difficult to have a stronger foundation for concluding that the material provisions of the statute are valid. The WRA 1996 makes Certified Agreements under Division 2 of Part VIB and AWAs under Part VID of the Act statutorily enforceable industrial instruments by means of which constitutional corporations are able, jointly with their employees and/or the relevant unions, to negotiate and structure their contractual relationship. That contractual relationship concerns the performance of work for the purposes of benefiting and promoting the business activities of the corporation. As such, it is central to the fulfilment of the main purpose such corporations exist to serve. The statutory provisions therefore regulate significant functions and relationships of constitutional corporations and, in so doing, directly affect their rights and obligations in ways substantially connected to their constitutional character.[141] The fact that responsibility for the actual certification or approval of these agreements is vested principally in the Employment Advocate rather than the Commission is, in a constitutional sense, a matter of no particular significance.[142]

Similarly, the provisions dealing with protected industrial action for parties negotiating Certified Agreements under Division 2[143] or AWAs[144] are concerned with, and have as their principal purpose, the facilitation of those statutorily endorsed arrangements in the general manner explained and approved by the court in *Victoria v Commonwealth*.[145] The conduct regulated by those provisions, and the rights and duties they confer and impose, directly affect, in their terms and operation, corporations of the constitutionally designated categories. The relevant statutory

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140. Ibid, 364-365 (emphasis added).
141. The absence of which accounted for the funding invalidity in relation to the particular provisions challenged in *Re Dingjan*. The tactical decision of the prosecutors in *Victoria v Cth* not to pursue their challenge to the constitutionality of the particular provisions of the IRA 1988 concerning EFAs strengthens, even if it cannot be regarded as confirming, this general conclusion.
142. The identity of the certifying agency or functionary is unrelated to whether the connection with the constitutional power is sufficiently close to make the provisions in law 'with respect to' s 51(xx).
143. See Part VIB, Div 8.
144. See Part VID, Div 8.
145. Supra n 105.

measures are all reasonably appropriate and adapted to the end in question and are therefore, at the very least, incidental to the subject matter of the power contained in section 51(xx).[146]

ARBITRATION AND AWARDS

Quite as important operationally as the new provisions dealing with collective and individual agreements are the changes the WRA makes to the system of compulsory arbitration and to the status and structure of Federal awards. Indeed a powerful case can be made for regarding these changes to Part VI as perhaps even more radical than the modification to Parts VIB and the introduction of Part VID.[147] The amendments to Part VI not only confirm and strengthen Labor's policy of promoting enterprise agreements between employers and employees as the statutorily preferred means of regulation,[148] but also significantly impair the effectiveness of the arbitral process by greatly reducing the regulatory role and authority of the Commission.[149]

These policies, of course, are closely related. The stronger the preference for an industrial relations model of agreement-making at the workplace level, the lower the tolerance for multi-employer style arbitration of almost any kind.[150] The strategy for persuading parties to opt for change of this order and importance must always involve providing incentives to transfer to the new system and disincentives for staying with the old. The incentives for transferring to Part VIB or VID — including the removal of public interest constraints, greater independence and a measure of operational simplicity — have already been outlined. The disincentives to remaining in the award system take the form, as we shall see, of further restricting and limiting the process of arbitration and radically altering the relationship between State systems of industrial regulation and existing or prospective Federal awards.

Once again some of the Coalition Government's amendments simply adopt and extend changes introduced by the Industrial Relations Reform Act 1993. Thus the

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146. Ibid; see also the general discussion in *Leask* v *Cth* (1996) 140 ALR 1, Kirby J 39-42.
147. They certainly constitute the most severe curtailment of the Commission's arbitral powers to have been enacted since 1904.
148. See the explanatory memorandum accompanying the Industrial Relations Reform Act 1993 (Cth).
149. This is an outcome entirely consistent with the general scepticism of the value of so-called third party involvement vigorously espoused in recent years: see the very influential report of the Employee Relations Study Commission supra n 1 established by the Australian Business Council and chaired by Mr F Hilmer.
150. The limited immunity for industrial action provisions has never covered negotiations for multi-employer agreements: see WRA 1996 s 170LC.

objects of Part VI continue to endorse the importance of maintaining the award system as a safety net of 'fair minimum wages and conditions of employment'[151] whilst reiterating the desirability of the Commission's powers being exercised 'in a way that encourages the making of agreements between employers and employees at the workplace or enterprise level'.[152]

Important differences, however, emerge in the reformulation of the provisions setting out the functions of the Commission and the manner in which they are to be performed. Gone is the statutory injunction that the Commission 'ensure, so far as it can, that the system of awards provides for secure, relevant and consistent wages and conditions of employment',[153] to be replaced by references to the establishment of 'fair minimum standards ... in the context of living standards generally prevailing in the Australian community' and adjusting the safety net to meet the needs of the low paid.[154] Moreover, the Commission is now to arbitrate to prevent or settle industrial disputes only as 'a last resort'.[155]

There are three substantive amendments which are of particular significance and warrant rather more detailed examination. They are all measures designed and intended to persuade employers, employees and unions to abandon arbitration and awards under Part VI in favour of negotiation and agreements under Part VIB and/or Part VID.

The first of these changes is the insertion into the Act of section 89A restricting the general award making and variation power of the Commission under section 89 to awards in prevention or settlement of disputes about enumerated allowable award matters.[156] Those matters, set out in sub-section (2), are as follows:

Section 89A. Scope of industrial disputes

(2) (a) classifications of employees and skill-based career paths;
(b) ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours;
(c) rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system;
(d) piece rates, tallies and bonuses;

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151. S 88A(b).
152. S 88A(d).
153. IRA 1988 s 90AA(2)(a).
154. WRA 1996 s 98B(2).
155. S 89(a)(ii).
156. S 89 prescribes the 'general functions of the Commission'. S 89A achieves the desired arbitral restriction by limiting the scope of industrial dispute for these particular purposes.

(e) annual leave and leave loadings;
(f) long service leave;
(g) personal/carer's leave, including sick leave, family leave, bereavement leave, compassionate leave, cultural leave and other like forms of leave;
(h) parental leave, including maternity and adoption leave;
(i) public holidays;
(j) allowances;
(k) leadings for working overtime or for casual or shift work;
(l) penalty rates;
(m) redundancy pay;
(n) notice of termination;
(o) stand-down provisions;
(p) dispute settling procedures;
(q) jury service;
(r) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work;
(s) superannuation;
(t) pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.

Some potential for arbitration beyond these enumerated topics is provided by section 89A(6) which authorises the Commission to include in an award 'provisions that are incidental to the matters in subsection (2) *and* necessary for the effective operation of the award'. These two requirements are cumulative and the notion of incidentality employed by the section is not to be confused with that used in relation to constitutional interpretation. Further, section 89(7) permits 'exceptional matters' to be made part of a dispute — and thence possibly the subject of an order under the new section 120A — provided that the Commission is satisfied as to all of the conditions specified therein, including that 'the issues involved in the exceptional matter are exceptional issues' and that the outcome would otherwise be 'harsh or unjust'. Any award that is ultimately made under sections 89 and 89A, however, can only set minimum rates and conditions whatever be the matters with which it deals.[157]

157. S 89(3); note, however, that there continues to be debate about the definition of a minimum

In the context of limitations designed to discourage third-party involvement in industrial relations and to address the sources of alleged inflexibilities in the labour market, section 89A(4) is especially interesting. That provision imposes serious restrictions on the Commission's power to regulate one of the increasingly important of the 'allowable matters' identified in section 89A(2), namely 'type of employment' (paragraph (r), above). It excludes from that matter any capacity the Tribunal would otherwise have 'to limit the number or proportion of employees that an employer may employ in a particular type of employment' as well as 'to set maximum or minimum hours of work for regular part-time employees'. These, it need hardly be said, are crucial issues for unions in industries undergoing restructuring and casualisation.[158] They are also matters which go to the heart of existing wage structures in industry as well as to prevailing patterns of union density and workforce segmentation and are therefore central to the future shape and strength of the organised labour movement.

Importantly, the Act goes on to provide that unless existing awards have been altered in such a way as to bring them into compliance with the provisions of section 89A by July 1998 — the end of the 'interim period'[159] — then in accordance with the provisions of Item 50 of Schedule 5 of the transitional provisions 'each award ceases to have effect to the extent that it provides for matters other than the allowable award matters'.[160]

It is clear that in both intention and likely effect the changes introduced by section 89A, in spite of their superficial formal resemblance to the old 'industrial matters' definition in the (repealed) Commonwealth Conciliation and Arbitration Act 1904, represent a very significant and far-reaching modification of the established Federal system of compulsory conciliation and arbitration — potentially perhaps the most significant to have been enacted since the passage of the original statute in 1904.[161] The nature of the proceedings in the ACCI test case on award simplification is testimony to this. And although express provision is made in

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rates award — a term which is not clarified in the statute itself. See also in this connection s 143 (IB) which, inter alia, enjoins the Commission to avoid including in awards 'matters of detail or process'.

158. The textiles, clothing and footwear industry and the tourism and hospitality industry being the most publicised examples.

159. Sch 5, Item 46.

160. See also Sch 5, Items 49 and 51 dealing with variation of awards during and also after the interim period.

161. They are certainly completely at odds with the recommendations contained in the Committee of Review *Report into Australian Industrial Relations Law and Systems* (Canberra: AGPS, 1985) Vol 2, 332-235.

section 106 for the Full Bench of the Commission to 'establish principles about the making or varying of awards in relation to each of the allowable award matters' it is already evident that section 89A raises a number of difficult issues of construction.

Even accepting that the categories of allowable award matters are not mutually exclusive and should be 'construed against the background of industrial usage' recent decisions suggest that the Commission is unlikely to be receptive to ingenious arguments designed to minimise the impact of these amendments. As the Full Bench observed in the *Newlands Coal* case :

> For ... an award provision to be made, it must be within or reasonably incidental to the ambit of an industrial dispute. For that purpose , it is sufficient that there be a relevant and appropriate part of the subject matter of the dispute to which the provision can be referred. It is not necessary that there be a specific subject matter of the dispute matching the allowable award matter description, but the subject of the dispute must afford a jurisdictional basis for the arbitration of the particular allowable award matter.[162]

Whatever difficulties of interpretation section 89A presents there can be little doubt about its validity. The IRA 1988 and its predecessors always imposed various limitations on the jurisdiction of the Commission which, from a constitutional as distinct from a policy point of view, were completely unnecessary. One of the most closely examined of such constraints was that which for decades applied to the making of awards of preference and demarcation.[163] At an even more fundamental level, perhaps, the previous statutory definition of 'industrial dispute', although much more generous in scope than the presently relevant provisions, expressly restricted the Commission's arbitral jurisdiction to disputes 'about matters pertaining to the relationship between employers and employees',[164] thereby excluding from regulation such subjects as employer deduction of union dues ('check-off')[165] and (other than indirectly) the employment of independent contractors.[166]

Constitutionally, then, the new constraints imposed by section 89A merely *further* condition and confine the already limited arbitral power of the Commission.

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162. *Australian Collieries' Staff Assoc and Newlands Coal Pty Ltd* 23 May 1997 (Print P1188) 5. Cf *FSU and Cth Bank of Australia Officers Award 1990* 29 May 1997 (Print P1297).
163. Eg *R* v *Findlay, ex parte Victorian Chamber of Manufacturers* (1950) 81 CLR 537; R Mitchell 'The High Court and the Preference Power: *Wallis* and *Findlay* in the Context of the 1947 Amendments' (1986) 16 UWAL Rev 338.
164. IRA 1988 s 4(1) 'industrial dispute'.
165. *Re Alcan Australia*, ex *parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96.
166. *R* v *Judges of the Cth Industrial Court*, ex *parte Cocks* (1968) 121 CLR 313; *R* v *Moore, ex parte FMWU* (1978) 140 CLR 470.

They do so in the manner and on the basis explained by Isaacs and Rich JJ in their joint judgment in the *Union Badge* case[167] where, in the course of refusing to read down the meaning and scope of the phrase 'industrial disputes', those justices observed that:

> The words of the Constitution 'industrial disputes' stand unabridged by any specified subject matter of dispute; they fit themselves to every phase of industrial growth, and look only to the single fact of an industrial dispute. Parliament, *shaping the national policy in accordance with the predominant political ideas for the time being,* may or may not restrict the causes upon which public intervention shall proceed; but unless it does so, we are unable to see how the court can impose any limitation on the matters which, at any given moment in the life of the Commonwealth, do in fact, an by their practical operation, affect at some stage the interrelations of employers and employed so as to give rise to what would then be regarded as an industrial dispute. [168]

In circumscribing very much more severely than the previous legislation the range of matters capable of giving rise to a statutory industrial dispute and of therefore being made the subject of award, the parliament, far from exceeding its legitimate authority, appears to have acted well within it.[169] Of course, as the High Court has repeatedly pointed out in past cases, the question of whether particular legislation is wise or fair is very different from whether it is valid.[170] The former is a political rather than a legal issue and as such not justiciable.[171]

Similarly, in limiting and conditioning the exercise of the power of arbitration by reference to particular specified matters or considerations, the parliament has not, it would appear, impermissibly prescribed or dictated the actual outcomes of any arbitration. Decisions such as *Victoria v Commonwealth* now establish this point quite plainly,[172] notwithstanding certain earlier dicta to the contrary.[173] Directly in point in this regard are the High Court's observations in that case concerning the validity of the provisions of the IRA 1988 governing the Commission's authority to regularly review and vary existing awards and to certify, or refuse to certify,

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167. *Australian Tramway Employees' Assoc* v *Prahran and Malvern Tramway Trust* (1913) 17 CLR 680.
168. Ibid, 702 (emphasis added).
169. Indeed, there is no constitutional requirement that the Commonwealth parliament exercise its legislative powers in respect of this topic at all, much less exhaustively.
170. Eg *Cunliffe* v *Cth* (1994) 182 CLR 272, Brennan J 320, Deane J 388, Dawson J 357. Cf *Leask v Commonwealth* supra n 146, Kirby J 40-43.
171. Ibid.
172. Supra n 105.
173. See *R* v *Cth Conciliation and Arbitration Commission, ex parte AEU* (1967) 118 CLR 219, Barwick CJ 242, Windeyer J 269.

agreements under Part VIB.

The long-term significance of these limitations on the future scope of arbitration imposed by section 89A is underscored by the changed nature of the relationship between Federal awards and State agreements brought about by the amendments to section 152 of the Act. The relevant provisions of that section now read as follows:

Section 152. Awards to prevail over State laws and State awards

(2) If:

(a) but for this subsection, an award would become binding on an employer in respect of an employee at a particular time; and

(b) immediately before that time, the wages and conditions of employment of the employee were regulated by a State employment agreement;

then the award is not binding on any person in respect of the employee, while the wages and conditions of employment of the employee continue to be regulated by the agreement.

(3) If, at a particular time, a State employment agreement that is made after the commencement of this subsection would regulate wages and conditions of employment of an employee but for the fact that an award is binding on an employer in respect of the employee, then:

(a) the award does not prevent the agreement from coming into force and regulating the wages and conditions of employment of the employment; and

(b) while the agreement continues to regulate those wages and conditions, the award is not binding on any person in respect of the employee....

(5) Subsections (2) and (3) do not apply to a State employment agreement unless the agreement is one that was approved by a State industrial authority under a State Act that required the authority, before approving the agreement, to be satisfied:

(a) that the employees covered by the agreement are not disadvantaged in comparison to their entitlements under the relevant award; and

(b) that the agreement was genuinely made, or that the agreement was not made under duress or that the agreement was made without coercion; and

(c) that the agreement covers all the employees whom it would be reasonable for the agreement to cover, having regard to matters (if any) specified in the State Act (such as the nature of the work performed under the agreement and the relationship

> between the employees in the part of the business covered by the agreement and the remainder of the employees in the business).

Industrial instruments made under the relevant Federal legislation have hitherto always prevailed over State laws, including of course State industrial awards and agreements.[174] The paramountcy provisions of the Constitution and the Federal statute, together with the rather broad application by the High Court of the 'covering the field' test to identify and deal with such inconsistency,[175] have ensured that this was so, sometimes in circumstances favourable to employees[176] and at other times favourable to employers.[177] Although strictly speaking this position still obtains, as indeed it must in a constitutional sense, it seems that in consequence of the changes to section 152, State regimes of employment agreements[178] which protect parties to negotiations by expressly prohibiting coercion or duress,[179] and by mandating the application of an award based no-disadvantage test of the kind set out in Part VIE of the WRA 1996,[180] can now be utilised by employers and employees to effectively opt out of the Federal award system. Any award which would otherwise apply simply ceases to bind the relevant employer and employees by virtue of the provisions of the Federal Act itself. The result is that section 109 of the Constitution has no statutory inconsistency upon which to operate, the Commonwealth having voluntarily vacated that particular field.[181]

There are sound reasons for believing that giving parties the capacity to opt out of Federal awards by means of State registered employment agreements is likely to pose a threat to the continuance of widespread Federal award coverage which is at least as serious as that created by the introduction of AWAs under Part VID of the Act.[182] Unlike AWAs, not only are such State agreements open to *all* employers

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174. See Creighton et al supra n 108, ch 23.
175. Cth Constitution s 109; IRA 1988 s 152; the cases are collected and discussed in Creighton et al supra n 108, ch 23.
176. *Ex parte McLean* (1930) 43 CLR 472.
177. *Metal Trades Industry Assoc* v *AMWSU* (1983) 152 CLR 632.
178. WRA 1996 s 4(1) relevantly defines 'state employment agreements'.
179. S 152(5)(b).
180. S 152(5)(a).
181. Moreover this outcome is achieved in a way which appears to raise none of the problems identified and discussed by the High Court: see *University of Wollongong v Metwally* (1984) 158 CLR 447; *WA v Cth* (1995) 183 CLR 373. See more generally the discussion of this and related issues in G Williams 'The Return of State Awards — S 109 of the Constitution and the Workplace Relations Act 1996 (Cth)' (1997) 10 Aust Journ Lab Law 170.
182. Doubts have been expressed by some commentators about the likelihood of many employers and employees utilising the present AWA arrangements: see McCallum supra n 61, 60-61. Fewer than 3 500 had been filed and approved as at October 1997.

(incorporated or unincorporated) but the procedures governing their negotiation and registration are also as a rule simpler and somewhat less rigorously applied.[183] Added to this is the greatly enhanced prospect of destructive forms of 'competitive unionism' becoming a more common feature of industrial relations in certain industries, with various employee organisations prepared to play one jurisdiction (State) off against another (Federal) for temporary tactical advantage.[184] The very recent amendments to the Workplace Agreements Act 1993 (WA), for example, certainly attest to the keen interest some State governments have in taking full advantage of the opportunities presented by this particular change to the Federal legislation.[185]

Finally, the operation of section 152 is strengthened and supplemented by the inclusion of section 111AAA. The latter section provides:

> **Section 111AAA. Commission to cease dealing with industrial dispute in certain circumstances**
>
> (1) If the Commission is satisfied that a State award or State employment agreement governs the wages and conditions of employment of particular employees whose wages and conditions of employment are the subject of an industrial dispute, the Commission must cease dealing with the industrial dispute in relation to those employees, unless the Commission is satisfied that ceasing would not be in the public interest.
>
> (2) In determining the public interest for the purpose of subsection (1), the Commission must give primary consideration to:
>
> (a) the views of the employees referred to in subsection (1); and
>
> (b) the views of the employer or employers of those employees.

The section replaces the now repealed section 111(1G), regarded as insufficiently protective of State employment arrangements. Effectively reversing the onus of proof in section 111(1)(g)(iii) in respect of Federal award applications involving

183. Eg Ford supra n 72.

184. A practice which has hitherto been contained, at least in part, by the operation of s 111(1)(g) of the Act.

185. Part 2A of the Workplace Agreements Act 1993 (WA), inserted by Part 10 of the Labour Relations and other Legislation Amendment Act 1997 (WA). The new provisions came into effect on 12 July 1997. Similar provisions have also been included in the industrial legislation of most other States: eg Workplace Relations Act 1997 (Qld) ss 25 and 116; Industrial Relations Act 1984 (Tas) ss 55 and 61F; and the Industrial and Employee Relations (Harmonisation) Amendment Act 1997 (SA) s 8 (amending s 79, in particular, of the principal Act).

parties under State award or employment agreements (as defined in section 4(1)), the new provision will clearly — as was intended by the Government — make movement from State systems to the Federal jurisdiction much more difficult in the future. With an ever-increasing number of employees, particularly non-unionists, facing no realistic alternative to employment under various forms of State registered agreements, the significance of this development should not be underestimated. Certainly the mass exodus of unions and employees which has been occurring from jurisdictions such as Victoria[186] (until the recent reference of its relevant industrial powers to the Commonwealth[187]) and Western Australia[188] is very unlikely to be able to be repeated, or even continued, unless the employers and employees concerned are prepared to operate under agreements made pursuant to Part VIB or, of course, the newly introduced Part VID.[189]

CONCLUSION

As a national system of industrial dispute resolution or industrial regulation, compulsory conciliation and arbitration is uniquely Australasian. At the time of the enactment in 1904 of the original Commonwealth Conciliation and Arbitration Act, shortly after Federation, the attempt to claim the field of industrial relations as (in the now famous words of H B Higgins)[190] a new province for law and order was well recognised to be a social and economic experiment of the greatest importance. The highly laudable aim of those who championed conciliation and arbitration was to substitute reason and justice for collective bargaining's reliance on the brutal weapons ('the rude and barbarous process') of strike and lock-out. Now, nearly a century later, the institutional framework of that great social and economic experiment is in the process of being substantially dismantled in favour of a return to an Australian version of collective bargaining.[191] This is the context in which the importance of the changes begun by Labor with its Industrial Relations Reform Act 1993 and now accelerated and augmented by the Coalition's Workplace Relations Act 1996 must be assessed.

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186. Eg *AEU v Minister for Education (Vic)* (1995) 61 IR 174; *Vic v MacBean* (1996) 68 IR 442.
187. Ibid.
188. See WRA 1996, Part XV.
189. As in Victoria, the move from the state to the Federal system has been most marked in relation to public sector employment.
190. HB Higgins 'A New Province of Law and Order' (1915) 29 Harvard L Rev 13.
191. A development which has already occurred in New Zealand with the passage in that country of the Employment Contracts Act 1991, supra n 70.