CORPORATIONS

INCREASING POWER TO CANBERRA?

THE HIGH COURT'S INTERPRETATION OF THE CONSTITUTION HAS LED TO THE EXPANSION OF FEDERAL POWERS. BUT WILL ANY LIMITS REMAIN TO PREVENT FURTHER EXPANSION? BY DR ROBERT DEAN

There has been a great deal of debate in recent times about whether or not political power should be centralised in Canberra. Former Prime Minister Howard made it an election issue and Prime Minister Rudd has made it the iron fist in his velvet glove.

But however enthusiastic a federal government may be to achieve that goal, it is limited by the Constitution, or more particularly the High Court which controls the gate drafting each law into the valid or invalid paddock. Is the valid paddock about to receive an influx?

NSW and Ors v Commonwealth

The recent case of *New South Wales and Ors v Commonwealth*[1] (the *Workplace Relations Act case*), which determined the validity of the *Workplace Relations Amendment (Work Choices) Act* 2005, is one of the most comprehensive judgments of the High Court in recent times. It reviewed the law with respect to the s51(xx) constitutional corporations power and appears, at first blush, to give a centralist federal government its expansionist dreams on a corporate plate.

The critical paragraph of the majority's judgment is their Honours' adoption of Gaudron J's minority judgment in *Re Pacific Coal Pty Ltd; Ex parte CFMEU*.[2] The majority accepted her Honour's understanding of s51(xx):

"I have no doubt that the power conferred by s51(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" (at 375).

One possible interpretation of this is that any law that is directed specifically to corporations in s51(xx) (constitutional corporations) and those that do business with them will be a law "with respect to" corporations. If this is so, the validity of the states is on borrowed time because the federal government could, if it wishes, enter any field so long as it addressed the law concerned to constitutional corporations or to those who conduct business with them.

To fuel that approach, the Court methodically disregarded various tests by previous members of the Court which require a law to have some additional connection to s51(xx) other than that it was directed specifically to constitutional corporations and those who do business with them.

The Court then stripped back to its bare essentials the role the framework of the Constitution plays in its interpretation. It said (at para 194) that the framework of the Constitution assists in interpretation no further than the fact that the legislative, judicial and executive functions of the states remain and that the states remain as separate governments, but makes no judgment on the extent and type of powers they may have. In other words, so long as they continued to exist they could be effectively impotent.

Precedent

But did the Court go this far? To answer that question, a quick skip through the forerunners of the *Workplace Relations case* will help.

There can be no doubt that following the decision in the *Engineers' case*[3] in 1920 the majority jettisoned the approach to interpreting the Constitution that required consideration of powers which were reserved to the states and to the sovereignty of the states to ensure they were immune to interference by the Commonwealth. The majority adopted a new approach (which had already been referred to in previous minority judgments). The Court would limit its interpretation to the specific words in the text interpreted in the light of changes in the Australian community.

In the *Melbourne Corporation case*[4] the Court held that a law that required federal approval for a bank to take on state government banking was invalid – not because it impugned basic state functions, but because in discriminating against the states vis-a-vis other persons, it was not a law about banking under the Constitution but a law about state authorities. It confirmed the textual approach to interpretation of the Constitution, noting that the only protection of the states arose from the framework of the Constitution that envisaged the survival of the states. But, in describing the survival of the states, it referred to the states' "normal and essential" functions which could not be interfered with.

In 1971, in the much heralded judgment in the *Concrete Pipes case*,[5] the High Court held that proposed trade practices legislation was

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beyond the corporations power. In that case, Barwick CJ specifically took the trouble to state the proposition that just because a law is directed only at constitutional corporations this does not necessarily make it a law with respect to s51(xx) (at 489).

This view was repeated by Gibbs CJ in the *Actors Equity case*.[6] In that case, the question was the validity of s45D of the *Trade Practices Act*, the secondary boycott provision. In fact, Gibbs CJ stated that in "the case of corporations, extraordinary consequences would result if the parliament had power to make any kind of law on any subject affecting corporations". It is important to note that Gibbs CJ's view was influenced by the federal nature of the Constitution.

Despite the textual approach and the unspecified limitations on state immunity, the High Court continued to require something extra, over and above the fact that a law was directed specifically at s51(xx) corporations, to give it sufficient connection to that head of power. It had to be focused on "the trading activities" of trading corporations (the *Tasmanian Dams case*)[7] or have some other feature connecting it to the character of s51(xx) type corporations and their business.

In *Re Dingjan*[8] and in *Re Pacific Coal*,[9] the majority again required more in a valid law than just the fact that it focused its command on constitutional corporations. Brennan J in *Re Dingjan* suggested a "discriminatory operation" test, that to be valid the law, which may affect non corporations, must have a differential effect on corporations (noting Stephen J's observation (quoting Kitto J) in the *Actors Equity case* that the connection must not be "so incidental as not in truth to affect its character").[10] In that case, regulating agreements of independent contractors subcontracting work to another independent contractor working under a contract for a constitutional corporation was held to be "too tenuous" a connection.

Hence, right up until the *Workplace Relations Act case* last year, the majorities in the various relevant decisions in the High Court continued to require more than simply the fact that a federal law was directed specifically at constitutional corporations.

Limits on constitutional corporations power?

However, in my view, the majority in the *Workplace Relations Act case* did not decide that any law would, ipso facto, be valid if it was targeted to constitutional corporations. Confusingly, they did everything else but this.

The High Court interpreted Barwick CJ's caution (referred to above) as distinguishable because it was a reaction to an untenable argument by the plaintiff of the opposite proposition – that no law which relies solely for its connection to s51(xx) on the fact that it was directed specifically at constitutional corporations could be within power, without something more to tie it to that power. Then the Court distinguished Gibbs CJ's reference in *Actors Equity* to the danger of such an interpretation (referred to above) on the basis that there the focus had been on the tenuous nature of the connection with constitutional corporations, and thus Gibbs CJ's statement could not be taken as "exhaustive".

The Court then rejected the proposition that to be valid a law must be about "the trading activities" of trading corporations (para 172) and specifically adopted the minority's view in *Re Dingjan* which "took a view of the reach of s51(xx) which was wider than the majority" in that case and specifically quoted Gaudron J's judgment set out at the beginning of this article. Further, it drove the point home (para 181) by stating that "there is no evident basis upon which laws of the kind described by Gaudron J in *Re Dingjan* and later in *Re Pacific Coal* should not be characterised as laws with respect to that subject matter. That is, laws regulating the 'activities, functions, relationships and the business' of a constitutional corporation, and laws creating 'rights and privileges' belonging to such a corporation, [imposing] obligations on it and in respect to those matters, [regulating] the conduct of those through whom it acts' . . .".

Devil and detail

But a closer look at that paragraph reveals that it begins with the words "But if such a [discrimination] test is to be applied in deciding whether a law applies to all persons indifferently is a law with respect to constitutional corporations there is no evident basis upon which a law which imposes a duty or liability . . . *only* on a constitutional corporation should not be characterised as a law with respect to constitutional corporations". The Court then notes that accordingly there is no reason why Gaudron J's characterisation of s51(xx) should not be a law with respect to a constitutional corporation.

The paragraph immediately following then says: "But whether or not that is so what is now important is that the plaintiffs. . . [assert] a distinctive character test". The Court rejects any special s51(xx) test. In other words, the Court's determination (in para 181) which suggests it is accepting the proposition that any law specifically directed to constitutional corporations will inevitably be valid, is not what it seems. It is saying firstly that a law which is directed only to a constitutional corporation without any other connection will not automatically be discounted as invalid and secondly, whether a law directed only to constitutional corporations is valid is a matter which may or may not be correct. It leaves open the possibility that a law that appears on its face to be directed only to constitutional corporations may "in truth" be a law not with respect to corporations.

In its conclusions (para 198) the Court concludes that a law directed to the industrial relations of a company's employees is a sufficient bona fide connection.

Conclusion

In summary, the decision in the *Workplace Relations Act case* has given a more expansive interpretation of the constitutional corporations power than ever before. It may be that any laws directed only to constitutional corporations are laws with respect to s51(xx), but the Court is not yet deciding that such laws will necessarily always be valid. The Court's only comment on laws so limited is that they should not automatically be ruled invalid.

Further, although the Court has stripped back the role of the framework of the Constitution in interpreting the Constitution and refused to have regard to what powers, if any, the states retain, it gives no indication of when a law will interfere with the existence of state governments. That is left open. In accepting the minority's judgments in the various previous constitutional corporation cases such as those of Mason, Dean and Gaudron JJ, the Court has adopted a purist textual approach to the interpretation of the Constitution that definitely takes another large step in expanding federal powers by use of s51(xx). But there are still limits – undefined and ambiguous – but nevertheless limits which the High Court will, as is its wont, keep under wraps until the next judgment or maybe even the next judgment after that. ●

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1. [2006] HCA 52.
2. (2000) 203 CLR 346.
3. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
4. *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.
5. *Strickland v Rocla Concrete Pipes Limited* (1971) 124 CLR 468.
6. *Actors and Announcers Equity Association of Australia and Ors v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 182.
7. *Commonwealth v Tasmania* [1983] 158 CLR 1.
8. (1995) 183 CLR 323.
9. (2000) 203 CLR 346.
10. Note 6 above, at 194.