

**STATE OF NEW SOUTH WALES v COMMONWEALTH OF AUSTRALIA**  
**(S592/2005);**  
**STATE OF WESTERN AUSTRALIA v COMMONWEALTH OF AUSTRALIA**  
**(P66/2005);**  
**STATE OF SOUTH AUSTRALIA v COMMONWEALTH OF AUSTRALIA**  
**(A3/2006);**  
**STATE OF QUEENSLAND v COMMONWEALTH OF AUSTRALIA**  
**(B5/2006);**  
**AUSTRALIAN WORKERS UNION & ANOR v COMMONWEALTH OF**  
**AUSTRALIA (B6/2006);**  
**UNIONS NSW & ORS v COMMONWEALTH OF AUSTRALIA (S50/2006);**  
**STATE OF VICTORIA v COMMONWEALTH OF AUSTRALIA (M21/2006)**

Date of Writ of Summons: 21 December 2005 (S592/2005)

Date Demurrer Set Down: 9 March 2006

On 14 December 2005 the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (the amending Act) received assent. The amending Act amends the *Workplace Relations Act 1996* (Cth) (the Act). The majority of the amendments effected by the amending Act commenced on 27 March 2006, on which date the Regulations made under the Act were promulgated.

The first of the proceedings challenging the amending Act was brought by the State of New South Wales by writ of summons and statement of claim filed on 21 December 2005. The remaining proceedings were brought by writ and statement of claim at various dates thereafter. On 22 February 2006 the Commonwealth demurred to the New South Wales statement of claim, and to the various other proceedings subsequently. Notice pursuant to section 78B of the *Judiciary Act 1903* (Cth) was filed by New South Wales on 8 March 2006 (and subsequently by each of the plaintiffs in the other proceedings). The Court (Gleeson CJ) made directions on 9 March 2006 that all the matters be heard together, and for the filing and service of written submissions. His Honour also set aside six days for the Full Court hearing for oral submissions by counsel for each of the plaintiffs, the Commonwealth and the interveners. The interveners in all matters are Northern Territory, Australian Capital Territory and Tasmania; Victoria is an intervener in the first four matters.

The Act creates a scheme for the regulation of industrial relations between “employers” and “employees” as defined in the Act, and governs the content of the employment relationship between those employers and employees. The Act establishes the Australian Fair Pay Commission and provides for the making and registration of, and the terms and conditions in, employment agreements between employers and employees. The Act also imposes restrictions on the jurisdiction of State industrial relations tribunals and courts to set employment terms and conditions or to resolve industrial disputes between employers and employees covered by the Act.

The Act is expressed to apply to employers who are defined in the Act as “a constitutional corporation”. (There are two other classes of “employers”

defined in the Act, comprising employers, not necessarily corporations, of flight crew, maritime employees and waterside workers, and employers, not necessarily corporations, who or which carry on activities in a Territory). A “constitutional corporation” is defined in the Act as “a corporation to which paragraph 51(xx) of the Constitution applies”. An “employee” is defined in the Act as an individual employed by an employer, so defined.

The plaintiffs challenge the constitutional validity of the changes introduced into the Act by the amending Act as being beyond the Commonwealth’s powers under the Constitution to make laws with respect to:

- “trade and commerce ... among the States” (section 51(i));
- “postal, telegraphic, telephonic, and other like services” (section 51(v));
- “banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money” (section 51(xiii));
- “insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned” (section 51(xiv));
- “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth” (section 51(xx));
- “external affairs” (section 51(xxix));
- “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State” (section 51(xxxv)); and
- “the government of any territory” (section 122).

The Commonwealth demurred to the whole of the statement of claim on the ground that none of the provisions of the Act, as amended by the amending Act, are invalid.

The matters raised by the statement of claim include:

- The scope of the Commonwealth Parliament’s power to make laws with respect to each of the heads of power identified above;
- The capacity of the Commonwealth Parliament to make laws which authorise the Commonwealth Executive to issue an injunction to a State court or tribunal;
- The scope of the Commonwealth Parliament to make laws prohibiting certain conduct by industrial associations;
- The scope of the Commonwealth Parliament to make laws with respect to the internal structure, organisation and management of pre-existing constitutional corporations;
- The capacity of the Commonwealth Parliament to make laws in respect of corporations wholly owned or subject to the control of a State or a Minister of a State, and in respect of the employment relationships

between the States and their employees which may interfere with the capacity of the State to function as a government;

- The extent to which and the manner in which constitutionally invalid provisions can be “read down” so as to give them a valid operation; and
- If only parts of the Act are invalid, whether those parts can be severed from the Act.