## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td>2</td>
</tr>
<tr>
<td>Terms of reference</td>
<td>4</td>
</tr>
<tr>
<td>Executive summary</td>
<td>5</td>
</tr>
<tr>
<td><strong>CHAPTER 1</strong> – The Inquiry process</td>
<td>8</td>
</tr>
<tr>
<td><strong>CHAPTER 2</strong> – The regulation of industrial relations in Australia</td>
<td>9</td>
</tr>
<tr>
<td><strong>CHAPTER 3</strong> – Australia’s federal system and cooperative schemes</td>
<td>32</td>
</tr>
<tr>
<td><strong>CHAPTER 4</strong> – The regulation of industrial relations in other nations</td>
<td>54</td>
</tr>
<tr>
<td><strong>CHAPTER 5</strong> – Principles for a new system of industrial relations</td>
<td>61</td>
</tr>
<tr>
<td><strong>CHAPTER 6</strong> – The way forward</td>
<td>81</td>
</tr>
<tr>
<td><strong>APPENDICES</strong></td>
<td></td>
</tr>
<tr>
<td>1. List of submissions</td>
<td>99</td>
</tr>
<tr>
<td>2. List of consultations</td>
<td>100</td>
</tr>
<tr>
<td>3. Extracts from the <em>Corporations Act 2001 (Cth)</em></td>
<td>102</td>
</tr>
</tbody>
</table>
Urgent attention needs to be paid not only to the specific content, but also to the legal structure of workplace regulation in Australia. While debate has been dominated by sharply divided opinions on unfair dismissal, AWAs and the like, we also need to focus on deeper problems. These include how to fix a system characterised by disagreement between governments and high levels of uncertainty and legal complexity. It is unsatisfactory that even small non-profit businesses and individual workers can be forced to seek expensive constitutional law advice on whether it is the federal or State system, or a combination of the two, that sets out their basic rights and obligations. Whatever their content, Australia needs simpler, cooperative and more efficient laws that promote fairness in the workplace.

I heard about these and other like problems time and time again over the three months I read submissions and travelled around Australia to speak to employer associations, unions, governments and academic experts. Despite the heated disagreement over specific questions of industrial law, there was a consensus that Australia needs to do better in setting out the architecture of the system as a whole. People from all perspectives sought a structure that would eliminate arcane questions of constitutional law and provide a more harmonious basis for the regulation of industrial relations. They sought to remove duplication and promote agreement between governments.

An area of the law that is so fundamental to both economic prosperity and dignity and justice in the workplace demands a better outcome. In particular, it needs greater stability and certainty than has been the case for many years. Hence, many people told me they wanted a system that is not prone to radical shifts with each change of government. They wanted a more secure foundation for the regulation of workplace issues.

In this report I set out a new model that responds to these concerns by providing an improved underpinning for the regulation of industrial matters in Australia. The model is based on the perspectives of employers and employees across Australia and has been tested with the benefit of expert academic commentary and a careful look at international practice. The model has been devised with the principles in mind that should underpin the best possible system for Australia. These principles, developed over the course of the Inquiry, require that the structure be fair, efficient, universally accessible, adaptive and cooperative. I am confident that the model matches these goals. After several years of disputation and disagreement between the Commonwealth and the States over the regulation of industrial matters, the model provides the opportunity for a fresh start as well as a stable, long term foundation for this important area of law.

While this Inquiry was initiated by the New South Wales Government, my recommendations are not New South Wales specific. I have approached the task on the basis that the best structure must accommodate the needs and interests of all of the States and Territories as well as the Commonwealth. No one government, including the Commonwealth, can go it alone and achieve the best outcome for the nation. This can only be achieved cooperatively in a way that allows for national standards as well as local knowledge and enforcement. A structure of this kind has the potential not only to serve the national interest but also, in being enforced and applied at the local level, to build legitimacy and trust amongst all of the participants in the workplace.
Finally, I thank the many people who have assisted me in this Inquiry. They include the organisations and people who made written submissions and the even larger number who gave up their time to meet with me, often more than once, about how governments can best serve the needs of employers and employees in structuring the regulation of industrial relations. I also thank those who made me welcome in my travels around Australia. All have been generous with their time in what for them was a very busy period. Finally, I owe a large debt of gratitude to the staff of the Office of Industrial Relations in the NSW Department of Commerce who supported this Inquiry in a professional and always helpful manner.

Professor George Williams
The aim of this Inquiry is to advise the NSW Government how a fair and harmonised national industrial relations system that appropriately balances the interests of employees and employers could be put in place, in partnership between the Commonwealth and the State of New South Wales.

Specifically, the Inquiry will:

1. Identify principles which would underpin a harmonised national industrial relations system which would operate within a framework of cooperative federalism.

2. Consider the range of options for achieving such a harmonised national industrial relations system.

3. Recommend the optimum model for NSW.

4. Develop an implementation strategy for the optimum model, including recommendations as to:
   (a) the time-frame
   (b) any legislative or institutional changes that would be required to give effect to it, and
   (c) appropriate governance arrangements to ensure ongoing cooperation between the jurisdictions to maintain the new system.

In undertaking its activities, the Inquiry is encouraged to:

(a) take account of past and present cooperative federal schemes in a variety of subject areas, as well as any other available Australian or international proposals for such schemes

(b) consider how such schemes might be adapted to suit the unique characteristics of industrial relations

(c) familiarise itself with both the existing and any proposed federal industrial relations systems, and consider the utility of the recommended model in each of those contexts.
This Inquiry was commissioned by the Hon John Della Bosca MLC, Minister for Industrial Relations in NSW. It commenced its work on 9 August 2007. In accordance with the terms of reference established by the Minister, the Inquiry has focused on:

- identifying principles to underpin a harmonised national industrial relations system within a framework of cooperative federalism,
- considering the range of options for achieving such a harmonised national industrial relations system, and
- recommending the optimum model for NSW.

An Issues Paper was released on 14 September 2007 and public submissions were sought. The Issues Paper set out the background to the Inquiry, proposed five principles that should underpin any framework for a national industrial relations system and put forward six models for achieving such a framework.


The Inquiry received 32 written submissions. In addition, the Inquiry met with 54 individuals and organisations. Views were expressed by a wide range of interested people, including employers, employer associations, employees, unions, community groups, politicians, departmental officers, legal experts and academics.

To achieve a harmonised national industrial relations system within a framework of cooperative federalism, the Inquiry recommends that any framework be:

- fair
- efficient,
- universally accessible,
- adaptive, and
- cooperative.

The Inquiry recommends that the optimum model for creating a new national industrial relations system have the following elements:

- There should be an intergovernmental agreement between the Commonwealth and all States and Territories that wish to participate setting out:
  - a process and timetable for bringing about the national law,
  - a requirement that the text of the law be approved by all participating governments, along with the option for any government that does not approve the text to opt out of the scheme, and
  - governance arrangements and other matters.

- The governance and other aspects of the intergovernmental agreement should be enacted as part of the national law so that they are legally enforceable.

- The intergovernmental agreement should establish a Ministerial Council to oversee the development, implementation and maintenance of a new national industrial relations system.

- The chair of the Ministerial Council should be rotated, with the Commonwealth Minister chairing every second year and the States and Territories chairing in the alternate years as agreed between them.
• The Ministerial Council should be supported by an independent secretariat.

• States wishing to participate in the new national system should have a choice of two mechanisms to ensure that the new law applies in their jurisdiction. They will be able to either:
  – enact legislation that provides for a text-based referral to the Commonwealth of the exact terms of the national law, or
  – enact uniform legislation in exactly the same terms as the national law.

• Other than trivial changes, all amendments to the national law should require the consent of a two thirds majority of the Ministerial Council, including a majority of the States. The national law should provide that amendments not approved in accordance with this requirement will have no effect.

• States and Territories should be able to specify exclusions from the national law (for example, some States may wish to retain public sector employment under State law). Three types of exclusions should be possible:
  – general exclusions applying to all States and Territories written into the text of the law at the time of its drafting,
  – jurisdiction-specific exclusions applying only to one or more States or Territories written into the text of the law at the time of its drafting, and
  – later exclusions of a general or jurisdiction-specific nature made by amendment to the national law by the process set out above.

Over time, States and Territories should be able to include any of their prior exclusions in the national law.

• The regulations that support the new national law should require the agreement of all the participating jurisdictions. Subsequent amendments to the regulations should be made by the Commonwealth but be disallowable by a majority of the jurisdictions.

• A national commission, tribunal or other like body might be established as follows:
  – it would be composed of divisions within each State and Territory,
  – each division might be constituted by the transfer of the personnel of the current State or Territory industrial relations commission or like body,
subsequent appointments to each division might be made 50 per cent by the
Commonwealth and 50 per cent by the relevant State or Territory,

each division would be vested with power under the national law, and

each division would be vested with power by the relevant State or Territory with
regard to excluded matters within that jurisdiction.

• Inspection and other compliance work might be contracted out to State and Territory agencies. These agencies could be authorised to enforce both the national law and any State based exclusions.

• Judicial supervision of the system should be undertaken by the Federal Court in jurisdictions that choose text-based referral, or by the State court systems in States with uniform legislation.

• Given the possibility of divergence in judicial decision making over time in those jurisdictions which have adopted uniform legislation, it is recommended that the Ministerial Council support a proposal for a referendum to amend the Constitution to enable the States to confer judicial power and enforcement functions on the Commonwealth.

• The new national law should be drafted in plain English and be as succinct as possible. It should set clear objectives and contain broad guidelines for administration and enforcement by tribunals, agencies, courts and other bodies.

• The timeline for achieving these goals should be as follows:

  – Step 1 by March 2008 – States, Territories and the Commonwealth agree on the governmental and other structures to provide the architecture of the scheme.

  – Step 2 by June 2008 – States, Territories and the Commonwealth agree on the principles, core content and general exclusions that will constitute the drafting instructions for the national law.

  – Step 3 by December 2008 – national law drafted.

  – Step 4 by June 2009 – national law enacted, States enact referral or uniform legislation, States and Territories enact legislation for any jurisdiction-specific exclusions and reform of institutions commences.

  – Step 5 January 2010 – new national law comes into force.
This Inquiry was initiated on 9 August 2007 when the NSW Minister for Industrial Relations, the Hon John Della Bosca, announced that an inquiry into a new national industrial relations system would be undertaken by the Iemma Government. On the same day, the Minister released the terms of reference of the Inquiry and announced that it would be undertaken by Professor George Williams of the University of New South Wales.

Consistent with the terms of reference, Minister Della Bosca stated that the Inquiry would:

• identify principles to underpin a harmonised national industrial relations system within a framework of cooperative federalism,

• consider the range of options for achieving such a harmonised national industrial relations system, and

• recommend the optimum model for New South Wales.

The Inquiry released a 32 page Issues Paper on 14 September 2007. The Paper provided background information and sought comment on draft principles and six options for the architecture within which a harmonised and cooperative national industrial relations system could be created. The Issues Paper was sent by email and posted to over 300 people and organisations around Australia. At the same time, a website for the Inquiry was established to provide public information on the process and an online link to the Issues Paper.

From the outset, the Inquiry sought to engage with as many people and organisations as possible with a perspective or ideas about the issues raised by the terms of reference. The Inquiry also sought to hear from people from around Australia to ensure that people from all jurisdictions were consulted. This involved travel to each of the States and the Australian Capital Territory. Discussions were also held with people in the Northern Territory by teleconference.

The submissions and consultations have provided the opportunity to listen to people from all viewpoints of the industrial relations debate. This includes engagement with employers, local and national employer associations, employees, unions and peak union bodies across the private and public sector, political leaders such as industrial relations ministers, ministerial advisors, members of government agencies responsible for industrial relations policy and compliance, departments of premier and cabinet, academic experts on industrial relations and constitutional law, legal and non-legal industrial relations practitioners, lawyers such as State Solicitors-General and members of commissions and like bodies responsible for applying the current law. A roundtable of experts was held at the mid-point of the Inquiry to test emerging ideas against an informed, critical and diverse set of perspectives.

Overall, the Inquiry:

• Received 32 written submissions as set out in Appendix 1, and

• Held 54 consultations in person and by teleconference as set out in Appendix 2.

## Chapter 2 – The regulation of industrial relations in Australia

### 2.1 HISTORY OF INDUSTRIAL RELATIONS LAWS IN AUSTRALIA

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1.1 Conciliation and arbitration</td>
<td>10</td>
</tr>
<tr>
<td>2.1.2 Corporations power ascendant</td>
<td>11</td>
</tr>
<tr>
<td>2.1.3 The external affairs power</td>
<td>12</td>
</tr>
<tr>
<td>2.1.4 Conclusion</td>
<td>13</td>
</tr>
</tbody>
</table>

### 2.2 THE CURRENT INDUSTRIAL RELATIONS SCHEMES

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.2.1 The current federal system</td>
<td>14</td>
</tr>
<tr>
<td>2.2.2 The current State systems</td>
<td>14</td>
</tr>
<tr>
<td>2.2.3 Interaction between the federal and State systems</td>
<td>18</td>
</tr>
</tbody>
</table>

### 2.3 WHAT IS WRONG WITH THE CURRENT STRUCTURE?

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.3.1 Inadequate coverage</td>
<td>18</td>
</tr>
<tr>
<td>2.3.2 Who’s in and who’s out</td>
<td>21</td>
</tr>
<tr>
<td>2.3.3 Legal complexity</td>
<td>26</td>
</tr>
<tr>
<td>2.3.4 Duelling systems</td>
<td>27</td>
</tr>
<tr>
<td>2.3.5 Is the corporations power an appropriate foundation?</td>
<td>28</td>
</tr>
<tr>
<td>2.3.6 Conclusion</td>
<td>29</td>
</tr>
</tbody>
</table>

### ENDNOTES

<table>
<thead>
<tr>
<th>Subsection</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ENDNOTES</td>
<td>30</td>
</tr>
</tbody>
</table>
2.1 HISTORY OF INDUSTRIAL RELATIONS LAWS IN AUSTRALIA

Industrial relations is a field in which there has been a long history of tension between federal and State laws, mostly over the extent to which federal law can regulate areas that have traditionally been subject to State industrial relations regulation. The present controversy over Work Choices is only the latest in a series of constitutional battles.

The history of regulating industrial relations in Australia extends back to the mid-nineteenth century. It is not proposed to do other than provide a brief overview here. This history has been divided into two eras which reflect the constitutional bases of the laws enacted in each phase – firstly the conciliation and arbitration power, and secondly the corporations and other constitutional powers.

2.1.1 Conciliation and arbitration

The early employment statutes in the colonies were modelled on English master and servant legislation. The middle part of the nineteenth century then saw the rapid development of the Australian union movement, and during the 1870s and 1880s most colonies passed trade union recognition legislation. By the early twentieth century, Australian labour law at both the State and Commonwealth levels had sharply diverged from the British model and an approach based on conciliation and arbitration had taken root in all jurisdictions. By the early twentieth century, Australian labour law at both the State and Commonwealth levels had sharply diverged from the British model and an approach based on conciliation and arbitration had taken root in all jurisdictions.

The constrained text of section 51(35) indicates that the framers did not envisage it as either necessary or desirable that the national government should involve itself in other aspects of industrial relations. It is also noteworthy that on every one of the four occasions on which the Commonwealth has sought to expand its capacity to deal with industrial relations by way of amendment of the Constitution, those proposals have been rejected at referenda.

For much of the twentieth century, most federal industrial laws were based on the section 51(35)
head of power. The cornerstone of this system was the Australian Industrial Relations Commission (and its predecessors), the independent statutory tribunal entrusted with the role of conciliating and arbitrating to prevent and settle interstate industrial disputes.

Broad interpretation of the Constitution by the High Court and by the federal courts and tribunals saw the expansion of the federal industrial relations system into many areas that might, on the face of it, appear to be the domain of intrastate disputation. This occurred on the basis that permitting the tribunal to deal with what might otherwise be regarded as intrastate matters was conducive to the prevention and settlement of interstate disputes. This expansion was often achieved by unions seeking to expand their coverage nationally, so creating interstate disputes which could be resolved by the making of a national award.

There were also limited attempts to achieve consistency in outcomes across State borders by cooperative means. A prime example of this is the Coal Industry Tribunal, which was established by joint Commonwealth and NSW legislation. This was upheld as valid by the High Court in R v Duncan; Ex parte Australian Iron and Steel.10

The Commonwealth did not seek to move persons compulsorily into its system, nor attempt to exclude the operation of State industrial relations laws as a reserved field of regulation as they applied to employers and employees in the federal system. On the other hand, the expansion of federal coverage was often contested by the parties to a particular matter on account of the relative advantage they saw in being covered by one system or the other.

Due to a range of other limitations inherent in the conciliation and arbitration power, the Commonwealth was often frustrated by not being able to legislate to deal directly with issues that were thought to require national action. In the late twentieth century, Commonwealth governments of both political persuasions increasingly sought to rely on other powers to circumvent those restrictions.

2.1.2 Corporations power ascendant

The most important of the alternative constitutional powers has turned out to be the corporations power in section 51(20), which allows Commonwealth laws to be enacted for ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’ (collectively known as ‘constitutional corporations’).

In 1993 the Keating Government instigated amendments to the Industrial Relations Act 1988 with two main aspects: a new dismissal jurisdiction based on the ‘external affairs’ power in section 51(29) of the Constitution, and the capacity for employers who were constitutional corporations to enter into enterprise based agreements that could override awards. The unfair dismissal part of the termination regime was overturned by the High Court in Victoria v Commonwealth,11 but the States conceded the validity of the use of the corporations power with respect to enterprise bargaining, so the High Court was not required to rule on the question of validity.12 The unfair dismissal laws were later recast to apply to constitutional corporations, with only the unlawful termination laws continuing to rely on the external affairs power.13

In 1996, the Workplace Relations Act was introduced by the Howard Government. It maintained the broad industrial relations system based on the conciliation and arbitration power, but greatly expanded the workplace agreement making system for constitutional corporations, including the capacity for businesses to choose to use registered individual agreements.
In the same year, the Victorian Parliament referred that State’s industrial relations powers to the Commonwealth Parliament under section 51(37) of the Australian Constitution. For the first time, the Commonwealth industrial relations law was the only industrial relations law in one Australian State. Although the referral has been continued under the subsequent Labor Governments in Victoria, the experience was far from a success, with salutary lessons about the pitfalls and limitations of referral.14

In 2000, the then Minister for Employment and Workplace Relations, the Hon Peter Reith, published a series of discussion papers titled *Breaking the Gridlock*, proposing ways in which the Constitution’s corporations power could be used to expand the workplace relations system into areas currently covered by the States.15 Subsequently, the Howard Government introduced several bills that relied on the corporations power to expand the reach of the federal system to the exclusion of the State systems. None of these bills passed through Parliament. The then Minister for Employment and Workplace Relations, the Hon Tony Abbott, in his second reading speech to the House of Representatives on the *Workplace Relations Amendment (Termination of Employment) Bill 2002*, which proposed the takeover of the State unfair dismissal jurisdictions, said:

> The [Howard] government believes that an expansion of federal jurisdiction on this scale should eventually lead to a ‘withering away of the states’ at least in this aspect of workplace law.

This ‘withering away’ concept clearly underlies the rationale for Work Choices as a whole as first enacted in 2005. The Explanatory Memorandum to the Bill that became Work Choices acknowledged that the system being created would not apply to all employers, but made repeated reference to the likelihood that ‘states might subsequently choose to refer their powers to the Commonwealth, as maintaining State jurisdictions for such a low proportion of workers may be too costly and difficult’.16

The important advantage of the corporations power for the Commonwealth, as confirmed by the High Court in the 2006 *Work Choices Case*, is that it enables the making of almost any law dealing with constitutional corporations.17 Thus, for the first time, it was confirmed that the Commonwealth was able to enact laws directly setting the minimum conditions of employment for employees of constitutional corporations. Under the previous system, it could only establish the machinery (conciliation and arbitration involving the exercise of the powers of an independent tribunal) through which minimum conditions could be set.

Importantly for the States, the *Work Choices* decision also confirmed that the corporations power validly supported Commonwealth laws excluding State laws from applying to constitutional corporations.

### 2.1.3 The external affairs power

Section 51(29) empowers the Commonwealth Parliament to make laws with respect to ‘external affairs’. High Court decisions have established that section 51(29) empowers Parliament to carry out Australia’s international treaty obligations, irrespective of the subject of those obligations, as long as the law made reflects a faithful interpretation of the terms of such obligations.18

The potential of section 51(29) is vast. International instruments which could provide the basis for domestic laws range from multi-nation agreements like United Nations conventions and declarations through to bilateral treaties like the Australia United States Free Trade Agreement. In the area of industrial relations, there is a whole body of international labour conventions that
could be the source of new national laws that could operate without regard to definitional issues such as whether an employer is a corporation or not, or whether an industrial dispute is an interstate or intrastate one. The International Labour Organisation (ILO) is a tripartite body consisting of representatives of the government, business and unions of each member state, which has made almost 200 conventions dealing with basic employment rights and obligations in its almost 100 year history.

The main use of the external affairs power in the current industrial relations system is as the basis for the unlawful termination provisions in the Workplace Relations Act. The list of grounds on which employment must not be terminated, set out in section 170CK(2), applies to all employees in Australia, and not just those who are employed by a constitutional corporation, because that list is supported by the Termination of Employment Convention, 1982 and other international instruments.19

Although there is a vast array of other international labour conventions on which Commonwealth laws could be based, few have been called upon by the current Australian government. This is likely to be because many of these international conventions are generally highly supportive of collective bargaining and protective of employee entitlements. Reliance on such conventions would not, for example, provide a basis for the system of individual agreements known as Australian Workplace Agreements (AWAs).

2.1.4 Conclusion

Industrial relations regulation in Australia now consists primarily of State legislation and the Workplace Relations Act as amended by Work Choices. The constitutional foundations and the policy assumptions underlying these two sets of legislation are quite different. Whereas the tensions between federal and State industrial relations systems during most of the twentieth century were mainly related to boundary issues while the underlying elements of each system were broadly similar, the present day tensions are between systems that take totally different approaches to how industrial relations should be regulated.

While conciliation and arbitration is still the foundation stone of the State systems, the direct regulation of the industrial relationships of corporations is the focus of the federal law. The key differences between these two sets of industrial relations legislation are explored in detail in the next section.

2.2 THE CURRENT INDUSTRIAL RELATIONS SCHEMES

In 2007, the federal Workplace Relations Act 1996 regulates the majority of workplaces around the country on the basis of the corporate nature of the employer. It also operates without restriction in the State of Victoria (which referred its powers over industrial relations to the Commonwealth in 1996) and in the Territories (on the basis of the power of the Commonwealth to make legislation for the Territories in section 122 of the Constitution). Non-corporate employers in the five other States are covered by the various State industrial relations Acts.

In addition to the principal statutes, all jurisdictions regulate industrial relations directly or peripherally by means of various other statutes such as long service leave Acts, child employment laws, occupational health and safety and workers compensation legislation, workplace surveillance laws and so on.
2.2.1 The current federal system

Regulation of industrial relations at the federal level is dominated by the Workplace Relations Act, as amended by Work Choices in March 2006 and various subsequent amendments, including the Workplace Relations Amendment (A Stronger Safety Net) Act 2007, which created the Fairness Test. As has already been noted, this statute departs radically from the former conciliation and arbitration based approach.

The key features of the federal legislative regime are as follows:

• highly detailed prescriptions in relation to most, if not all, areas of regulation,
• minimal discretion for tribunals,
• objects of the legislation contain no reference to fairness,
• legislated minimum conditions and provision for a specific minimum wage,
• federal system covers all constitutional corporations,
• State and Territory industrial relations laws excluded from having effect in relation to constitutional corporations,
• bargains made at the workplace or individual level prevail over awards,
• no power to make new awards and limited power to vary existing awards,
• all industrial action outside of a bargaining process is unlawful,
• the Australian Industrial Relations Commission has no ability to arbitrate to resolve industrial disputes,
• unfair dismissal claims may not be brought against any employer with 100 or fewer employees at the date of termination,
• valid unfair dismissal claims can be excluded if the dismissal was ‘for genuine operational reasons’, and
• significant barriers to union organisation as a result of restrictive right of entry provisions and ballots regarding protected industrial action.

Other significant pieces of federal legislation regulating industrial relations are:

• Trade Practices Act 1975 (sections 45D and 45E prohibit secondary boycotts),
• Occupational Health and Safety Act 1991,
• Independent Contractors Act 2006, and
• Building and Construction Industry Improvement Act 2005.

2.2.2 The current State systems

Regulation of industrial relations in the various States – with the exception of Victoria

Broadly stated, the common features of current State systems are:

• broadly cast legislation, with significant discretion for tribunals regarding interpretation and application,
• fairness is a key objective,
• awards made by the industrial tribunals through a process of conciliation and arbitration are the centrepiece of the system,
• industrial tribunals have the capacity to make common rule awards that apply to all employers and employees within the industry or occupation covered by the award,
• new awards can be made and existing awards are subject to review and variation,
• the system is operated by collective groups – organisations of employees or employers have primary standing,
• provision for collective bargaining subject to a no-disadvantage test (some States also provide for individual bargaining),
• tribunal has broad powers to hear and determine disputes by conciliation and arbitration,
• broad range of content may be included in awards and agreements,
• community standards such as the minimum wage and termination arrangements are set by the tribunal,
• unfair dismissal may be challenged in the tribunal, with no restriction as to the size of the employer, and
• tribunal can establish explicit wage fixing principles which provide an overall de facto wages policy.

While many of these features were also found in the pre-Work Choices federal industrial relations system, some were not able to be achieved by the Commonwealth on the basis of the conciliation and arbitration power (in particular, common rule awards were not able to be made by the federal tribunal, and the capacity of the federal tribunal to deal with unfair dismissal was never satisfactorily settled). These limitations on federal power meant that the States maintained strong and active industrial relations jurisdictions. To the extent that they were responding to local needs, some of the advances achieved by State tribunals and State legislatures remained unique to the jurisdiction they arose in, but other innovations were subsequently adopted in other jurisdictions and so spread across the country.

The NSW jurisdiction has led the way in exploring and developing concepts such as payment for redundancy, rights on termination of employment, pay equity and equal remuneration, the incorporation of anti-discrimination concepts into industrial relations, expanding the rights of casual employees and addressing the exploitation of clothing outworkers. Many of these initiatives have been picked up by other jurisdictions. Significant provisions which are either unique to particular States or were originally innovations of the States include the following:

**New South Wales**

• Chapter 6 of the *Industrial Relations Act 1996* provides for a modified industrial relations system for drivers of public vehicles and carriers of goods who are engaged under contracts that are not contracts of employment.

• Chapter 2 Part 9 of the *Industrial Relations Act 1996* permits the Industrial Court of New South Wales to review the terms of any contract involving the performance of work. If the contract is found to be unfair, the Industrial Court may declare the contract wholly or partly void, vary the terms of the contract or make any order as to the payment of money.

• The first pay equity inquiry in Australia was undertaken by the Industrial Relations Commission in 1998. Following this, the Commission formulated the Equal Remuneration and Other Conditions Principle...
as a wage fixing principle. The Principle provides the framework for pay equity cases to be brought before the Commission, to remedy the existence of gender-based undervaluation of work. Other State jurisdictions have subsequently held their own pay equity inquiries and taken State-based action to redress the problem.

- The Ethical Clothing Trades Act 2001 provides for a mandatory code of conduct to apply to persons giving out work in the clothing trades.

**Victoria**

- While the other Australian jurisdictions chose conciliation and arbitration as the means of settling industrial disputes, Victoria established a system of wages boards, consisting of equal numbers of employer and employee representatives with independent chairs, whose function was to fix wage rates in trades. Decisions of wages boards took effect in much the same way as awards and operated as common rules. The wages boards were renamed conciliation and arbitration boards under the Industrial Relations Act 1979 which for the first time created an Industrial Relations Commission in Victoria, but full-scale conciliation and arbitration was not established in Victoria until 1992.

- The new system operated for two months before the election of the Kennett Government, which enacted the Employee Relations Act 1992. That Act abolished conciliation and arbitration, replacing it with direct negotiation of terms and conditions of employment.26

- In 1996, the Kennett Government referred its industrial relations powers to the Commonwealth. Industrial relations in Victoria is now regulated by the Workplace Relations Act 1996.27

- The referral does not mean that Victoria has stopped legislating in the area of industrial relations. For example, the Outworkers (Improved Protection) Act 2003 is aimed at ensuring that outworkers in the Victorian clothing industry receive their lawful entitlements.

**Queensland**

- Chapter 2 of the Industrial Relations Act 1999 sets out a number of legislated minimum conditions including matters such as working time, sick leave, annual leave, public holidays, parental leave, bereavement leave, long service leave and equal remuneration for equal work.

- Section 276 of the Queensland Act provides unfair contract provisions similar to those in the NSW Act, but more restricted in terms of who can access them.

- Queensland has on two occasions adopted a ‘mirror’ legislation approach, enacting industrial statutes which in large part mirrored the current federal statute. In 1994 the existing Industrial Relations Act 1990 was amended by the Industrial Relations Reform Act 1994 which picked up and mirrored many of the new elements introduced into the federal system by the Industrial Relations Reform Act 1993, including enterprise flexibility agreements and minimal protections for termination of employment. This system was wholly repealed and replaced by the Workplace Relations Act 1997 (Qld), which largely mirrored the Workplace Relations Act 1996 (Cth), including providing for a State version of Australian Workplace Agreements, called QWAs.

- The mirroring ceased with the amendment of the Workplace Relations Act 1997 in 1998, followed by its wholesale repeal and replacement by the Industrial Relations Act 1999. QWAs were not entirely abolished, but important protections were introduced.
Western Australia

- Western Australian Workplace Agreements (WAWAs) were introduced in 1993. WAWAs were statutory individual agreements that completely replaced any applicable State award on registration and could be offered by employers as a condition of employment. WAWAs were not subject to an award-based no disadvantage test, but were instead underpinned by a set of statutory minimum conditions established under the Minimum Conditions of Employment Act 1993. The WAWA provisions were eventually repealed by the Labour Relations Reform Act 2002, which permits the making of statutory individual agreements called Employer-Employee Agreements (EEAs), which cannot be made a condition of employment and must pass an award-based no disadvantage test.

- The original Minimum Conditions of Employment Act 1993 included a single statutory minimum wage (which in later years fell well below the award minimum), matters pertaining to the payment of wages, and annual, sick, bereavement and parental leave. It applies to all employees in the Western Australian jurisdiction, including those covered by awards, agreements and common law contracts of employment. The Act has since been expanded to deal with carers leave, reasonable hours, and flexible work for parents returning from parental leave.

- Western Australia’s unfair dismissal laws are the least restrictive as to access in the whole of Australia, with no rules excluding employees on the basis of qualifying periods or their employment status.

South Australia

- South Australia pioneered the concept of individual access to a remedy for unfair dismissal when the Industrial Conciliation and Arbitration Act 1972 commenced on 1 January 1973.

- South Australia was the first jurisdiction to establish an office specifically focused on assisting employees in their interactions with the industrial relations system. The Employee Ombudsman was established in 1994 under the Fair Work Act 1994, which introduced enterprise bargaining to the State.

- The Fair Work Act was amended in 1997 by the Industrial and Employee Relations (Harmonisation) Act 1997 which, as its name implies, sought to harmonise the South Australian industrial system with that established under the Commonwealth Workplace Relations Act 1996.

- After a review of South Australia’s industrial system in 2002, amendments were made to the Fair Work Act in 2005 which introduced new provisions regarding minimum conditions, carers and bereavement leave, protection of outworkers and pay equity.

- In 2007, South Australia adopted a similar mandatory code of conduct for providers of clothing work to that originated in NSW in 2002 and Victoria in 2003.28

Tasmania

- Until the enactment of the Industrial Relations Act 1975, Tasmania, like Victoria, had a wages board system for the regulation of wages and conditions. In 1975, wages boards were re-named industry boards and their determinations became known as awards, and the system was overseen by the newly established Industrial Appeals Tribunal.

- The board system was abolished and the Industrial Commission was established by the Industrial Relations Act 1984.

- Unfair dismissal is dealt with as a class of industrial dispute, rather than as a separate
and distinct jurisdiction (although the *Industrial Relations Act* does provide in section 30 a set of distinct criteria to be applied by the Commission in dealing with a dispute about termination of employment.)

### 2.2.3 Interaction between the federal and State systems

The *Workplace Relations Act* seeks to generally exclude the operation of State industrial laws. However, the Act also limits the exclusion of State laws by explicitly not excluding State laws about a specified range of matters, such as occupational health and safety, child labour, long service and others. This approach creates complex legal issues which may take some time to be resolved or may never be fully resolved. These issues are discussed in more detail below.

### 2.3 WHAT IS WRONG WITH THE CURRENT STRUCTURE?

This section examines the difficulties attending the current interrelationship between federal and State industrial relations laws. Four specific areas are considered:

- Inadequate coverage
- Who’s in and who’s out
- Legal complexity and duelling systems
- Limitations of the corporations power.

#### 2.3.1 Inadequate coverage

The structure put in place by Work Choices does not cover all Australian workplaces. At the time it was introduced it was claimed that it would cover up to 85 per cent of the workforce, but no explanation of how this figure has been derived has been made publicly available. This section attempts to derive a more robust estimate of the number of workers covered by the current federal system.

One of the major hurdles of determining coverage is the uncertainty about which employing entities are constitutional corporations and which are not. The entities capable of being affected by a federal law based on the corporations power must be one of the following: foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

The question of coverage is further complicated by the approach taken in Work Choices to transitional arrangements and 'non-excluded' matters. In relation to the former, after five years of Work Choices, unincorporated employers covered by pre-Work Choices federal awards in the transitional system will no longer be subject to the federal system and potentially flow into the State industrial relations systems. This migration is likely to be greatest in the pastoral and construction industry sectors.

The non-excluded matters set out in section 16 of Work Choices cause additional complexity. These non-excluded matters include long service leave, child employment, the method and frequency of payment of remuneration, observance of public holidays, jury service and deductions from wages. In these areas, the coverage of the State systems has actually increased as a result of the Work Choices legislation. It is now probable that the State industrial relations systems are the predominant jurisdiction for establishing the entitlements and responsibilities of the majority of employers and employees in these non-excluded matters.

As a benchmark for how the jurisdictional coverage was divided prior to Work Choices, figures reported in the 2001 Working New South Wales Employer Survey commissioned by the then NSW Department of Industrial Relations found that about 45 per cent of employees worked under State industrial instruments, 23 per cent under federal instruments and the remainder under other arrangements. It is likely that many of the workers...
in this final category were covered by general NSW industrial relations legislation such as theAnnual Holidays Act 1944 and Long Service Leave Act 1955.

There is no doubt that the introduction of Work Choices had a significant effect on the relative numbers of employers in the federal and State jurisdictions. However, while a substantial proportion of the NSW workforce is now within the federal jurisdiction, the actual number is not clear. The federal government has estimated the figure at 85 per cent. The New South Wales Government estimates federal coverage at less than 70 per cent of the workforce, with proportionally lower coverage in rural and regional areas where businesses are less likely to be incorporated.

This estimate is derived in part from business registrations, which show that 61 per cent of businesses based primarily in NSW are incorporated, 30 per cent are unincorporated and the remaining nine per cent are trusts (which are split across the federal and State jurisdictions depending upon the corporate status of the trustee(s) and the requisite trading or financial activities).34

The major employers clearly remaining within the NSW industrial relations system are the State public sector, family partnerships, partnerships, trusts and sole traders.

It should also be noted that aggregate estimates of coverage mask a range of notable factors, including:

• that some industries largely remain within the NSW industrial relations system, including retailing, hospitality, personal services and pastoral/agricultural areas,36 and

• that as a consequence of the industry and occupational patterns displayed across the NSW workforce, women workers are more likely to remain within the NSW industrial relations system than men.

Further support is derived from Table 1, which estimates the jurisdictional coverage of non-farm employees in each State and Territory by employing entity. This table is based on unpublished data derived from the ABS 2006 Survey of Employee Earnings and Hours.

The data shows the coverage of the State jurisdiction in New South Wales at 28 per cent. This total is calculated by adding the unincorporated, State and local government data categories (noting that the status of local government remains unclear). Since the introduction of Work Choices the NSW Government has enacted legislation with the effect of providing coverage within the NSW system to at least some employees of State-owned corporations. On this basis it is reasonable to assume that some proportion of the seven per cent of State Government Corporations are now covered by the NSW jurisdiction thus making the percentage of employees covered much higher than 28 per cent.

The coverage of State jurisdiction ranges from 28 per cent in New South Wales to as high as 49 per cent in Tasmania. On a national basis it is estimated that 26 per cent of employees Australia-wide are covered by State jurisdictions. It is important to clarify the Australia-wide estimate for State jurisdictions. The Northern Territory, Australian Capital Territory and the State of Victoria are excluded when calculating this estimate as they do not have their own systems.
It is also important to note that, since the introduction of Work Choices the number of unincorporated entities incorporating may have increased with a subsequent effect on coverage. Since 2006, the federal government has provided incentives to incorporate by lowering the costs involved and easing the reporting requirements for lower earning corporations. Employers may have simply chosen to incorporate to enable them to be covered by the federal jurisdiction.37

While it is difficult to do more than estimate coverage levels at this point in time, it is clear from the data in Table 1 that federal coverage is certainly less than the 85 per cent figure claimed by the Commonwealth. Instead, the figure appears to be in the range of 70 to 75 per cent, which makes it clear that the present structure is not capable of covering at least one quarter of the workforce.

Appendix Table 1: Proportion of non-farm employees, State and Australia by type of legal organisation

<table>
<thead>
<tr>
<th>% of non-farm employees</th>
<th>NSW</th>
<th>VIC</th>
<th>QLD</th>
<th>SA</th>
<th>WA</th>
<th>TAS</th>
<th>NT</th>
<th>ACT</th>
<th>AUST</th>
</tr>
</thead>
<tbody>
<tr>
<td>Incorporated</td>
<td>62.4</td>
<td>54.4</td>
<td>54.1</td>
<td>51.3</td>
<td>48.8</td>
<td>43.9</td>
<td>42</td>
<td>33.5</td>
<td>55.4</td>
</tr>
<tr>
<td>Unincorporated for profit</td>
<td>16.0</td>
<td>24.0</td>
<td>20.3</td>
<td>24.1</td>
<td>28.0</td>
<td>25.6</td>
<td>19.4</td>
<td>14.7</td>
<td>20.8</td>
</tr>
<tr>
<td>Unincorporated not for profit</td>
<td>3.8</td>
<td>3.9</td>
<td>4.8</td>
<td>2.5*</td>
<td>2.8</td>
<td>3.2*</td>
<td>5.1**</td>
<td>3.9</td>
<td>3.8</td>
</tr>
<tr>
<td>Unincorporated total</td>
<td>19.7</td>
<td>27.8</td>
<td>25.1</td>
<td>26.6</td>
<td>30.8</td>
<td>28.8</td>
<td>24.5</td>
<td>18.5</td>
<td>24.6</td>
</tr>
<tr>
<td>Aust Govt</td>
<td>2.4</td>
<td>2.8</td>
<td>2.1</td>
<td>2.7</td>
<td>1.9</td>
<td>3.3</td>
<td>4.5</td>
<td>36.9</td>
<td>3.2</td>
</tr>
<tr>
<td>State Govt</td>
<td>6.4</td>
<td>6.4</td>
<td>11.8</td>
<td>14.5*</td>
<td>7.9</td>
<td>16.6</td>
<td>22.5</td>
<td>8.1</td>
<td>8.5</td>
</tr>
<tr>
<td>State Govt Co</td>
<td>7.2*</td>
<td>6.5</td>
<td>3.7</td>
<td>2.7*</td>
<td>8.3</td>
<td>4.3</td>
<td>3.0</td>
<td>3.0</td>
<td>6.0</td>
</tr>
<tr>
<td>Local Govt</td>
<td>1.9</td>
<td>2.1</td>
<td>3.2</td>
<td>2.3*</td>
<td>2.3</td>
<td>3.1</td>
<td>3.5</td>
<td>n.a.</td>
<td>2.3</td>
</tr>
<tr>
<td>Total</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: Unpublished data, ABS Survey of Employee Earnings and Hours (Cat No 6306.0) May 2006

Notes: n.p not published
n.a not available
* Estimate has a relative standard error of between 25% and 50% and should be used with caution.
** Estimates has a relative standard error greater than 50% and is considered too unreliable for general use.
2.3.2 Who’s in and who’s out

Use of the corporations power as the constitutional basis for the Workplace Relations Act means that the focus of the legislation is on corporations, rather than on industrial relations matters. In other words, the legislation operates through corporations, directing them and their employees to do, or not do, a very large number of things.

The States challenged this constitutional foundation without success before the High Court of Australia in 2006. Instead, the Court majority supported a very broad interpretation of the extent of the corporations power, adopting the following view of Justice Gaudron in the earlier Pacific Coal case:

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.39

The majority in the Work Choices Case went on to conclude that:

It follows, as Gaudron J said, that the legislative power conferred by s51(xx) ‘extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations’.40

At the centre of this approach is the corporation and its relationships, in contrast to the approach taken between 1904 and 2006, which was founded on the conciliation and arbitration of interstate industrial disputes. Using the corporations power, the Commonwealth can or could do everything it could do using the conciliation and arbitration power and more but only in respect to constitutional corporations.

However, this extended power to regulate industrial relations can necessarily only apply to corporations or those with a ‘sufficient connection’ to a corporation (eg a person contracted to perform work for a corporation). Therein lies its most substantial limitation. While many employers are financial or trading corporations – many more than would have been the case at the time Constitution was crafted in the late nineteenth century – many are not.

The Motor Traders Association of NSW is an example of an organisation with mixed membership, that is, the members are mostly small businesses, many of whom are unincorporated, while others are incorporated. It is a matter of significant concern to the Motor Traders Association that the State award which formerly provided a stable source of industrial relations rights and obligations for all its members is no longer available to many members simply because they are incorporated.42

At least in the case of motor traders, corporate status should mostly be a clear-cut issue. Classes of employers whose status as financial or trading corporations is at least doubtful include local councils, charitable organisations, educational institutions and entities of the churches. While most local councils are incorporated (usually by virtue of relevant State or Territory legislation), it is not clear whether they could be considered to be trading or financial corporations. Similarly, while some charitable organisations are incorporated
The non-government social and community service industry employs some 30,000 employees in NSW. Pre-Work Choices, the public and community sector industry in NSW was covered by awards of the Industrial Relations Commission of NSW.

The Australian Services Union (ASU) notes that the operation of the Work Choices legislation has had a ‘major disruptive impact on the Social and Community Services industry in NSW’ and that:

This disruption derives from the uncertainty that arises for non-government not for profit organisations determining if they trade, and if they do, if that trade is significant.

This is a significant issue as there are now differential pay rates operating in the two systems (Federal and State). Accordingly, there is no way in which an employer can determine with certainty which rates of pay and which conditions apply to which employees.\(^{51}\)

Further confusion arises from the fact that the Australian Fair Pay Commission excluded the social and community services sector from the most recent pay increase handed down in July 2007.

The ASU contends that the only possible way of resolving these matters would involve individual applications to the High Court, observing that ‘This is an unacceptable solution.’\(^{52}\)

The Youth Action and Policy Association, the peak community group working in the interests of young people and youth services in NSW also remarked on the jurisdictional uncertainty in their submission to the Inquiry.

At present, many youth service Boards are dealing with the uncertainty of Federal coverage in industrial relations. The wide definition given to ‘trading’ corporations has made it very difficult for services to assess their position in relation to the criteria that would move them into the Federal system.\(^{53}\)
and undertake fund raising activities, it is similarly unclear whether they could be considered to be constitutional corporations.

The situation is even more complicated for an organisation like the Catholic Church. There are a range of Catholic Church employers in the sectors of education, aged care, social welfare, community services, ministry and parish and diocesan administration. According to the Catholic Commission for Employment Relations: ‘Through the various organisations operated by Catholic Dioceses, Congregations of religious priests, brothers and sisters and other agencies, the Catholic Church is the largest non-government employer in NSW’.43

In education, while most schools are public schools run by State governments and are not corporate employers, there is a substantial private school system, consisting of schools run by various religious institutions as well as by private organisations. As described by the NSW/ACT Independent Education Union:

About two thirds of school teachers in NSW are employed in the government system; of the non-government school sector approximately two thirds of teachers are in Catholic Schools which consider themselves to be most likely in the NSW system. Effectively all school education in NSW is non-profit, and although many independent schools have made federal agreements, the constitutional status of some schools remains unclear. Further, government school teachers have a benchmark role industrially and rates paid by Catholic system employers to teachers follow exactly those of the government sector. For other independent school employers such rates are also a key factor in setting rates of pay.44

So far, courts and tribunals which have had to grapple with these questions have taken the approach first developed by the High Court in *R v Judges of the Federal Court of Australia; Ex Parte Western Australian National Football League*.45 In that case, Chief Justice Barwick, for the majority, found:

I remain of the firm conviction that for constitutional purposes a corporation formed within the limits of Australia will satisfy the description ‘trading corporation’ if trading is a substantial corporate activity. Its activities rather than the purpose of its incorporation will designate its relevant character. But so to say assumes that such trading activities are within its corporate powers, actual or imputed. It is the corporation which satisfies the description which is the subject matter of the power. Thus its corporate capacity or incapacity cannot be ignored. But once it is found that trading is a substantial and not merely peripheral activity not forbidden by the organic rules of the corporation, the conclusion that the corporation is a trading corporation is open.46

Using this and other criteria, the Industrial Relations Commission of NSW has developed a set of principles specifically for the purpose of determining whether a particular employer before it is a constitutional corporation.47 These principles go to the current activities of the corporation, and to the question of whether those activities are trading activities, and then whether those trading activities are ‘substantial and not merely peripheral’. Tribunals in other jurisdictions are making similar decisions.48

Application of the test will be a matter of fact and degree in each case. Thus, in the case of a charitable organisation, whether or not it is a constitutional corporation will depend on the degree to which its trading activities are
‘substantial’. Indeed, it may be that the test will yield different results at different times in relation to a particular enterprise – the level of trading activities may wax or wane from time to time.

Consequently, not all of the members of a particular class of incorporated bodies may be constitutional corporations. In practical terms, this is not an issue for conspicuously commercial, profit-making organisations, however for enterprises of more doubtful status such as local councils and social and community organisations, this issue remains uncertain.

In this regard, it is salient to note that the Work Choices Case shed no light on this specific issue, with the majority observing that:

The challenge to the validity of the legislation enacted in reliance on the corporations power does not put in issue directly the characteristics of corporations covered by s 51(xx). It does not call directly for an examination of what is a trading or financial corporation formed within the limits of the Commonwealth. (Plainly, a foreign corporation is a corporation formed outside the limits of the Commonwealth.) No party or intervener called in question what was said about trading and financial corporations in R v Federal Court of Australia; Ex parte WA National Football League.49

It appears that these questions will remain unresolved in the short to medium term at least.

For the present though, one of the most significant consequences is that the boundary between the federal and the State systems remains unclear, and in some respects fluid. While some members of a particular class of organisations may be corporations and therefore in the federal system, others may not, or changes to the mix of their activities may mean that they move from one jurisdiction to another and back again over time.

Professor Andrew Stewart of Flinders University has described the practical effects as follows:

Even where [a South Australian not-for-profit corporation or an association to which they belong] can afford legal advice, that advice must often be tentative in nature. This includes acknowledging the possibility of the High Court itself revisiting its current approach to determining trading corporation status.

It is difficult then for many not-for-profit employers to be sure as to:

- whether to comply with federal or State minimum pay rates or conditions;
- whether to comply with federal or State record-keeping requirements;
- whether they will have to hand out the new ‘fact sheet’ that the Workplace Authority will be required to develop;
- especially if they have less than 100 employees, whether or not they may be exposed to unfair dismissal claims;
- whether they can make AWAs, which are available under the WR Act but not the [South Australian] Fair Work Act 1994;
- if they wish to make a collective agreement, whether this must be done under the WR Act or the FW Act, which impose very different procedural and substantive requirements.50
The principal concern in the local government sector is whether local councils are classed as constitutional corporations for the purposes of Work Choices and therefore whether they are in the federal industrial relations system.

The position of the United Services Union (USU) is that councils are not constitutional corporations and that there are doubts in the industry about the application of Work Choices to local government. In particular, the USU is concerned about the effect that coverage uncertainties may have on wage increases:

The complexities and uncertainties of the federal industrial relations system raise significant problems associated with the payment of general wage increases. Great financial uncertainty awaits councils in contemplating the possibility of federal jurisdiction being confirmed.

For its part, the relevant employer organisation, the Local Government Association of NSW recently called on the federal Minister for Employment and Workplace Relations, the Hon Joe Hockey to end this jurisdictional uncertainty for local councils by exempting them from the federal jurisdiction.

To mitigate these problems, the parties have sought alternative means of conducting their industrial affairs, and have developed two template referral agreements under section 146A of the NSW Industrial Relations Act 1996. These template agreements empower the Industrial Relations Commission of NSW to resolve disputes and deal with dismissals alleged to have been unfair.

In relation to such referral agreements, the USU says that:

In the uncertain legal and jurisdictional environment, s146A has provided an opportunity for the Union and councils to take a responsible and practical approach to resolving industrial issues at the local level … Where a dispute does arise, referral agreements provide a forum where issues can be resolved quickly, simply and without costly Federal Court and High Court litigation.

At the time of writing this report 95 councils had signed referral agreements. … Whilst this is a commendable outcome, the fact that a number of councils remain uncommitted to signing referrals indicates the extent of the complexity and confusion caused by Workchoices.

There are now two test cases under way in Queensland which will address the question of whether the councils concerned are constitutional corporations. Given that the decisions of the courts are likely to turn strongly on the specific facts, the degree to which these cases assist the resolution of these jurisdictional issues generally remains to be seen.

Case Study 2 – NSW Local Government
2.3.3 Legal complexity

Apart from the issues arising out of uncertain coverage, the complexity of the current Workplace Relations Act arises from the following three aspects of the Act:

1. A highly prescriptive and detailed legislative style. Many of the provisions prescribe what employers and employees can or cannot do in extensive and complex detail, especially when compared to State counterpart legislation. Professor Stewart describes the Act as ‘bloated, convoluted and in parts almost unintelligible’, and as failing to achieve ‘the elegance or economy of words that mark some of the more readable State laws’. Professor Stewart provided an example in his 2002 Submission to the Senate Inquiry into the Workplace Relations Amendment (Termination of Employment) Bill 2002:

[T]he provisions in Division 3 of Part VIA of the Workplace Relations Act and their attendant regulations are (much like the remainder of the statute) unnecessarily complex and unduly prescriptive. They are very hard for ordinary workers or managers to understand, necessitating legal advice for even the simplest procedures. Instead of simply empowering the Australian Industrial Relations Commission (AIRC) to deal with certain claims and providing broad guidance as to how to do so, as most State laws do, the legislation seeks to regulate each step of the process in ever-increasing detail. As is generally the way when Parliament tries to anticipate and counter every eventuality, this level of detail simply creates potential gaps and uncertainties for litigants and their lawyers to exploit.

2. Excessive length. The extent of detailed prescription in the federal Act leads, unsurprisingly, to a statute of what can only be described as gargantuan length. This may be demonstrated by the following facts:

- At 1,700 pages, the Work Choices legislation and associated regulations stand as one of the longest and most complex pieces of federal regulation of any area, outside tax law.
- The 23 September 2006 CCH Edition of the Act contained 919 sections, plus nine separate schedules dealing with matters such as Registration and Accountability of Organisations (Schedule 1), and various Transitional Arrangements (Schedules 6-8 and 10). Some of the Schedules are themselves quite lengthy (Schedule I stretches to over 359 separate sections).
- The original 2006 legislation was augmented by the Workplace Relations Legislation Amendment (Independent Contractors) Act 2006 (69 pages), and then the Workplace Relations Amendment (A Stronger Safety Net) Act 2007 in March 2007 (102 pages).
- The contrast with relevant State Acts is striking: for example, the Industrial Relations Act 1996 (NSW) contains 411 sections, the Fair Work Act 1994 (SA) contains 237 provisions, and the Industrial Relations Act 1979 (WA) is a mere 113 sections in length.

3. A lack of trust in the parties. The prescriptive nature of Work Choices carries over into the discretion and flexibility it affords to the parties. At the workplace level, the activities of employers, their employees and their unions are heavily circumscribed or limited. Agreements cannot contain prohibited content, awards can only contain allowable matters, and unless the correct procedures have been followed, unions cannot engage in protected industrial action nor enter the workplace. The Australian Industrial Relations Commission (AIRC) can no longer deal with disputes or arbitrate unless the parties so agree first.
Standards are no longer set by the AIRC in test cases, in which all the parties have a right to be heard, but directly by enactments of the Australian Parliament. In other words, rather than having a system that is shaped by and evolves in accordance with the wishes of the parties and considerations of the public interest, the specifics of the structure now in place are a matter for the legislature.

In addition, tasks previously performed by either the industrial parties or the Commission have been shifted to the federal bureaucracy: whether agreements are fair or otherwise is determined by the Workplace Authority, and enforcement of conditions and pay is the primary responsibility of the Workplace Ombudsman.

The net result is a federal system whose shape the users can influence only if they can convince the legislature of the rightness of their case. Given the rapidly changing nature of labour markets and workplace conditions, as well as the constant requirement to reconcile strongly diverging viewpoints, this is a job of micro-management.

2.3.4 Duelling systems

The Workplace Relations Act explicitly seeks to exclude State industrial legislation from the regulation of the industrial relations of corporations – in other words, it is intended to ‘cover the field’ in this area. The breadth and depth of this exclusion is yet to be fully tested, however, the view of the Full Court of the Federal Court in the Tristar case suggests that this exclusion is very wide. In that case, the Court held that an inquiry into various industrial relations matters at Tristar Steering and Suspension Limited, a constitutional corporation, being conducted by the Industrial Relations Commission of NSW at the direction of the NSW Minister for Industrial Relations, was beyond jurisdiction and should cease. In other words, the NSW Commission no longer has the power to inform itself as to the particulars of a serious and protracted industrial situation at the direction of the NSW government of the day.

However, not all matters are excluded, and the federal Act contains a list of matters which may be the subject of valid State or Territory laws, as follows:

- anti-discrimination and equal employment opportunity,
- superannuation,
- workers compensation,
- occupational health and safety,
- matters relating to outworkers,
- child labour,
- long service leave,
- public holiday observance,
- payment of wages or salaries issues (method, frequency and deductions),
- industrial action affecting essential services,
- attendance for service on a jury, and
- regulation of associations of employers and employees.

The non-excluded matters list has prompted some State governments and some industrial parties to use the jurisdictional space so created to meet their policy or industrial goals. For example, in late 2006, the NSW Parliament passed the Industrial Relations (Child Employment) Act 2006, which provides, amongst other things, that an employer offering a federal workplace agreement must provide children with minimum conditions of employment. The explicit purpose of this legislation was to mitigate the effects of WorkChoices on young workers. The Queensland and Western Australian Governments have introduced similar legislation.

Such ‘legislative duelling’ will continue as long as the current legislative structure remains in place.
2.3.5 Is the corporations power an appropriate foundation?

The extensive use of the corporations power in section 51(2) of the Constitution to found industrial relations laws is unprecedented. While previous federal statutes have used the corporations power to extend what is in essence a conciliation and arbitration based system, Work Choices has effectively abandoned conciliation and arbitration and focuses directly on the corporation and its relationships.

Founding industrial relations laws on this constitutional power may have consequences for the kind of industrial system that is created. In terms of the place occupied by section 51(20) in the constitutional framework, Justice Kirby in his dissenting judgement in the Work Choices Case said:

Preserving industrial fairness: … The requirement to decide industrial relations issues through the independent processes of conciliation and arbitration has made a profound contribution to progress and fairness in the Australian law on industrial disputes, particularly for the relatively powerless and vulnerable. To move the constitutional goalposts now and to commit such issues to be resolved directly by federal laws with respect to corporations inevitably alters the focus and subject matter of such laws. The imperative to ensure a ‘fair go all round’… which lay at the heart of federal industrial law (and the State systems that grew up by analogy), is destroyed in a single stroke. This change has the potential to effect a significant alteration to some of the core values that have shaped the evolution of the distinctive features of the Australian Commonwealth, its economy and its society.

Limiting the corporations power … I accept that the corporations power in the Constitution, when viewed as a functional document, expands and enlarges so as to permit federal laws on a wide range of activities of trading and financial corporations in keeping with their expanding role in the nation’s affairs and economic life. But there are limits. Those limits are found in the express provisions and structure of the Constitution and in its implications. This Court’s duty is to uphold the limits. Once a constitutional Rubicon such as this is crossed, there is rarely a going back. 75

From a policy viewpoint, Professor Ron McCallum, former Dean of Law of University of Sydney Law School, makes the point that:

laws based upon the corporations power will be centred around corporations to the detriment of flesh and blood persons who interact with corporations. Wholesome labour laws seek to balance the rights duties and obligations of employers and employees as equal legal actors in the processes of work and production. However, general labour laws of broad application which would be required to found a national labour regime, which were enacted in reliance upon the corporations power could not for long maintain this balance between employers and employees. In the fullness of time, these labour laws will become little more than a sub-set of corporations law because inevitably they will fasten upon the economic needs of corporations and their employees will be viewed as but one aspect of the productive process in our globalized economy. 76
2.3.6 Conclusion

The present State and federal approaches to industrial regulation differ starkly in character and approach, reflecting the policy differences between the jurisdictions. The Commonwealth has sought to diminish the coverage of State jurisdictions, while the States have opposed this approach, and in some cases, sought to mitigate it within available constitutional limits. Even Victoria, which referred its industrial relations powers in 1996, has taken steps to mitigate some of the effects of Work Choices.77

Whatever one’s view of this legislative struggle might be, one thing is clear – this approach cannot, and will not deliver a simple and efficient national industrial relations system. The constitutional reach of the Commonwealth is limited and it cannot ever cover all employers and employees. In practice, the dependence on the corporations powers leaves too many gaps and uncertainties. The differences in the respective legislative approaches of the Commonwealth and the States also mean that the incentives and opportunities for cooperation are limited.

The present structure is a poor one for regulating industrial relations in Australia. As noted by Professor Stewart, the complexity of the legislation provides ample opportunities for litigation and resultant uncertainty.78 The issue of the corporate status of local government provides a case in point: even the litigation currently under way may not provide a definitive answer about the corporate status of local councils. That in turn means that further legislation or constitutional cases may be necessary to either resolve the question in a more definitive fashion, or to resolve it for particular councils. Similar considerations apply to enterprises in the social and community services sector. The cost of such matters will no doubt be considerable, and it is difficult to see how the spending of this money could be in the public interest.

At the very least, this suggests that a new and different approach, deploying fresh ideas and a different constitutional approach, is required. The following Chapters grapple with the task of developing and describing such an approach.
ENDNOTES

1 In this report, “Work Choices” is used as a compendium term to describe the Workplace Relations Act 1996 (Cth), as amended by the Workplace Relations Amendment (Work Choices) Act 2005 and the Workplace Relations Amendment (A Fairer Safety Net) Act 2007.


3 For example, the Masters and Servants Act 1828 (NSW).

4 For example, Trade Union Act 1876 (SA), Trade Union Act 1881 (NSW), Trade Unions Acts 1884 1886 (Vic).

5 For example, the Industrial Conciliation and Arbitration Act 1900 (WA), the Industrial Arbitration Act 1901 (NSW) and the Conciliation and Arbitration Act 1904 (Cth).


8 Quick and Garran, The Annotated Constitution of the Australian Commonwealth, Sydney, Angus & Robertson, 1901, p646.

9 See discussion by Callinan J in New South Wales v Commonwealth (Work Choices Case) [2006] HCA 52 at [707]-[735].

10 R v Duncan; Ex parte Australian Iron and Steel Pty Ltd (1982) 158 CLR 535. The Coal Industry Tribunal scheme and the Duncan decision are further discussed at 3.2.2.

11 Also known as the Industrial Relations Act Case (1996) 187 CLR 416.


13 There is further discussion of the external affairs power at 2.1.3.

14 The 1996 referral by the Victorian Government is further discussed in Chapter 3 at 3.3.4.

15 These papers are available at http://www.simplerwrsystem.gov.au.


17 New South Wales v Commonwealth (Work Choices Case) [2006] HCA 52.

18 Koowarto v Bjelle-Petersen (1982) 153 CLR 168; Commonwealth v Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1; Victoria v Commonwealth (Industrial Relations Case) (1996) 186 CLR 416, in which the attempt to base unfair dismissal laws on the Termination of Employment Convention of the ILO was overturned because “the inclusion of the ‘harsh, unjust or unreasonable’ criterion does not implement the terms of the Convention but goes beyond its requirements and adds an alternative ground for making terminations unlawful” (per Brennan CJ, Tookey, Gaudron, McHugh and Gummow JJ at 518).

19 See Workplace Relations Act 1996, section 659(1) for the full list.

20 Victoria abolished existing conciliation and arbitration provisions with the Employee Relations Act 1992. The Kennett Government then referred almost all of Victoria’s powers to regulate industrial relations to the Commonwealth in 1996, under section 51(37) of the Australian Constitution, (refer to discussion at 3.3.4 of this report).

21 For example, in NSW, this lineage is as follows: the Industrial Arbitration Act 1901, the Industrial Arbitration Act 1940, the Industrial Relations Act 1991, and the Industrial Relations Act 1996.

22 Australian Meat Trade Employees Federation v Whybrow & Co (1910) 11 CLR 311.

23 This was despite cases like Re Ranger Uranium Mines Pty Ltd Ex parte Federated Miscellaneous Workers Union of Australia (1987) 163 CLR 656, where the High Court indicated a willingness to consider that there might be some valid ways in which to deal with unfair dismissals through conciliation and arbitration.

24 See for example, Submission 17, Unions NSW p5: “The NSW Industrial Relations System has a strong history of regulation dating back to 1901. Many of these measures have set a precedent in the regulation of working conditions and have eventually become national standards”. A timeline is provided showing the important changes that were made in NSW since 1901.

25 Submission 19, Transport Workers Union of NSW pp 4-6 describes the operation of this system.


27 The reference of power by Victoria is further discussed in Chapter 3 at 3.3.4.


29 Workplace Relations Act 1996 (Cth) s146(1).

30 Workplace Relations Act 1996 (Cth) s146(2), 163).


32 The Hon Kevin Andrews MP, (the then Minister for Employment and Workplace Relations) Work Choices Media Release, 9 October 2005.


34 Australian Business Register database – unpublished data obtained by the NSW Department of Commerce.

35 Using the Australian Business Register data, the Department of Commerce has estimated the proportion of unincorporated businesses (including all trusts) in Wagga Wagga to be (60%), Griffith (71%), Lithgow (51%), Bathurst (58%), Orange (56%), Parkes (65%), Dubbo (61%), Mudgee (61%), Tamworth (59%), Armidale (61%), Taree (57%), Coffs Harbour (53%), Grafton (60%), Tweed Heads (58%), Nowra (53%) and Bateman’s Bay (57%).


37 Minister for Small Business and Tourism, the Hon Fran Bailey MP, “Incorporation Fee For Small Business Halted” Media Release, 7 April 2006.

38 New South Wales v Commonwealth (Work Choices Case) [2006] HCA 52.

39 Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union (2000) 203 CLR 346 at 375.

40 New South Wales v Commonwealth (Work Choices Case) [2006] HCA 52 at [178].

41 See Re Dingjan; Ex parte Wagner (1995) 183 CLR 323.

42 Submission 21, Motor-Traders Association of NSW, p1.


44 Submission 4, NSW/ACT Independent Education Union, pp1-2.

45 (1979) 143 CLR 190.

46 (1979) 143 CLR 190 at 208.

48 For example see Aboriginal Legal Service of WA Inc v Lawrence [2007]
WAIRC 00435.

49 New South Wales v Commonwealth (Work Choices Case) [2006] HCA 52 at
[55].

50 Submission to the Industrial Relations Commission of South Australian
Inquiry into the Work Choices and Independent Contractors Legislation,
p8, footnotes omitted.

51 Submission 31, Australian Service Union of NSW, pp.2-3.

52 Submission 31, Australian Service Union of NSW, p3.


54 Submission 22, New South Wales Local Government, Clerical,
Administrative, Energy, Airlines and Utilities Union pp5-6.

55 Submission 22, New South Wales Local Government, Clerical,

56 Submission 8, Local Government Association p2.

57 Submission 22, New South Wales Local Government, Clerical,

58 Australian Workers Union of Employees (Queensland) v Etheridge Shire Council,
currently before the Federal Court; and Palm Island Aboriginal Shire Council
v Queensland Industrial Relations Commission, appeal matter before the
Queensland Industrial Court.

59 Submission 2, Professor Andrew Stewart, p5.

60 Prof Andrew Stewart , Submission to the Senate Employment, Workplace
Relations and Education Committee Inquiry into the Workplace Relations
Amendment (Termination of Employment) Bill 2002 pp2-3.

61 Workplace Relations Act 1996 (Cth) Part 8, Division 1, Subdivision B.

62 Workplace Relations Act 1996 (Cth) Part 10, Division 1, Subdivision A.

63 Workplace Relations Act 1996 (Cth) Part 9, Division 3.

64 Workplace Relations Act 1996 (Cth) Part 15.

65 Workplace Relations Act 1996 (Cth) Part 8, Division 5A.


67 Workplace Relations Act 1996 (Cth) Part 9, Division 2.

68 Workplace Relations Act 1996 (Cth) section 166B.

69 Tristar Steering and Suspension Australia Ltd v Industrial Relations Commission

70 Workplace Relations Act 1996 (Cth) ss 16(2), 16(3).

71 Industrial Relations and Other Legislation Amendment Act 2007 (Qld); Industrial and Related Legislation Amendment Bill 2007 (WA).

72 See also CFMEU (NSW) (o-b of Hemsworth) v Brokk Pty Ltd t/as Botany
Crane & Forklift Services [2007] NSWIRComm 205, Transport Industry -
Mutual Responsibility for Road Safety (State) Award and Contract
Determination (No 2), Re [2006] NSWIRComm 328.

73 New South Wales v Commonwealth (Work Choices Case) [2006] HCA 52 at
[60(4)-615].

74 Ron McCallum, ‘The Australian Constitution and the Shaping of Federal
and State Labour Laws’ (2005) 10 Deakin Law Review 460 at p 469,
referred to in Submission 28, Professor Ron McCallum p1.

75 For example, Public Sector Employment (Award Entitlements) Act 2006.

76 Submission 2, Professor Andrew Stewart, p2.
## Chapter 3 – Australia’s federal system and cooperative schemes

### 3.1 WHY LOOK AT COOPERATIVE SCHEMES? 33

### 3.2 EXAMPLES OF COOPERATIVE SCHEMES 35

3.2.1 Ministerial Councils 36
3.2.2 Coal Industry Tribunal 38
3.2.3 Cooperative companies scheme 1981 – 1990 39
3.2.4 Corporations Law scheme 1991 – 2001 40
3.2.5 Corporations Act scheme 2001 41
3.2.6 Australian Uniform Credit Laws 42
3.2.7 Financial Institutions scheme 42
3.2.8 National Competition Council 43
3.2.9 Consumer Protection scheme 43

### 3.3 REFERRAL OF POWERS 44

3.3.1 The early history 44
3.3.2 Characteristics of the referral power 45
3.3.3 NSW industrial relations referral 46
3.3.4 Victorian industrial relations referral 47
3.3.5 Other referrals 48

### 3.4 CONSTITUTIONAL LIMITS ON COOPERATIVE ENDEAVOURS 49

3.4.1 Section 109 49
3.4.2 Limits on sharing power 50

### 3.5 CONCLUSION 51

ENDNOTES 52
Chapter 2 described a number of problems that mark the current structure of industrial relations regulation in Australia. This creates uncertainty for employers and employees and their representatives about their rights and obligations and the tools available to them to resolve industrial relations issues. This Chapter explores the mechanisms that could be used by jurisdictions to avoid this complexity and uncertainty through a more cooperative approach to regulation.

3.1 WHY LOOK AT COOPERATIVE SCHEMES?

The terms of reference for this Inquiry seek a model that would involve cooperation between jurisdictions to create and maintain an industrial relations system for the nation. However, quite apart from the terms of reference, there are a number of good arguments for why a cooperative approach, with a partnership between jurisdictions, is likely to provide the best outcomes.

The first argument for the involvement of both the States and the Commonwealth is the simple constitutional fact that the Commonwealth cannot create a complete and universal industrial relations system on its own. The limits of its constitutional powers (as described in Chapter 2) mean that it will never achieve 100 per cent coverage of all Australian workplaces. Hence, State involvement is a necessary ingredient for achieving national laws. While this could be brought about by the agreement of the States to simply abandon the field and refer their industrial relations powers without restriction to the Commonwealth, there are compelling reasons why there should be ongoing State involvement in any future industrial relations system.

The States are an integral part of the Australian federation and often the necessary partners of the Commonwealth. Chapter V of the Australian Constitution deals expressly with the States, recognising them as continuing entities with their own constitutions and powers, and requiring the laws of each to be given full faith and credit throughout the Commonwealth.

As fully functioning polities in their own right, the States have significant democratic rights and obligations under the Australian system of government. Through their elected governments, they have a responsibility to carry out policies and functions in accordance with their constitutions, electoral mandates and the strategic management of their policy priorities.

Competent management of the State economy and the efficient and effective delivery of public services are two of the key responsibilities of the State governments. Workplace conditions and workforce capacity (including participation in the labour force, level of skills etc) are key contributors to the achievement of good outcomes in these areas.

State governments are able to influence these outcomes through a range of measures, not least through their capacity to regulate industrial relations relationships. As was described in Chapter 2, the States have maintained conciliation and arbitration based industrial relations systems. It is also important to remember that the States are major employers in their own right and the industrial relations systems they have established govern their relationships with their own employees, as well as those of private sector employers and employees.

The States, with their broad legislative powers, have been important innovators in the area of industrial relations and have developed policy responses and legislated for a diverse range of industrial relations matters. These include enterprise bargaining, individual contracts, redundancy standards, unfair dismissal, long service
leave, annual holiday entitlements and pay equity. Development of each of these policy responses to workplace needs was first initiated at the State level. As described by Unions NSW in its submission:

The NSW Industrial Relations System has a strong history of regulation dating back to 1901. Many of these measures have set a precedent in the regulation of working conditions and have eventually become national standards.\(^3\)

The Commonwealth in the pre-Work Choices period was constrained by the limitations of the labour power in section 51(35) of the Australian Constitution, which restricted it to making laws to establish conciliation and arbitration for the prevention and settlement of interstate industrial disputes. It did not have the capacity that the States have to directly legislate for industrial relations matters. Nor did it have the ability to establish tribunals that could determine a common rule for a particular industry.\(^4\) Thus, even though the Australian Industrial Relations Commission and its predecessors did a large amount of work in setting new workplace standards through the exercise of their arbitral functions, action on the part of all the nation's tribunals was required to ensure universal access.

The historic reliance of the Commonwealth on the conciliation and arbitration power, confined in its ambit to interstate disputes, meant that the federal industrial relations system prior to Work Choices primarily addressed the industrial requirements of larger national employers operating across several jurisdictions. By contrast, the States have developed and maintained industrial relations systems which are particularly responsive to the specific needs and characteristics of small to medium business employers and sole traders. The focus of regulation has been on occupations and industries where employees characteristically have less bargaining power.

An important feature of State industrial relations systems has been the operation of common rule awards determined through specialised dispute resolution bodies. The various State Commissions have acted as independent umpires for industrial parties representing employers and employees. These awards, with their comprehensive coverage of industrial relations matters, have been an important vehicle for regulating a significant segment of the Australian workforce and providing industry wide coverage.

One example of this is the system of industrial regulation established for NSW workers in the hairdressing industry. Its industry wide application, accompanied by a trade licensing system, had no counterpart in the pre-Work Choices Commonwealth industrial relations domain. Hairdressing is an intrastate business by and large, and national regulation of the industry was not considered either necessary or appropriate.

State awards also have a significant degree of relevance for employers operating outside awards and enterprise bargaining. They tend to use State awards as indicative industrial benchmarks when bargaining with employees for the setting of minimum employment conditions.

State award-making industrial relations tribunals have become important repositories for the industrial relations expertise required to run a system based on the regulatory needs of medium to small employers. This expertise and experience should not be lost – it should be effectively utilised in a national system.

A national scheme of regulation of this kind would be consistent in its general and specific application and more adaptive to the requirements and emerging needs of all participants in the workplace. As Associate Professor Peter Gahan of Monash University has observed, there is a need for a local capacity to respond to stakeholder concerns about how industrial regulation operates in practice.\(^5\)
There is a strong case for involvement by the States in the establishment and ongoing governance of a national industrial relations system. The WorkChoices experience is a salutary reminder of what can happen where a collaborative approach is rejected in favour of the unilateral imposition of a new national industrial relations system.

In a national cooperative scheme in which all Australian jurisdictions have a significant stake, ideological policy extremes can be avoided as there is a broad based diffusion of political power accompanied by a much greater measure of democratic accountability. Such a scheme is more likely to achieve a fair balance between the interests of employers, employees and other significant stakeholders.

As responsible and democratically accountable governments, the States should not be surprised that their communities continue to expect them to respond to industrial relations issues and concerns. The fact that so many submissions to the Inquiry sought the retention of the State systems is a timely reminder that there is a high community expectation that States will continue to take responsibility for industrial relations issues arising within their territories. For example, in its submission, the State Public Services Federation Group of the Community and Public Sector Union said:

Any system established cooperatively in Australia needs to take due cognisance of the sovereign rights of the States and Commonwealth, and the presently superior institutional arrangements and rights of employers and employees extant in the various State systems.7

The Youth Action Policy Association said:

Given that a perfect system of ‘cooperative federalism’ may never be achieved, and that political preferences ebb and flow over time, YAPA believes it is beneficial for young people that the States retain the power to exercise their authority, if it is deemed in the interest of their constituents.8

These demands can best be met by States having an ongoing stake (such as through the development of policy or the delivery of compliance services) in any industrial relations system that regulates workplaces within their area. Regulation in this context, approached in a consensual and balanced fashion, can capture many of the benefits that currently derive from policy innovation between State jurisdictions. This should be part of a cooperative scheme for national regulation which draws on the policy making strengths of the States and draws on the accumulated and specialised industrial expertise of State arbitral bodies.

The argument that the involvement of the States enhances the capacity to achieve good regulatory outcomes is supported by a careful analysis of recent Commonwealth/State cooperative schemes and the effectiveness of their regulatory arrangements. These are the subject of discussion in the following pages of this Chapter.

3.2 EXAMPLES OF COOPERATIVE SCHEMES

Given the division of powers imposed by the Constitution, it is not surprising that the various Australian jurisdictions have often had good cause to work cooperatively to achieve common, harmonised or uniform outcomes in a wide range of areas. Examination of how these attempts at cooperation have fared provides insights into the type of cooperative arrangements that might be appropriate for establishing a new national industrial relations system. As will be seen, a variety of approaches is available (such as mirror legislation, uniform legislation and Commonwealth legislation made on the basis of referred powers or
text), each of which has already been used as the basis for achieving nationally consistent approaches to regulation.

The Council of Australian Governments (COAG), which comprises the Prime Minister and each of the Premiers of the States and the Chief Ministers of the Territories, is the ultimate embodiment of the value in regular meetings to consider issues of national significance and to develop responses that will benefit all Australians. COAG cannot deal with every such issue, and much of the work of developing consistent or harmonised approaches is done either by working parties or Ministerial Councils established under the auspices of COAG.

The next section provides an overview of the way in which these Ministerial Councils operate, before turning to more specific analysis of a number of particular cooperative schemes:

3.2.1 Ministerial Councils

Ministerial Councils are established under the auspices of COAG. Their role is ‘to facilitate consultation and cooperation between governments, to develop policy jointly, and to take joint action in the resolution of issues which arise between governments in the Australian Federation’.9

The Compendium of Ministerial Councils sets out the list of Councils existing as at September 2007.10 There are 30 Ministerial Councils, dealing with issues as diverse as the corporations law, the Murray Darling Basin, and industrial relations.

The work undertaken by Ministerial Councils varies widely. Some are essentially information sharing bodies (for example, the Workplace Relations Ministers Council), others are forums for the setting of national policy agendas which influence local decision making (for example, the Ministerial Council for Vocational and Technical Education), and still others have direct responsibility for overseeing jointly empowered legislative schemes (for example, the main function of the Ministerial Council for Corporations is to consider proposals for the amendment of the Corporations Act 2001, an Act made on the basis of powers referred by all the States). 11

The Compendium sets out broad protocols for the operation of Ministerial Councils, the aims of which are to ‘facilitate high-quality consultative decision-making, through a robust framework that is accountable, fiscally prudent, and administratively efficient’. The broad nature of the protocols means that councils have considerable flexibility in determining their own operations. Most are comprised of the responsible Minister or Ministers from each jurisdiction, meet once or twice a year, and are supported by a secretariat. Further support is provided by meetings of senior officials from each participating jurisdiction. Each Council is able to establish its own decision making procedures (unless these are set out in separate legislation).

Ministerial Councils use a range of processes and procedures in their operations, some of which are described below:

Chairing: While the relevant Commonwealth Minister is the permanent chair of many Ministerial Councils, it is also common for Ministerial Councils to be chaired on a rotating basis. For example, the Standing Committee of Attorneys General
meets in a different jurisdiction each time, and is chaired by the Attorney General of the host jurisdiction. Other councils with annual rotation of the chair include the Ministerial Council on the Administration of Justice, the Commonwealth State Ministers Conference on the Status of Women and the Ministerial Council on Consumer Affairs.

Decision making: While many Ministerial Councils make decisions on the basis of votes, others use a consensus model (for example the Tourism Ministers Council). Some have a mix of consensus decision making for general issues and voting for specified matters (for example, the Australian Transport Council). Most Ministerial Councils have the same voting rights for Territories and States. However, there are examples where the votes of the Territories are not equivalent to those of the States. This is typically the case where the scheme involves a referral of State power; as in those cases it is only the States who are giving up legislative power to the Commonwealth. On the other hand, there is also merit in the view that as the Territories would be totally covered by any laws or amendments agreed by such Ministerial Councils, they should have equal voting rights. In the case of the Ministerial Council on Corporations, any proposed legislative amendments must be approved by at least three State or Territory Ministers of whom at least two must be State Ministers. Effectively, this means that the Commonwealth has two votes on any amendment, the States have one vote each, and the Territories between them have only one vote. In the case of the Agreement on Counter Terrorism Laws, amendments have to be approved by a majority of the States and Territories including at least four States. At the Ministerial Council for Vocational Education and Training, the Commonwealth gets two votes, each State gets one vote, the chair (the Commonwealth Minister) gets the casting vote, and voting is by a simple majority.

Secretariats: The most common model for secretariats is that they are operated by staff from the relevant federal government agency, with the Commonwealth meeting the budget (for example, the Workplace Relations Ministers’ Council and the Ministerial Council on Immigration and Ethnic Affairs). One step along from that are secretariats which are located in the relevant Commonwealth agency but jointly funded by member governments (for example, the Ministerial Council on Consumer Affairs). Some secretariats are located outside Canberra, under the auspices of State government agencies (for example, the Community and Disability Ministers’ Council is supported by a permanent secretariat jointly funded, but currently located in South Australia with the South Australian Department of Health providing hosting facilities). In a small number of cases, the secretariat rotates with the chair (for example, the Sport and Recreation Ministers’ Council).

A different model is that used by the Ministerial Council on Education, Employment, Training and Youth Affairs, which has an independent secretariat which is not itself a legal entity, but operates under the legal shelter of a corporation owned by the Ministers and answering for operational matters to the Chief Executive of that corporation.12

Officers meetings: Ministerial Councils also receive support from senior officers’ meetings, where officers from each relevant Minister’s agency meet in advance of the council meeting to develop issues for the consideration of Ministers. Variations on this include the meetings of Solicitors General and of Parliamentary Counsels which provide assistance to the Standing Committee of Attorneys General, in addition to the meetings of departmental officers. Some officers’ meetings may include non-government representatives, for example the Cultural Ministers’ Council Standing Committee includes a representative from the Australian Local Government Association and the Australia Council.
3.2.2 Coal Industry Tribunal

The importance of cooperation between the Commonwealth and the States as a principle of constitutional federalism was emphasised in *R v Duncan; Ex parte Australia Iron and Steel Pty Ltd* in which Justice Deane made the following observation:

Cooperation between the Parliaments of the Commonwealth and the States is in no way antithetic to the provisions of the Constitution: to the contrary, it is a positive objective of the Constitution.

A prime example of this type of cooperation was the scheme which was the subject of that High Court decision, the Coal Industry Tribunal (CIT) and its associated scheme, which operated between 1946 and 1995. The CIT had direct responsibility for the settlement of interstate industrial disputes in the coal industry throughout Australia and intrastate disputes within New South Wales. Below the CIT were Local Coal Authorities with dispute settling functions limited to the localities in which they were constituted.

The combined statutory scheme of largely complementary laws, the *Coal Industry Act 1946* (Cth) and the *Coal Industry Act 1946* (NSW), authorised the Governor General and Governor of New South Wales to enter into an arrangement for the establishment of a single member tribunal, the CIT. The CIT was empowered under the relevant provisions of the Commonwealth and State Acts to appoint persons to be those authorities in the State of NSW.

The joint legislation was enacted following an agreement between the Commonwealth and NSW. The principal objective of the agreement and the joint legislation was to ensure an adequate supply of coal throughout Australia and for the regulation and improvement of the New South Wales coal industry.

Under the relevant statutory provisions the CIT had power, among other matters, to consider and determine an industrial dispute extending beyond the limits of any one State and an industrial dispute wholly within NSW. An industrial dispute was defined as a dispute over a matter pertaining to the relations of employers and employees in the NSW coal mining industry.

As Chief Justice Gibbs observed in *R v Duncan*, the CIT was able to exercise both Commonwealth and State powers in the same case. If it made an award in settlement of an interstate dispute under powers derived from the Commonwealth *Coal Industry Act* it could later amend or vary the award in exercise of powers derived from the State *Coal Industry Act* for the purpose of settling a purely intrastate dispute. This was because a body which derives power from two sources can exercise whichever power is appropriate and efficacious in a particular case.

The scheme provides an important insight into the way a cooperative national industrial relations arrangement could facilitate the establishment of industrial tribunals vested with both Commonwealth and State non-judicial powers. A prime objective of such a scheme is to address jurisdictional problems and provide effective dispute resolution forums and mechanisms.

Two submissions before the Inquiry promoted consideration of the scheme as a model for cooperation in the area of industrial relations (the Construction Forestry Mining and Energy Union, Mining and Energy Division (CFMEU) and Mr Tony Slevin, Barrister, HB Higgins Chambers).

This scheme was, however, not immune to constitutional challenge. In *R v Duncan* the High Court was asked to determine the constitutional validity of the CIT scheme. The High Court rejected the argument that the CIT was of a constitutionally impermissible hybrid nature where the powers were indiscriminately blended so that
they were deprived of the character and incidents of federal and State power. Instead, the High Court held that the two Acts validly maintained a clear distinction between Commonwealth and State powers vested in the Tribunal.

In *Cram; Ex parte NSW Colliery Proprietors Association Ltd* the High Court further clarified the jurisdictional position of the CIT, noting that the powers are not required to be exercised in isolation from each other but can be exercised concurrently or in combination with respect to the same matter. In effect the CIT could exercise State powers conferred under the State Act only because this was authorised under the Commonwealth Act, and even when it was exercising State powers it did not lose its character as a Commonwealth body amenable to jurisdictional review by the Federal Court.

As the CFMEU Mining & Energy Division submission to this Inquiry noted:

> Cram went on to decide that the CIT was a single Tribunal made under Commonwealth Law, but exercising concurrent Commonwealth and State powers. In so doing, the Court determined that an accrual of State and Commonwealth jurisdiction could be exercised in a seamless manner and without the need to continuously identify or compartmentalise the source of jurisdiction.¹⁹

While *R v Duncan* in particular dealt with the specific issue of the constitutionality of vesting State and Commonwealth arbitral or non-judicial powers in one body, the High Court in that case also acknowledged a constitutional basis for cooperative federalism. As Chief Justice Gibbs observed:

> The constitution effects a division of powers between the Commonwealth and the States but it nowhere forbids the Commonwealth and the States to exercise their respective powers in such a way that each is complementary to the other. There is no express provision in the Constitution, and no principle of constitutional law, that would prevent the Commonwealth and the States from acting in cooperation, so that each, acting in its own field, supplies the deficiencies in the power of the other, and so that together they may achieve, subject to such limitations as those provided by s.92 of the Constitution, a uniform and complete legislative scheme.²⁰

### 3.2.3 Cooperative companies scheme 1981 – 1990

This scheme was an attempt to achieve uniformity of law across the field of companies and securities regulation. The scheme was underpinned by a national agreement which was signed by the States and the Commonwealth in 1978. The agreement provided for the enactment by the Commonwealth of template legislation for the ACT using its territories power in section 122 of the Australian Constitution. This legislation was applied in each of the States and the Northern Territory by application of laws acts (known as uniform legislation) which provided for the automatic amendment of the legislation.

A Ministerial Council was established for the purposes of overseeing the scheme and approving amendments to the template legislation by the Commonwealth. However, unlike subsequent corporations schemes, the Commonwealth only had one vote and could be outvoted by the States under simple majority voting mechanism.

A national regulatory body, the National Companies and Securities Commission (NCSC) was established which was accountable to the Ministerial Council. However, the actual responsibility for the enforcement was vested...
with the State Corporate Affairs Commissions. One criticism of this scheme was the potential for interference at the State level as investigations and enforcement actions depended on State resources and expertise. This was reinforced through the Ministerial Council which insisted on prosecutions being within the exclusive domain of the participating jurisdictions.21

A disadvantage in the administration of the cooperative scheme was that criminal enforcement remained with the State Corporate Affairs Commissions. These Commissions were often independent in their approach to the regulation of the scheme with the NCSC having no direct sanctions over them and in practice relying mainly on reason and persuasion to investigate complaints.

A problem with the cooperative scheme was that the Commonwealth could be easily outvoted by the States under a simple majority process. This issue, combined with the Commonwealth’s perception that the States could use the Ministerial Council as a means of entrenching State control over the enforcement and regulatory functions of the scheme, led to the Commonwealth becoming a passive participant in the scheme and performing little more than a subservient function in the legislative process. These issues provided a catalyst for the Commonwealth unilaterally enacting laws to replace the cooperative scheme.

3.2.4 Corporations Law scheme 1991–2001

The Corporations Law scheme represented the second stage of cooperative corporations legislation. The scheme grew out of the Commonwealth’s determination to remedy the problems of the first cooperative scheme. The Corporations Law scheme was underpinned by an intergovernmental agreement which provided for the Commonwealth to enact the Corporations Act for the ACT under its territories power. This became template legislation for adoption by the States and the Northern Territory through application of laws acts and was known in each of those jurisdictions as the Corporations Law.

However, unlike its predecessor, the application of laws acts applied the Corporations Act as if it were a Commonwealth statute with national operation. This was achieved by the inclusion of a number of legislative provisions conferring jurisdiction on Commonwealth bodies and officers, such as the federal Director of Public Prosecutions. The scheme also provided for the conferral of State judicial power on the Federal Court through cross vesting legislation so as to overcome jurisdictional issues in the adjudication of disputes under the scheme.

Decisions under the scheme were made through the Ministerial Council for Corporations with the Commonwealth holding two votes.

Responsibility for the regulation and enforcement of the State and Territory Corporations Laws was conferred on the Australian Securities Commission (later to become the Australian Securities and Investments Commission), a Commonwealth statutory body directly accountable to the federal minister. This meant that there would be no requirement to involve State and Territory enforcement bodies in the investigation and prosecution of breaches under the scheme legislation.

The scheme was largely responsible for the transfer of State responsibility for the regulation of companies and securities to the Commonwealth, leaving the States with responsibility only for business names registrations and the incorporation of associations and cooperatives. Concurrent with the transfer of this responsibility was the loss of State expertise in the regulation of corporations and in the development of policy initiatives.

In essence, the Commonwealth had achieved under the scheme what it could not under the previous
cooperative scheme – namely control of the policy agenda. What this scheme could not achieve, in the end, was constitutionally valid judicial and enforcement functions for the Commonwealth. In *Re Wakim; Ex parte McNally*, the High Court held that the States could not confer their judicial power on federal courts. Thus the Federal Court, which had been developing a considerable expertise in commercial and companies matters, lost almost all its jurisdiction to deal with matters under the Corporations Law. In *R v Hughes* it was held that a Commonwealth law could not in some cases validly authorise a Commonwealth officer to exercise State enforcement functions. (Both of these cases are further discussed at 3.4.2.)

These decisions put the Corporations Law scheme on a precarious constitutional footing. In order to restore certainty, it was necessary for the States to find a way to preserve a national approach to the regulation of companies and securities. Given that the States had lost their regulatory expertise in the area of corporate regulation, and would have needed to commit substantial resources in reactivating the cooperative scheme, the only viable option left was for the States to refer their powers.

### 3.2.5 Corporations Act scheme 2001

The Corporations Act scheme represents the final stage in Commonwealth control over the area of corporate regulation. As with the two previous schemes, the Corporations Act scheme is underpinned by an intergovernmental agreement.

The lynchpin to the operation of this scheme was the referral of State powers for the purposes of section 51(37) of the Constitution to enable the Commonwealth to enact the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*. The referred powers also enabled the Commonwealth to make amendments to that legislation in relation to the formation and regulation of corporations and the regulation of financial products and services.

The legislation now applies as Commonwealth law across Australia and is administered by the Australian Securities and Investment Commission, which is directly responsible to the federal Treasurer. The scheme puts in place that which was not constitutionally permissible under the previous Corporations laws – namely a Commonwealth law administered by Commonwealth bodies and officers and enforced through the Federal Court.

The scheme continues the role of the Ministerial Council, made up of representatives of the State, Territory and Commonwealth governments. The Council has the right to be consulted on amendments, but generally amendments cannot be made without the approval of at least three States and Territories. However in key areas, such as the issue and regulation of securities, matters pertaining to takeovers and compulsory acquisitions, and the licensing of financial markets, approval of the Ministerial Council is not required for a Commonwealth amendment or regulation.

The scheme also contains detailed provisions to deal with the possible inconsistency of State or Territory laws and the Commonwealth *Corporations Act*. Part 1.1A ‘Interaction between Corporations legislation and State and Territory laws’ (which is set out in Appendix 3) seeks to provide as much scope as possible for State legislation to operate concurrently with the Act. The clear intention is to limit the instances in which the *Corporations Act* will override inconsistent State legislation under section 109 of the Constitution (further discussed at 3.4.1). This Part is effective in establishing that the *Corporations Act* does not cover the field, but is unable to prevent State legislation being overridden in the event of direct inconsistency.

The referral of powers to the Commonwealth has done nothing to increase the involvement
of the States at the ministerial council or policy levels. While it provides a mechanism by which the Commonwealth can achieve national laws, in the absence of a strong governance mechanism it leaves the States as little more than passive participants.

3.2.6 Australian Uniform Credit Laws

The Uniform Consumer Credit code is a legislative scheme that involves the enactment of a Uniform Consumer Credit code by the Queensland Parliament in accordance with the Uniform Credit Laws Agreement 1993 (UCLA) of the States and Territories. The most salient feature of the UCLA for present purposes is that it is an initiative of the States and Territories only – there is no Commonwealth involvement.

The scheme provides States and Territories with the option of either applying the code as a law of the State or Territory or enacting a law that is consistent with the code. Under this scheme each of the States and Territories, other than Western Australia and Tasmania, adopted application of laws acts to automatically apply the Queensland legislation and subsequent amendments which are approved by the Ministerial Council and enacted by the Queensland Parliament. Western Australia enacted the code as a statute of that State. Amendments to the Tasmanian code require approval of both Houses of the Tasmanian Parliament and are effected by proclamation of the Governor.

The UCLA provides for the establishment of the Ministerial Council for Uniform Credit Laws constituted by ministers responsible for administering credit laws in each of the participating jurisdictions. With the exception of the approval of the initial legislation, each member of the Council has one vote and there is no casting vote for the Chairperson.

The functions of the Ministerial Council include:

- consideration and review of the credit legislation and its administration,
- the approval of the initial legislation by unanimous resolution,
- the approval until the proclamation date of the initial legislation of regulations under the initial legislation by unanimous resolution and thereafter by a majority vote comprising at least two thirds of the members who are present and vote, and
- the approval of amending legislation passed by a majority vote comprising at least two thirds of the members who are present and vote.

The Ministerial Council is serviced by a secretariat consisting of such person or persons as the Council may determine. Under the UCLA each of the participating jurisdictions must not submit legislation to their Parliament which conflicts with or negates the operation of the code.

3.2.7 Financial Institutions scheme

Another example of a cooperative scheme with State and Territory involvement, but no role for the Commonwealth, was the Financial Institutions scheme, established in 1992. Like the Uniform Credit Laws scheme, the Financial Institutions scheme was based on template legislation passed by the Queensland Parliament and adopted by each of the States and Territories. Each of the States and Territories passed application of laws legislation which applied the template Financial Institutions code and Australian Financial Institutions Commission code set up by the originating legislation. Amendments to the Queensland legislation automatically applied in all participating jurisdictions thus guaranteeing ongoing uniformity.

The role of Australian Financial Institutions Commission (AFIC) in overseeing State and Territory enforcement was underpinned
by supervisory principles prescribed in the Commission’s Act. Unlike the Corporations scheme, this scheme was able to draw on the expertise of State regulators, as independent statutory bodies, to implement uniform standards and guidelines on a national basis. This was due largely to AFIC’s implementation and monitoring of procedures and policies relating to the frequency and type of inspections undertaken by the State and Territory enforcement bodies.27

The effectiveness of the Financial Institutions scheme was demonstrated by the combined commitment of the States and Territories to work together with AFIC to ensure that building societies and credit unions were regulated uniformly across the Commonwealth. This, combined with the referral of certain administrative functions to AFIC such as the reservation and allocation of names for building societies and credit unions, reduced the level of duplication which bedevilled the Cooperative Companies scheme.

3.2.8 National Competition Council

The Council was established in 1995 under the Trade Practices Act 1974 (Cth) as an independent statutory authority to act as an independent policy adviser to governments about their implementation of National Competition Policy (NCP). The Council is underpinned by an intergovernmental agreement between the Commonwealth, States and Territories – the ‘Competition Principles Agreement’.

The Council is permitted to perform any function or power conferred on it by a law of the Commonwealth, or of a State or Territory. Functions or powers conferred by a State or Territory law must not be exercised by the Council other than in accordance with the Competition Principles Agreement.

The Council may cooperate with any department body or authority of the Commonwealth, or of a State or Territory, and may carry out research and provide advice on matters referred to the Council by the federal Minister.

The function of the Council has been to assess progress by State and Territory Governments in opening the business activities of their agencies to competition and to make recommendations to the Commonwealth Government on compensation payments to the States and Territories as a result.

Although the Council is funded by the Commonwealth Government, it is accountable to all Australian States and Territories through the Council of Australian Governments (COAG). As a statutory body, the Council is independent of the executive arm of governments.

The Council consists of the Council President and four other Councillors appointed by the Governor General for a period of five years. Appointments to the Council must have majority support of the States and Territories that are parties to the Competition Principles Agreement. The Council is supported by a small independent secretariat located in Melbourne. The Secretariat provides advice and analysis at the Council’s direction on matters related to the implementation of the NCP. It represents the Council in dealings with Commonwealth, State and Territory government officials and other parties with interests in competition policy matters.28

3.2.9 Consumer Protection scheme

The operation of consumer protection laws offers a further variation of how cooperation between the States, Territories and Commonwealth might be achieved. Rather than using referral or automatic adoption of template laws, the Consumer Protection scheme demonstrates how a mirror legislation model can work.

The Trade Practices Act 1974 (Cth) is based largely on the corporations power. It has an extended operation for businesses (whether incorporated or
not) which engage in interstate or overseas trade or commerce. The Act does not apply to individuals or partnerships trading within the confines of a particular State. To remedy this deficiency and with a view to achieving some uniformity in State consumer protection laws, all the States and Territories have enacted Fair Trading Acts. The State Acts are expressed as applying to ‘persons’, rather than being restricted to corporations.

The common feature of this scheme is that it contains provisions prohibiting misleading and deceptive conduct, unconscionable conduct and specific false representations. A number of the ‘unfair practices’ proscribed by the Trade Practices Act are also the subject of State legislation and conditions and warranties are implied in consumer sales by both State and Commonwealth Acts. The State Fair Trading Acts also contain similar sanctions for non-compliance, both civil and criminal, in relation to contravention of the Trade Practices Act.

In view of the problems which could arise in consequence of this overlap between Commonwealth and State legislation, the Trade Practices Act provides that the consumer protection provisions of the Act are not intended to exclude or limit the concurrent operation of any law of a State or Territory. Where an act or omission is both an offence under the Trade Practices Act and an offence under the law of a State or Territory, a corporation or person convicted of either of those offences is not liable to be convicted of the other.

Consumer affairs bodies have been set up in all States and Territories to investigate consumer complaints and disseminate information to business and consumers. Small claims tribunals provide easy, cheap and speedy avenues for the resolution of disputes between consumers and the providers of goods and services, covering diverse industries from home building to second hand motor vehicles sales.

One of the main strategies of the Ministerial Council on Consumer Affairs is to achieve nationally consistent consumer protection law. There is no intergovernmental agreement or other formal arrangement which deals with the issue of uniformity. If the Trade Practices Act is amended, the States will consider whether to adopt the change, but there is no formal arrangement to do so. The Productivity Commission is currently conducting an inquiry into Australia’s Consumer Policy Framework, including the consideration of uniformity of fair trading and consumer protection laws in Australia.

### 3.3 REFERRAL OF POWERS

One of the principal constitutional means that enables the Commonwealth and the States to act cooperatively is the referral of power under section 51(37) of the Constitution by the States to the Australian Parliament. This head of legislative power allows the Australian Parliament to make laws for the peace, order and good government of the Commonwealth with respect to:

- Matters referred to the Parliament of the Commonwealth by the Parliament or parliaments of any state or states, but so that the law shall extend only to states by whose Parliaments the matter is referred, or which afterwards adopt the law.

#### 3.3.1 The early history

The debate on a proposed referral power that took place at the 1898 Melbourne Convention that drafted the Australian Constitution highlighted some key conceptions as to how the reference of State powers was intended to operate. Solicitor-General for Victoria, Ms Pamela Tate SC, has recently surveyed the views advanced at the 1898 debate as part of an examination of the referrals power and its legal operation and effect. The following discussion is significantly indebted to her analysis.
In the course of debate the Hon Alfred Deakin adopted the view that laws made pursuant to a referral might not be federal laws in the strict sense, particularly if they were laws not applying to the whole of the Federation because not all states had referred. The Hon John Quick was reluctant to endorse a mechanism for the reference of State powers as it would operate as a form of quasi-amendment of the Constitution, sideling the referendum mechanism provided in section 128. The Hon Edmund Barton saw the proposed power as an enlargement and not a restriction of State legislative powers because State parliaments would still have concurrent legislative power with respect to the referred matters. The Hon Isaac Isaacs thought that a referral power was required so that the Commonwealth had a capacity to legislate for matters of common concern that might arise in addition to those matters otherwise listed in the Constitution and that were beyond the legislative capacity of any one State. 30

3.3.2 Characteristics of the referral power

Two types of referral are possible: the general referral of a subject matter or a text based referral. Under a general referral, the State effectively hands over a specified subject matter, leaving it to the Commonwealth to determine what laws it might make on the basis of the referred power. The referring State or States retain no power to direct how the referral may be used. A recent example of such a referral was the Victorian referral of industrial relations powers in 1996 (discussed further at 3.3.4).

A text based referral, by contrast, ensures that the States have effective input into the national law that is created on the basis of their referral. Under a text based referral, the States refer the exact words of the legislation to be enacted by the Commonwealth and the Commonwealth cannot make any law or provision other than in the terms referred. To permit future modification, a text based referral is usually accompanied by a referral of a power to amend, but with the proviso that any such amendments will only be an effective use of the referral power if they comply with specified conditions (for example that the proposed amendments have been agreed by a majority of the referring jurisdictions). As Justice French has noted:

The text reference mechanism provides safeguards for the States who are not, by their reference, giving the Commonwealth carte blanche to make laws on any aspect of the subject matter referred.31

Over the course of the twentieth century other issues concerning the nature and limits of the referral power have been considered by the High Court and at a governmental level. These include:

• whether a State retains concurrent legislative power with respect to a matter its Parliament has referred to the Australian Parliament,
• the revocability of a reference by the relevant State Parliament, and
• the constitutional status of a Commonwealth law enacted on the basis of a reference where the relevant authorising State law has been repealed, varied or the reference has otherwise terminated.

In Graham v Paterson the High Court endorsed the proposition that the Commonwealth has only concurrent power over a referred State matter and the relevant legislative power is not withdrawn from the referring State Parliament. However, a State law on a referred matter could, under section 109 of the Constitution, be invalidated by an inconsistent Commonwealth law on the same matter. As Ms Tate has noted in relation to such a Commonwealth law:

a law made by the Commonwealth Parliament in reliance upon a reference is a genuine federal law. It thereby acquires the pre-eminence prescribed by s109 of the Constitution.33
On the question of the revocability of an unlimited State reference of powers by a State Parliament there has not been a definitive High Court determination. In *R v Public Vehicles Licensing Appeal Tribunal (Tas)* a majority of the Court, however, upheld the validity of a conditional reference containing a self-executing sunset clause or a limitation based on the future executive action of a State.

The High Court has not yet authoritatively determined the question of the continuing validity of a Commonwealth law made with respect to a referred matter where the reference of State power has lapsed. However, in *Airlines of New South Wales Pty Ltd v New South Wales*, Justice Windeyer held that a law made with respect to a matter referred for a limited period would only operate for the duration of the reference.

As Justice French has observed:

There are no doubt more unanswered questions in relation to the operation of the referral power. It may be doubtful whether many or any of these questions will reach the High Court. For it seems to be and likely to continue to be the case that the States and Commonwealth will proceed according to agreements made with all elements of the Australian federation that sufficient protective mechanisms will be built into those agreements and the subsequent referrals and adoptions to deter unilateral Commonwealth exploitation of the power.

These important concerns about the scope and nature of the constitutional mechanism for referral must inform any debate about the capacity of the referral power to:

- underpin intergovernmental cooperative arrangements, and
- give the States an effective ongoing role in the governance of such arrangements, including a last resort capacity to opt out of federal cooperative arrangements in circumstances defined by the participating jurisdictions.

### 3.3.3 NSW industrial relations referral

In the early part of the twentieth century there were largely unsuccessful legislative attempts by the States to refer matters relating to industrial conditions and the control of air navigation to the Commonwealth. Agreement to refer industrial conditions was reached at intergovernmental level as early as 1909, but came to nothing.

In 1915 the State Premiers agreed to submit to their respective parliaments a proposal for a reference on industrial conditions for the duration of World War I plus one year. Only New South Wales passed the necessary legislation – the *Commonwealth Powers (War) Act 1915* (NSW) – which expired on 9 January 1921. As well as matters relating to corporations and trusts there was a referral of matters relating to:

- strikes and lockouts,
- the maintenance of industrial peace and the settlement of industrial disputes,
- conciliation and arbitration in relation to disputes arising in the railway service of a State, and
- employment and unemployment.

The industrial matters referred addressed the limitations of the conciliation and arbitration power by giving the Commonwealth the legislative power to deal with industrial disputes that did not extend beyond the borders of NSW. The effect of the referral was that:

The Federal Arbitration Court can, if the Parliament sees fit, have full powers to make common rules. It can deal with men who are not parties to the original dispute. It can deal with other employees under a common rule, and can generally give a settlement.
of industrial disputes and a regulation of industrial conditions such as has not been possible for many years past.\textsuperscript{37}

The War Powers Act also provided that no Commonwealth law passed in reliance on the reference would have any force beyond the stated period of the reference. No other State has attempted to refer powers over industrial relations until Victoria in 1996.

3.3.4 Victorian industrial relations referral

The Victorian experience reveals the incapacity of the referral power to ensure full industrial relations protections for employees where there has been a largely unconditional subject matter referral to the Commonwealth. In 1996 Victoria referred the majority of its industrial relations powers to the Commonwealth when it enacted the Commonwealth Powers (Industrial Relations) Act 1996. Section 4 of the Act set out the specific matters over which power was referred (including ‘the matter of conciliation and arbitration for the prevention and settlement of industrial disputes within the limits of the State’, and also the matters of employment agreements, minimum terms and conditions, termination of employment, freedom of association, and minimum wages). Section 5 specified matters over which powers were not referred (including matters relating to the employment or appointment of ministers, judges, law enforcement officers, senior government officials and the like,\textsuperscript{38} and also specific areas of law such as occupational health and safety, workers compensation, apprenticeship, long service leave and equal employment opportunity).

The referral was accompanied by an intergovernmental agreement, which provides that the referral can be rescinded on the basis of the referral Act. Victoria was not informed of the Work Choices amendments in accordance with this obligation.

The intention of this referral was to create a single system of industrial relations for Victoria by moving employers and employees into the federal system created by the Workplace Relations Act 1996 (Cth). In fact, two systems continued to operate – one for those on awards or agreements and one for those with no industrial instrument coverage. The latter group of approximately 356,000 employees were called Schedule 1A workers and had access to only five minimum entitlements. While these workers were not precluded from entering the bargaining scheme, their marginalised labour markets position (many being low paid, low skilled, located outside metropolitan areas, or from culturally and linguistically diverse backgrounds) meant their capacity to influence bargaining outcomes was limited.

In 2000 these concerns prompted the Victorian Government to create the Victorian Industrial Relations Taskforce chaired by Professor McCallum.\textsuperscript{39} He delivered his report to the Victorian Government in August 2000 and noted the situation of Schedule 1A workers and in particular their treatment by Commonwealth law. This treatment was not dictated by the terms of the referral, but rather arose as a matter of the Commonwealth choosing the level of regulation to which those workers should be subject.

The Taskforce did not make any recommendations about whether the referral should be continued or rescinded. It was, however, of the view that fair conditions for Schedule 1A workers were unlikely to be achieved under federal regulation, and so recommended the enactment of a Victorian fair employment law and an associated Fair Employment Tribunal to deal with the basic rights of Victorian workers not covered by federal awards or agreements.
The Victorian Government introduced the *Fair Employment Bill* in 2000, which was defeated in 2001 in the Victorian Legislative Council. The Government ultimately decided that the better way to achieve fair outcomes for these workers was to refer further powers to the Commonwealth to enable the federal Commission to make common rule awards in relation to matters beyond the five minima in Schedule I A. This was achieved in 2003 after considerable debate and negotiation between the two governments, with Victoria proposing to give relevant powers to its civil tribunals as a fallback measure if the Commonwealth would not accept the common rule approach.

Despite its referral and general support for the concept of there being only one industrial relations system in Victoria, the present Victorian Government joined with the other States and Territories in launching the constitutional case against Work Choices. It has also been vocal in its criticism of Work Choices.

Despite the serious problems encountered as a result of the referral of powers, Victoria has never been inclined to revoke the referral and recreate its own fully fledged industrial system. Once a State industrial system is gone, it may be incapable of being restored. In the words of the Australian Institute for Employment Rights: 'A referral that acts as a blank cheque is difficult to cancel'.

### 3.3.5 Other referrals

There have been a number of recent significant referrals of State power to the Australian Parliament in the area of regulatory standards for goods and occupations, the prosecution of terrorists, corporations law and financial matters relating to the breakdown of de facto relationships.

The referrals from Victoria, Queensland and New South Wales in relation to the mutual recognition of regulatory standards for goods and occupations is noteworthy in that they are text based and provide that any amendments to the agreed, scheduled statutory text can only be made in terms approved by the designated person for each participating jurisdiction.

The 2003 referrals of powers from Victoria, New South Wales and Queensland relating to the regulation of certain financial matters arising from the breakdown of de facto relationships were formulated in terms of two separate definitions for de facto couples, one relating to same sex couples and one relating to couples of the two sexes.

The form of the referral had significant benefits for the Commonwealth as it gave the Australian Parliament legislative options as noted by Ms Tate:

> Constituting two separate matters, the Commonwealth can choose to legislate with respect only to de facto couples of different sexes and not with respect to those of the same sex, or, of course, conversely.

The two most significant recent exercises of the referral power are the 2001 creation of a national corporations law and the 2002 referral of the text of the new anti terrorism provisions in the federal *Criminal Code*. In both cases, the States adopted a text based referral approach. Both referrals are underpinned by intergovernmental agreements which require any amendments to be agreed at the Ministerial level. In relation to the regulation of corporations, financial products and services under the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth), which has been described above at 3.2.5, Ms Tate said:

> This has truly been an example where the process of cooperation between the States and the Commonwealth has achieved an object that neither could achieve by its own legislation, nor could be achieved by mirror legislation, given the background of
the pronouncements of the High Court in the corporations case and the deficiencies of the company law schemes.44

3.4 CONSTITUTIONAL LIMITS ON COOPERATIVE ENDEAVOURS

Despite the finding of the High Court in R v Duncan that ‘Cooperation between the Parliaments of the Commonwealth and the States is in no way antithetic to the provisions of the Constitution: to the contrary, it is a positive objective of the Constitution’, the Australian Constitution does impose significant limits on Commonwealth/State cooperative endeavours.45 The two main limits that require discussion in the present context are:

• section 109 of the Constitution by which Commonwealth law overrides and renders inoperative inconsistent State laws, and

• impediments to the sharing by the States of their judicial and enforcement powers with the Commonwealth.

3.4.1 Section 109

Section 109 of the Australian Constitution provides:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

There are three broad approaches to determining ‘inconsistency’ under section 109. ‘Inconsistency’ exists, and the Commonwealth law overrides the State law:

1. If it is impossible to obey both laws (the reference is to a logical impossibility: one law requires that you must do X, the other that you must not do X)

2. If one law purports to confer a legal right, privilege or entitlement that the other law purports to take away or diminish (one law says that you can do X, the other that you cannot do X). For example, the Commonwealth provision in Colvin v Bradley Brothers Pty Ltd (1943) 68 CLR 151 affirmed that employers in certain industries could employ women to work on certain machines; the State provision made it an offence to do so. It was possible to obey both laws, since nothing in the Commonwealth law required the employment of females.

3. If the Commonwealth law evinces a legislative intention to ‘cover the field’. In such a case there need not be any direct contradiction between the two enactments. It may even happen that both require the same conduct, or pursue the same legislative purpose. What is imputed to the Commonwealth Parliament is a legislative intention that its law shall be all the law there is on that topic. In that event, what is ‘inconsistent’ with the Commonwealth law is the existence of any State law at all on that topic.

Tests 1 and 2, although sometimes only test 1, are said to involve ‘direct’ inconsistency. Test 3 involves a more indirect form of inconsistency. It makes s 109 a much more powerful instrument for ensuring the supremacy of Commonwealth law.’ 46

Section 109 can pose a problem for national regulatory schemes where the Commonwealth and the States each enact their own legislation. However, recent experience in the area of company and security regulation suggests that the inconsistency issues can be clarified through complementary State and federal legislation defining concurrent and excluded areas of Commonwealth regulation. An example of this can be found in Part 1.1A of the Corporations Act 2001 (Cth), which is set out in Appendix 3.
3.4.2 Limits on sharing power

Before 1987, proceedings in either State or federal courts were often prolonged or compromised by the question of whether an action had been commenced in the correct jurisdiction. In an attempt to put an end to these jurisdictional arguments, the Commonwealth and the States each passed cross vesting laws (for example, the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)) that purported to vest State judicial power in federal courts, and vice versa. The intended effect was the creation of an integrated court system to allow all matters in dispute to be determined by the one court. The cross-vesting laws were universally viewed as a positive development in Commonwealth/State cooperation.

Section 77(iii) of the Constitution permits the Commonwealth to vest federal judicial power in State courts. On the other hand, the Constitution says nothing about whether a federal court can be invested with State judicial power. In Re Wakim; Ex parte McNally 47 the High Court held that cross-vesting schemes which had attempted to confer State judicial power on federal courts were invalid. The majority held that federal courts can only be conferred with the jurisdiction referred to in Chapter III of the Constitution. States cannot confer jurisdiction on federal courts as the jurisdiction to hear matters arising under State law is not listed in Chapter III of the Constitution. The High Court adopted the view that Chapter III is an exhaustive statement of the way in which the judicial power of the Commonwealth may be vested and that the Commonwealth cannot confer, or validly consent to the conferral of, State jurisdiction on federal courts. The practical effect of the decision was that the Federal Court, a body that had developed considerable commercial expertise, lost almost all of its jurisdiction to deal generally with Corporation law matters.

R v Hughes 48 established the further proposition that a Commonwealth law might not be able validly to authorise the conferral by the States of functions, including enforcement functions, on a Commonwealth authority or officer where:

- a duty was imposed on the Commonwealth authority or officer (particularly where the rights of an individual might be adversely affected), and
- the authorisation could not be supported by a constitutional head of Commonwealth legislative power.

These decisions undermined the effectiveness of the cooperative framework for the regulation of corporations. Faced with this obstacle, the States eventually decided to refer the relevant legislative powers to the Australian Parliament, which enabled the Commonwealth to make laws about those issues. This is the source of the current model for the national regulatory scheme for corporations, which has been discussed at 3.2.5.

Other than a reference of State legislative power to the Australian Parliament, the only other way to deal with the Re Wakim and R v Hughes problems is a referendum to change the Constitution.

Section 128 of the Constitution sets out the manner in which the Constitution may be amended. Under that provision, an amendment to the Constitution must be:

- passed by an absolute majority of both Houses of the Australian Parliament, or by one House twice, and
- at a referendum, passed by a majority of the people as a whole, and by a majority of the people in a majority of the states.

This process has been invoked 44 times, with only eight proposals succeeding at referendum. Clearly, achieving amendment of the Australian Constitution is no easy matter. However, that does not mean that a serious attempt to amend the Constitution to get around the problems caused by the Re Wakim and R v Hughes decisions should not be made.
The actual amendment to the Australian Constitution would be straightforward. It would not grant the Commonwealth more power nor transfer power from the States to the Commonwealth. It would merely ensure that the Constitution enables the Commonwealth and the States to work cooperatively with the legislative powers that they already possess. It need only fix the defect identified by the High Court in order to facilitate federal State cooperation. The amendment would entrench two legal propositions:

- the States may consent to federal courts determining matters arising under their law, and
- the States may consent to federal agencies administering their law.

A proposal of this kind has had the support of governments across Australia for several years. In 2002 the Standing Committee of Attorneys-General agreed that the Commonwealth and States would develop a proposal for a constitutional amendment to resolve the problem. This has yet to emerge. Despite this, the issue remains on the agenda due to the inconvenience and extra cost caused by the limitation.

There has been business support for such a referendum. In its twelve point plan entitled Reshaping Australia’s Federation released in November 2006, the Business Council of Australia listed as one of its action points:

**ACTION 8** The Commonwealth and state governments should work together to initiate and support an amendment to the Constitution to include an express provision that the states may choose to allow Commonwealth courts to determine matters under state laws and to allow Commonwealth agencies to administer state laws. 49

The proposal has also gained the unanimous, cross-party support of the House of Representatives Standing Committee on Legal and Constitutional Affairs. 50

### 3.5 CONCLUSION

There are numerous examples of cooperative models which have been used by the Commonwealth and States to achieve a national approach to the regulation of areas of joint concern. This Chapter has concentrated on those schemes which provide guidance as to the development of an appropriate model for achieving a cooperative industrial relations scheme. Where nationally consistent regulation is desirable, the options available to the jurisdictions range from mirror legislation (such as in the consumer protection model described at 3.2.9), through uniform legislation (such as in the Corporations Law scheme described at 3.2.4), and ultimately by way of referral of power, whether by way of a referral of specific subject matter (as in the Victorian industrial relations referral described at 3.3.4) or a text based referral (like the anti terror laws described at 3.3.5). Although current constitutional limitations may suggest referral is a ‘neater’ way of achieving true uniformity, the possibility of amending the Australian Constitution to do away with the difficulties of presented by the High Court decisions in *Re Wakim* and *R v Hughes* should be kept in consideration.

The range of existing Ministerial Councils and the varying ways in which they are established and operate indicate that there is real capacity to create a governance scheme which will ensure that all Australian governments, State, Territory and national, have the capacity to contribute and participate in the establishment and maintenance of a new national industrial relations system. The examples of the approaches that have been put in place to deal with a variety of issues of national concern, from corporations law to consumer protection, demonstrate the variety of models from which to choose when considering the approach that would work best for industrial relations.
ENDNOTES

1 Constitution sections 106 and 107.
2 Constitution section 118.
3 Submission 17, Unions NSW p5. Also at pp 5-6 of the submission is a timeline setting out some of the major achievements of the NSW industrial relations system since 1901.
4 Australian Boot Trade Employees Federation v Whybrow & Co (1910) 11 CLR 311.
6 See for example, Submission 3, Women’s Electoral Lobby Australia Inc, Submission 17, Unions NSW (and the submissions of affiliates and other unions representing NSW employees – Submissions 4, 5, 14, 15, 16, 19, 20, 22, 31), Submission 8, Local Government Association of NSW.
7 Submission 5, Community and Public Sector Union, State Public Services Federation Group, p3.
8 Submission 6, Youth Action Policy Association, p3.
11 Further discussed at 3.2.5.
14 Submission 9, Construction Forestry Mining and Energy Union, Mining and Energy Division at 4.1-5.
15 R v Duncan; Ex parte Australia Iron and Steel Pty Ltd (1982) 158 CLR 535.
16 Submission of Construction Forestry Mining and Energy Union, Mining and Energy Division
17 Submission 27, Mr Tony Slevin, Barrister, pp 3-4.
19 Submission 9, CFMEU Mining and Energy Division at 3.4.
20 R v Duncan; Ex parte Australia Iron and Steel Pty Ltd (1982) 158 CLR 535 at 654.
24 Corporations Act 2001 (Cth), Part 1.1A (extracted in Appendix 3).
25 Corporations Act, s 5E(1) (‘The Corporations legislation is not intended to exclude or limit the concurrent operation of any law of a State or Territory’).
26 Corporations Act, s 5E(4) (‘This section does not apply to the law of the State or Territory if there is a direct inconsistency between the corporations legislation and that law’). This section merely restates the position as set out by the High Court. See R v Credit Tribunal; Ex parte General Motors Acceptance Corporation (1977) 137 CLR 345 at 563 per Mason J (‘a provision in a Commonwealth statute evincing an intention that the statute is not intended to cover the field cannot avoid or eliminate a case of direct inconsistency or collision, of the kind which arises, for example, when Commonwealth and State laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed’). Section 5G does, however, further limit the cases in which ‘direct’ inconsistency will arise.
28 The website for the National Competition Council is at http://www.ncc.gov.au/.
32 (1950) 81 CLR 1.
34 R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd (1964) 113 CLR 207.
35 (1964) 113 CLR 1 at 52-5.
37 Hansard, New South Wales Parliamentary Debates 1915-16 Legislative Assembly 23 November 1915 at 3810.
38 These provisions in section 5 are complex. While the matter of appointments and employment of judicial officers, ministers, ministerial advisers, senior bureaucrats and the like are excluded in total, in relation to police officers and ordinary public servants the exclusion is far more limited. The result is that while public servants and police are by and large subject to the industrial system established under the Workplace Relations Act 1996 (Cth), the Commonwealth Act cannot govern matters such as their eligibility for employment or their redundancy. See CCH Australia Ltd, Australian Labour Law Reporter [11-070] and also Submission 14, Police Federation of Australia, p2.
40 Submission 29, Australian Institute for Employment Rights, p4. See also Submission 32, Centre for Employment and Labour Relations Law, University of Melbourne, p 4: ‘Writing from a Victorian perspective, we would agree that the referrals have unfortunately created a great deal of complexity, and made their own particular contribution to the technicization of the Work Choices Legislation’.
For examples of the State laws which effected the referral, see Corporations (Commonwealth Powers) Act 2001 (Qld) and Terrorism (Commonwealth Powers) Act 2002 (WA).


Chapter 4 – International Comparisons

4.1 INTRODUCTION

4.2 UNITED STATES OF AMERICA

4.3 CANADA

4.4 GERMANY

4.5 INTERNATIONAL LESSONS LEARNT

ENDNOTES
4.1 INTRODUCTION

In the twenty-first century, many countries are looking at how best to regulate labour relations to respond to changing demands, growth in technology and the global economy.

In this Chapter, several nations that have similar federal structures to Australia have been selected for closer examination.1 Like Australia, the selected nations have long industrial relations traditions which have evolved over the last century in a post war environment.

The United States, Canada and Germany are industrialised western nations like Australia with market economies that share high standards of living. The United States and Canada are also, like Australia, geographically large countries which have populations spread throughout the expanse of their respective territories. Although Germany has a comparatively smaller territorial size, it has a large population with significant social and cultural variation between its regions. Regional variation is another common thread among the nations selected for examination.

The selected nations also have substantial differences in their industrial relations systems. These differences reflect the unique social, cultural, historical and political experiences of each country, and provide important points of contrast with Australia. These industrial relations frameworks are examined below.

4.2 UNITED STATES OF AMERICA

The Government plays a major role in the United States industrial relations system as it establishes the legal environment for industrial relations. While it has no direct involvement in the terms and conditions negotiated through collective bargaining, it exerts influence by defining the capacity of the organisations involved. That is, the law regulates the manner in which organised labour and management relate to each other.

In the United States, the industrial relations legal system is characterised by:

- employee choice for union representation,
- majoritarianism (meaning that typically the choice of union or no union is based on a majority of employees in the designated bargaining unit),
- decentralisation of bargaining units,
- exclusive representation,
- bargaining power as the main criterion for establishing terms and conditions of employment under collective bargaining,
- written, legally enforceable agreements, and
- administration by agency experts in industrial relations.2

Industrial relations in the United States is regulated by a national system which differentiates between the private sector and the public sector. United States’ labour law is based on the National Labor Relations Act (NLRA) established in 1935 while collective bargaining in railways and airlines is covered by a separate federal statute called the Railway Labor Act.

Private sector bargaining is mainly governed by federal law, and is administered by a body called the National Labor Relations Board (NLRB) which represents all industries except agriculture, railroads and airlines. The NLRB is an independent agency of the United States Government which is responsible for conducting elections for labour union representation and for investigating and remedying unfair labour practices. Orders issued by the NLRB are not self-enforcing – enforcement must be obtained through the federal courts of appeal.3

Most public sector law in the United States is based on State labour law. Hence, federal, State and
local public sector employees are excluded from coverage under the National Labor Relations Act. Individual States regulate collective bargaining for their public sector employees with separate legal regulations governing each sector.

In the private sector, all levels of government play a very limited role in the collective bargaining process. Although it requires ‘good faith’ bargaining efforts, the statutes and government have little influence in directly determining the terms and conditions of employment for employees. The direct regulation of terms and conditions of employment is limited to the areas of employment discrimination, worker safety, unemployment compensation, minimum wages and maximum hours, and retirement.

Terms and conditions of employment are determined mostly at the workplace level. According to the US Department of Labor’s statistics on union membership, only 12 per cent of the workforce was unionised in 2006, a figure attributed largely to a relatively high unionisation rate in the public sector. In the non-union sector, employers determine pay and conditions of work through management prerogative, job evaluation and individual performance evaluation systems.

4.3 Canada

The industrial relations system in Canada incorporates employment, union and public policy that originated in England and the United States of America but has developed to form its own distinct structure. Rather than distinguishing between the private and public sectors as in the US, Canadian industrial relations law differentiates by the nature of the industry. Canada’s federal system of government is one of the most decentralised in the developed world, with most employment matters under the authority of the ten provinces.

The federal authority, administered by the Canada Industrial Relations Board, covers less than 10 per cent of Canadian workers. It limits itself to regulation of the federal civil service and employment within national industries such as inter-provincial transport. The majority of industrial relations laws in Canada are instead administered by various provincial labour relations boards.

Canada is a federation with a parliamentary government. The ten provinces hold substantial powers including the primary authority to regulate industrial relations. The provinces have not only resisted any efforts to expand federal powers but have gradually gained greater powers at the expense of the federal authorities. This growth is largely attributable to the structure of the Canadian Constitution and its interpretation over the last century.

Each province and the federal government has at least one Act covering employment relations and employment standards in the industries under its jurisdiction. The federal government has established minimum standards for federally regulated employment which cover:

- general holidays,
- annual vacations,
- hours of work,
- unjust dismissals,
- minimum wage,
- layoff procedures, and
- severance pay.

In the private sector, industrial disputes are an integral part of the bargaining process, with little direct influence from the State in determining terms and conditions of employment for employees. Collective bargaining agreements are set at the unit level and are generally enforced through binding arbitration, usually without court review of the decision.
The decentralised Canadian system allows for cultural and historic differences between provinces to be taken into account. The politics of each province are distinct, especially in French speaking Quebec, reflecting regional differences in Canada. National companies must comply with different labour and employment laws depending on the location of their employees, and unions must be sensitive to local differences in law when they organise, bargain and strike.

The public sector is regulated separately at the federal level and by all ten provinces for government employees, such as teachers and hospital workers.

### 4.4 Germany

The German model of federalism is based on a cooperative or ‘corporatist’ approach to industrial modernisation, which involves a partnership between the State, business and trade unions in developing and implementing policies. The contributions of business, labour and the State were crucial for its success. These contributions occur within a ‘corporatist’ institutional framework.

Among the most significant contributions of the corporatist State has been to support the collective organisation of interest groups such as business and labour. The strength of corporatism in Germany has been attributed to cultural traditions and strong federal institutions, which in turn contribute to a tradition of ‘constructive compromise’ within the political system. The corporatist approach also extends into the industrial relations system in Germany.

The origins of the German cooperative systems lie in its post war reconstruction and its efforts to divest power and influence from large companies that provided support for the Nazi regime. At the same time, trade unions sought equal status with companies. The idea was to restructure industry along more democratic lines so that there would be less opportunity for corporate power to serve political ends.

Industrial rights and cooperation have been legislated in federal laws governing industrial relations, which are underpinned by the German constitution, the ‘Basic Law’ adopted in 1949. The Basic Law guarantees some basic rights including freedom of association, free choice of occupation and prohibition of forced labour. It also establishes the principle of equal treatment and obliges the State to support the effective realisation of gender equality.

The Basic Law gives the States (the Länder) the right to legislate except on matters for which the federal government has exclusive legislative powers. The Basic Law grants concurrent legislative power on civil law, the law of association and labour law, among others, to the federal and State governments. The States can legislate to the extent that the federal government has not made laws in these areas. In practice, civil law, law of association, and labour laws are governed by federal legislation, although their operation often takes place at the local or State level. The broad range of powers of the federal government is balanced by the States having constitutional responsibility for applying and administering a large portion of the laws.

The main sources of labour law are federal legislation, collective agreements, works agreements and case law. Minimum labour standards on various issues are established in separate Acts that are supplemented by government ordinances.

Interpretation of labour legislation and regulation of industrial relations is administered through the system of labour courts. There are three levels of labour courts – at the local, State and federal levels. Disputes first go to the local Labour Court, and appeals would go to the States and then the federal Labour Court.
The Ministries of Labour of the individual States are the highest labour authorities at State level. The concurrent legislative powers under the Basic Law mean that there is very little labour legislation at individual State level and the States are authorised to issue orders only in a few particular areas. Apart from upholding the State’s policies relating to working life, occupational health and safety regulation is their main responsibility, for which States are the highest authority. The labour inspectorates are responsible for the implementation of protection against technical hazards at work, the enforcement of regulations on workplaces, restrictions on working hours, maternity protection and youth employment protection, and in some States also for certain aspects of environmental protection.

Germany’s industrial relations system places an emphasis on cooperation between workers’ and employers’ groups especially in relation to collective bargaining, which is the central industrial relations instrument used for the German workforce. Over 80 per cent of employees are covered by collective bargaining between unions and employers’ associations at the sectoral level. There are few regulations on collective bargaining. The main objective has been to strengthen the negotiating privileges of trade unions and employer associations and to establish collective agreements as binding. The Collective Bargaining Act 1949 and the Works Constitution Act 1952 govern collective bargaining and the dual system.

The States set the general working conditions, though not how much workers are paid. There is no explicit wage coordination at the national level. Wages and other employment conditions, such as vacation and working hours, are left to collective bargaining. Wage bargaining coordination is only reached by pattern setting. This means that agreements reached in industrial sectors in certain regions are used as a pattern for the negotiations elsewhere. Since the 1990s however, collective bargaining has shifted from sectoral level to company level bargaining. Germany’s governance structure has been described as an example of cooperative federalism, because there is an interlocked relationship between the State governments and the federal government. The State governments are directly involved in the federal government decision making processes through direct representation of the first ministers and designated cabinet ministers in the Bundesrat, the national upper house in Germany. The organisation of the Bundesrat means that federal policy is actually a product of federal-State consensus. The Bundesrat is also a crucial institution in German federal-State relations since it has a veto on federal legislation affecting the States.

4.5 INTERNATIONAL LESSONS LEARNT

This examination of the industrial relations frameworks in the United States, Canada and Germany has shown the diversity of means for the administration of industrial relations law. The industrial relations framework established in each country is dependent on the local political realities and constitutional framework. Equally, the particular political context and unique constitutional arrangement of Australia make it unfeasible to adopt the industrial relations framework of another nation. Important lessons however can be drawn from international industrial relations experiences. None of the federal political entities examined for this Inquiry rely on a unitary national system of industrial relations without the involvement of lower level governments. States and regional levels of government are participants in the devolved regulation and administration of industrial
relations law. Regional governance is considered an important aspect of each of these distinct industrial relations systems, in part because it provides a means of recognising and catering to local and regional variations within a nation. In the case of geographically large nations, regional governance is useful because of the impracticality of governing from a single location.

The coordinated federal system of governance in Canada means that industrial relations is a matter largely for individual provinces, with little cooperation between the governments. This does not lend itself to a national system of industrial relations.

In the United States industrial relations is generally governed by national laws. The States only have jurisdiction over their public sector employees. Federal and State industrial relations and labour laws in the United States sit alongside one another. There is little interaction or cooperation between federal and State jurisdictions. This system of industrial relations does not provide a useful guide for framing a cooperative national industrial relations framework.

The approach taken to industrial relations in Germany is an example of how regional variations can be accommodated within a national set of industrial relations laws. The German industrial relations framework functions in the context of cooperative federalism, with local level regulation and enforcement complementing federal laws.

However, the operation of the system is regionally based. The federal laws devolve decision making about employment conditions to the industry, regional and workplace levels rather than providing prescriptive conditions and standards. As such, the German system has national laws that permit considerable discretion and flexibility to lower levels of industrial relations governance.

Much of the content and specifics of employment conditions are left to bargaining and negotiation between the central players in Germany’s industrial relations system. Trade unions, employers’ associations, and work councils are the main actors responsible for a range of employment conditions. The emphasis on cooperation between all players in the German system has been successful in containing industrial disputes and conflicts. Cooperation is intrinsic to the German system and has been built into federal laws governing industrial relations. This is reflected in the high proportion of the German workforce covered by collective agreements.

The German system of industrial relations is also characterised by a high degree of participation by employee and employer representatives in decision making about employment conditions. This form of cooperation between different parties in the industrial relations system has been supported by submissions to the Inquiry. In its submission, the Centre for Employment and Labour Relations Law at the University of Melbourne supported an industrial relations system that ‘can encourage and facilitate co-operative or collaborative approaches to national, sectoral and enterprise-level relations between businesses, unions and employees’.26

The industrial relations system in Germany best provides a useful example of how a national Australian industrial relations system might operate. As the German approach demonstrates, a national industrial relations system does not preclude the implementation and enforcement of the national law by sub-national governments. In addition, like the German industrial relations system, national laws in Australia could be formulated to create a system that accommodates regional and cultural differences, and which responds to the regional context through localised outcomes and dispute resolution mechanisms.
ENDNOTES

1 Submission 12, Members of the Public Service Association employed at the NSW Industrial Relations Commission, p2 proposed that the Inquiry should also examine the Swedish model for labour relations. The Inquiry has focused mainly, however, on the federal models in this Chapter, reasoning that federated nations provide the best comparator for Australia.


## 5.1 INTRODUCTION

## 5.2 SOURCES

## 5.3 THE PRINCIPLES

### 5.3.1 Fair

### 5.3.2 Efficient

### 5.3.3 Universally accessible

### 5.3.4 Adaptive

### 5.3.5 Cooperative

## 5.4 HOW DOES THE CURRENT STRUCTURE FARE?

## ENDNOTES
5.1 INTRODUCTION

The terms of reference for this Inquiry require it to identify the principles that should underpin a national industrial relations structure operating within a framework of cooperative federalism. Identifying the kinds of values and aspirations that should underpin a national structure has assisted the Inquiry to develop its optimum model.

The Inquiry sought to identify principles that meet the diverse needs of those who participate in and are affected by the industrial relations system, including employers and employees, tribunal members, governments, employer and associations and unions, special interest groups and the wider community. It did so with the benefit of the submissions received in response to the Issues Paper, as well as the input received through consultation with many people and organisations. A full list of written submissions is at Appendix 1, and a full list of meetings and consultations is at Appendix 2.

The interest generated by this Inquiry demonstrates the high level of concern that there should be some way to address the inherent problems with the current structure of industrial relations regulation. However, despite evidence of convergence on the need for ‘something to be done about industrial relations’ to ensure that it is more appropriately regulated, there are strongly diverging views on what might be the content of a new national industrial relations model.

The Inquiry did not aim to provide principles on matters such as unfair dismissal, collective bargaining or AWAs. Rather the focus was to identify principles that provide guidance as to the design and structure of a new model for regulating industrial relations based upon cooperation between the States, Territories and Commonwealth. Viewed in this context there was a high level of agreement on the principles that should underpin such a model. It is noted however that a number of the submissions interrelated the underpinning principles with issues that would form the content of a future industrial relations structure, and their comments are reported as such.

The consultative process has affirmed that any principles must:

• meet the challenges of twenty-first century Australia by enabling Australia to compete in the global economy in terms of boosting productivity, workforce participation and skills development,
• meet Australia’s international treaty obligations to treat employers and workers with dignity, respect and fairness and to provide decent work,
• balance the interests of workers and employers, and
• enable a genuine partnership between the Commonwealth and the States and Territories.

5.2 SOURCES

The Inquiry undertook a search of the work that had already been undertaken by organisations that have considered principles that should govern industrial relations and working arrangements. The Inquiry drew upon a range of sources at both the domestic and international levels, including:

• United Nations covenants,
• International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998),
• National Reform Agenda adopted by the Council of Australian Governments,
• Charter of Employment Rights developed by the Australian Institute of Employment Rights,
• UK Institute of Employment Rights Council of Europe’s Social Charter, and

In addition, the Inquiry examined:

• Australian Council of Trade Unions Industrial Relations Legislation Policy (2006),
• Australian Chamber of Commerce and Industry Modern Workplace: Modern Future 2002-2010,
• Productivity Commission Roundtable Productive Reform in a Federal System (2005),
• Australian Industry Group Making the Federation Work Better report (2005) and Making the Australian Economy Work Better - Workplace Relations (2005),
• Australian Catholic Council for Employment Rights working paper, Workplace Relations; A Catholic Perspective (2007), and
• the paper prepared for the Queensland Government by Professor Peetz and Dr Mourell Towards a cooperative national industrial relations system (2004).

The Inquiry considered the central tenets of the ILO as expressed in the Declaration on Fundamental Principles and Rights at Work and promoted through its decent work agenda. The ILO concept of decent work recognises that work is not just an employment contract, but a vital source of personal dignity and self worth as well as individual, family and community stability. It accepts that work is an important arena where human rights can be achieved and fulfilled:

Decent work sums up the aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protections for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.¹

The Declaration on Fundamental Principles and Rights at Work establishes a set of core labour standards central to the concept of decent work. The Declaration was adopted by the ILO in 1998. It commits member states to the principles and rights in the following four areas (even if they have not ratified the relevant conventions):

• freedom of association and recognition of the right to collective bargaining,
• elimination of forced or compulsory labour,
• abolition of child labour; and
• elimination of discrimination in employment and occupation.

The Australian Charter of Employment Rights was developed by the Australian Institute of Employment Rights (AIER) and released in October 2007. The Charter is a statement of the reciprocal rights of workers and employers in Australian workplaces. In its submission to the Inquiry the AIER suggests the use of the Charter as a mechanism to assist the Commonwealth, States and other interested parties to reach agreement on the foundational elements of a national industrial relations structure.²

The AIER operates on the premise that core employment rights and productivity and efficiency are not mutually exclusive but are in fact
The AIER undertook a significantly broad consultation process to develop the Charter with both industrial relations stakeholders and the wider community to ensure its relevance and universality for all participants in the country’s system of industrial relations law and practice.

As with this Inquiry, the Charter finds three broad sources of rights. The first are rights embodied in international instruments which Australia has adopted and which as a matter of international law is bound to comply with. Secondly, the Charter is based on rights that are uniquely Australian values that have shaped the foundations and contours of Australian society and underpin the constitutional and institutional history and framework of labour relations law and practice in this country. Lastly, the Charter is premised on rights which reflect the true, current and evolving nature of modern working relationships and which are recognised by contemporary common law.

An Australian Charter of Employment Rights

The ten rights identified in the Charter are:

1. **Good Faith Performance**
   Every worker and their employer have the right to have the terms of employment they have agreed to, performed by them in good faith. They have an obligation to cooperate and ensure a “fair go all round”.

2. **Dignity At Work**
   Recognising that labour is not a mere commodity, workers and employers have the right to be accorded dignity at work including:
   - being treated with respect
   - recognised and valued for the work, managerial or business functions they perform
   - provided with opportunities for skill enhancement and career progression
   - protected from bullying, harassment and unwarranted surveillance

3. **Freedom From Discrimination**
   Workers and employers have the right to enjoy a workplace free of discrimination or harassment based on:
   - race, colour, descent, national, social or ethnic origin
   - sex, gender identity or sexual orientation
   - age
   - physical or mental disability
   - marital status
   - family or carer responsibilities
   - pregnancy, potential pregnancy or breastfeeding
   - religion or religious belief
   - political opinion
   - irrelevant criminal record
   - union membership or participation in union activities
   - membership of an employer or employee organization or participation in the activities of such a body
   - personal association with someone possessing one or more of these attributes
   - and free of sexual harassment.

4. **A Safe and Healthy Workplace**
   Every worker has the right to a safe and healthy working environment.

   Every employer has the right to expect that workers will cooperate and assist.
5 Workplace Democracy
Employers have the right to responsibly manage their business.
Workers have the right to express their views and have those views duly considered in good faith.
Workers have the right to participate in the making of decisions which will have significant implications for themselves or their workplace.

6 Union Membership and Representation
Workers have the right to form and join a trade union for the protection of their occupational, social and economic interests.
Workers have the right to require their unions to perform and observe its rules, and to have the activities of their union conducted free from employer and governmental interference.
Every worker has the right to be represented by their union in the workplace.

7 Protection from Unfair Dismissal
Subject to exceptions consistent with ILO standards, every worker has the right not to be dismissed unless there is a valid reason related to the worker’s performance or conduct or the operational requirements of enterprise affecting that worker.

8 Fair Minimum Standards
Every worker is entitled to the protection of minimum standards, established by an impartial, tripartite tribunal independent from government, which provide for a minimum wage and just conditions of work including safe and family friendly working hours.

9 Fairness and Balance in Industrial Bargaining
Workers have the right to bargain collectively through the representative of their choosing.
Workers, workers representatives and employers have the obligation to bargain in good faith.
Subject to compliance with their obligation to bargain in good faith, workers have the right to take industrial action and employers have the right to respond.
Conciliation and arbitration is available where there is no reasonable prospect of agreement being reached and the public interest so requires.
Employers and workers may make individual agreements that do not reduce minimum standards and that do not undermine the capacity of workers and employers to bargain collectively or the collective agreements made by them.

10 Effective Dispute Resolution
Workers and employers have the right and the obligation to participate in dispute resolution processes in good faith and where appropriate to access an independent tribunal to agitate a grievance or enforce a remedy.
The right to an effective remedy for workers includes the power for workers’ representatives to visit and inspect workplaces, obtain relevant information and provide representation.
Professor Andrew Stewart of Flinders University directed the Inquiry to two additional sources in considering the principles that should underpin a new national framework. The first is the ‘Checklist for assessing regulatory quality’, prepared by the Office of Regulation Review. The Office, which is part of the federal Productivity Commission, suggests that laws that ‘conform to best practice design standards’ can be characterised by seven principles or features. These are set out in the accompanying box.

The Productivity Commission’s checklist for assessing regulatory quality

**Minimum necessary to achieve objectives**
- Overall benefits to the community justify costs
- Kept simple to avoid unnecessary restrictions
- Targeted at the problem to achieve the objectives
- Not imposing an unnecessary burden on those affected
- Does not restrict competition, unless demonstrated net benefit

**Not unduly prescriptive**
- Performance and outcomes focused
- General rather than overly specific

**Accessible, transparent and accountable**
- Readily available to the public
- Easy to understand
- Fairly and consistently enforced
- Flexible enough to deal with special circumstances
- Open to appeal and review

**Integrated and consistent with other laws**
- Addresses a problem not addressed by other regulations
- Recognises existing regulations and international obligations

**Communicated effectively**
- Written in ‘plain language’
- Clear and concise

**Mindful of the compliance burden imposed**
- Proportionate to the problem
- Set at a level that avoids unnecessary costs

**Enforceable**
- Provides the minimum incentives needed for reasonable compliance
- Able to be monitored and policed effectively
The second additional source referred to by Professor Stewart was the work undertaken in Canada by a team led by Professor Harry Arthurs. Professor Arthurs prepared a report for the Canadian Government in 2006, entitled *Fairness at Work: Federal Labour Standards for the 21st Century*. That report identified a set of 12 principles by reference to which labour standards should be framed and judged, which are set out in the accompanying box.

---

### Fairness at Work: Federal Labour Standards for the 21st Century

**Principle 1: Decency at work**

Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as ‘decent.’ No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civic life.

**Principle 2: The market economy**

Labour standards ought – so far as possible – to advance the decency principle in ways that allow workers to contribute to, and benefit from, the success of Canada’s market economy. Because successful enterprises are better able to treat workers decently, labour standards should support and, if possible enhance, the competitiveness and adaptability of enterprises.

**Principle 3: Flexicurity**

Labour standards should be coordinated with income security and other adjustment policies to provide protection to workers whose jobs are threatened by changing labour market conditions, employer strategies or job requirements. Labour standards, along with other legislation, should provide a framework for avoiding job losses, if possible; for planning and funding worker transitions to new jobs; and for reducing the impact of job losses on workers.

**Principle 4: The level playing field**

Labour standards should ensure that competition is not based on differential interpretation or application of the decency principle. While variability in labour conditions among competing firms is to be expected, it should reflect the circumstances prevailing in particular labour markets or sectors of the economy and genuine differences in firm strategy, not degrees of compliance with statutory labour standards.
Principle 5: The workplace bargain

Labour standards should respect the right of employers and workers (or their collective representatives) to negotiate the terms of their relationship, provided that the negotiations are authentic and the resulting employment bargain is clear, respects the basic decency principle and conforms to law. They should also ensure that workers and employers enjoy the fruits of their bargain.

Principle 6: Inclusion and integration

The decency principle requires that labour standards be inclusive, in the sense that all workers should enjoy in the workplace the full benefits accorded them by human rights legislation. The inclusion principle, in turn, requires that all workers enjoy like opportunities to integrate their working lives with their personal, family, cultural and civic lives in a balanced fashion.

Principle 7: Respect for international obligations

Labour standards and their administration should respect and reinforce Canada’s obligations under international agreements and conventions.

Principle 8: Effective and efficient use of public resources

Labour standards should be designed and administered with a view to achieving the highest possible levels of compliance consistent with the efficient use of public resources and the achievement of multiple public policies.

Principle 9: High levels of compliance

Labour standards ultimately succeed or fail on the issue of compliance. Widespread non-compliance destroys the rights of workers, destabilizes the labour market, creates disincentives for law-abiding employers who are undercut by law-breaking competitors, and weakens public respect for the law.

Principle 10: Regulated flexibility

Labour standards that do not respond to the realities of employment in diverse circumstances are unlikely to attract the willing compliance of employers and, sometimes, of workers or to serve their mutual interests in the success of the enterprise. Labour standards legislation should therefore permit some degree of flexibility in the initial establishment or subsequent adjustment of standards, so long as employers do not gain advantages that contravene the level playing field principle, workers are not deprived of the protection of the decency principle and both sides continue to enjoy the benefits of their bargain.

Principle 11: Clarity

Labour standards should be clearly stated, and workers and employers should have easy access to accurate and understandable information concerning their rights and responsibilities.

Principle 12: Circumspection

Labour standards should be designed and implemented so as to avoid unintended harm to workers, who are the intended beneficiaries of the legislation, and to avoid unnecessary costs and inconvenience for employers who are intended to be regulated by it. Where standards seek to alter established practices, expectations or cost structures in a significant way, it may sometimes be appropriate to introduce changes gradually so as to permit necessary adjustments in management and personnel practices, and to minimize negative impacts on firms and workers.
The National Reform Agenda

Australia will not meet its challenges if reform occurs in an ad hoc or piecemeal way. This has been recognised by the Commonwealth, State and Territory governments which have sought to develop a coherent national plan for systemic reform – the National Reform Agenda – to meet Australia’s national priorities.

In February 2006 the Council of Australian Governments (COAG) agreed on a National Reform Agenda to help underpin Australia’s future prosperity. The National Reform Agenda is aimed at further raising living standards and improving services by lifting the nation’s productivity and workforce participation over the next decade.

The agenda seeks to:

- enhance the capability and contribution of the Australian people – the nation’s human capital (with a focus on improved health, education, and support for work outcomes needed to enhance participation and productivity),
- continue competition reforms to make our markets work more efficiently (with a focus on further reform and initiatives in transport, energy, infrastructure regulation and planning and climate change technological innovation and adaptation), and
- reduce the regulatory burden on Australian business.

Business Council of Australia

In its report Policy that Counts: Reform Standards for the 2007 Federal Election the Business Council of Australia (BCA) has set as a goal that Australia move into the top five band of the world’s highest living standards by 2012. In its report, the BCA cites workplace reform by both major political parties over the past 20 years as fundamental to jobs growth, productivity and increased prosperity across the community.

The BCA report states many of the challenges and opportunities faced by Australia require better cooperation and coordination between the Commonwealth and State governments. Duplication, overlap and inconsistencies are creating too many barriers for large and small businesses.

In particular, the BCA states Australia needs:

- a genuine common market and consistency in core business regulation,
- intergovernmental systems and processes to be strengthened so that business and the community are confident that future challenges and opportunities are dealt with efficiently and effectively, and
- a new, long term approach to Commonwealth-State relations that commits each level of government to a clear set of accountabilities and responsibilities.

Australian Council of Trade Unions

The Australian Council of Trade Unions (ACTU) is Australia’s peak trade union organisation, representing about two million workers. It has developed principles for the twenty first century workplace that:

- apply consistently across the labour market to employers, employees and contractors,
- apply rights and entitlements without discrimination,
- are underpinned by decent minimum standards in awards or legislation and adjusted to take into account community/industry standards,
- are underpinned by collective bargaining in good faith and with democratic values,
- has a tribunal independent of government,
- give the right to union membership and representation, with a statutory right for unions to represent members in collective bargaining,
• provide protection for workers from arbitrary or capricious decision making,
• ensure safe, secure and healthy workplaces, and
• provide statutory rights to protect delegates in the workplace.

5.3 THE PRINCIPLES

The Issues Paper proposed five key principles to underpin a national industrial relations structure operating within a framework of cooperative federalism. The views expressed in the submissions, by everyone from employer associations to unions, strongly supported the retention of these five principles (subject to some further refinement). The principles have also been tested against the sources set out above, including the national reform agenda set by the Council of Australian Governments, business and union priorities, international conventions and pertinent domestic publications.

Taking into account the analysis of the sources referred to above and the consultations and submissions, the structure should be:

5.3.1 Fair

(just, balanced, equitable, ethical, non-discriminatory, impartial, transparent, reasonable, in the public interest)

This principle attracted the most comment in the feedback received by the Inquiry.

The concept of a right to fair treatment lies at the heart of most attempts to grapple with the essential elements of an industrial relations system, be they international human rights and labour rights instruments or the Charter of Employment Rights developed by the Australian Institute of Employment Rights. In Australia, the ethos of a ‘fair go’ is inherent in our expectations of what an industrial relations system should deliver. Both unions and the business community recognise the need for fairness and a stable safety net of minimum rights and conditions for workers, coupled with flexibility for both workers and employers to meet the needs of modern and diverse workplaces.

International instruments, including the United Nations Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the International Labour Organisation Declaration on Fundamental Principles and Rights at Work, emphasise the human rights associated with employment and the workplace and recognise the crucial role work plays in realising personal fulfilment and community stability. These instruments are concerned with the rights to personal dignity, respect and fair treatment at work, non-discrimination, a decent standard of living, decent remuneration and working conditions, equal pay for equal work, safe and healthy working conditions, as well as freedom of association.

There was support in some submissions for taking inspiration from international law standards. For example the Centre for Employment and Labour Relations Law at the University of Melbourne stated that setting a floor of minimum standards for those engaged in work provides an opportunity for Australia to give effect to such conventions. It also went further in stating that Australia should give further effect to other key United Nations instruments, including the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination.

On the other hand, others like Australian Business Industrial (ABI) opposed the introduction of international treaty obligations into domestic law without consultation with the business community. Nevertheless, ABI did support the ‘development of a workplace relations system that
facilitates the development of workplaces that are productive, cooperative, safe, flexible, responsive, tolerant and collaborative.\(^8\)

Most submissions supported a fair and stable safety net of legislated minimum entitlements for all workers and identified the ‘Fair’ principle as a meaningful guide for achieving this. On the other hand, not surprisingly, there are many different conceptions of what might be comprehended by the term ‘fair’.

For example, the NSW Teachers Federation argued that ‘the principles underpinning a fair national industrial relations system should guarantee, not displace, rights of unions and their members and ensure actual, rather than minimum, wages and working conditions are preserved in industrial awards and agreements’.\(^9\)

Unions NSW noted that ‘notions of fairness can receive wide interpretations both between governments and within the community at large’.\(^10\)

The Australian Industry Group (AiG) also stated that fairness has many different aspects. AiG agreed that minimum wages and conditions need to be fair, but at the same time said that fairness requires consideration of those employees who risk losing their jobs if companies fail to survive in a fiercely competitive global market.\(^11\)

The Catholic Commission for Employment Relations (CCER) addressed all the principles, but particularly the principle of fairness, through the prism of the principles of Catholic Social Teaching, which:

uphold and affirm the innate and inviolable dignity of the human person. CCER believes that the application of these ideals and principles to particular social, economic and political realities can construct a more humane social order that promotes justice, peace and the common good.\(^12\)

CCER noted that Catholic Social Teaching holds that the promotion of human dignity is contingent upon the fulfilment of basic rights at work, including:

- the right to a just wage,
- the right to fair and safe working conditions,
- the right to security of employment and fair treatment at work, and
- the right to participate in unions.\(^13\)

The CCER argued that these should not just be seen as ‘Catholic concerns’, but ‘also constitute minimum community standards for a fair and civilised society’. This view was affirmed by reference to the Universal Declaration of Human Rights and the ILO’s decent work agenda.\(^14\)

Some submissions noted the range of meanings that can be assigned to fairness, and argued that the needs of particular groups of workers, particularly those at a disadvantage in the labour market, need to be taken into account so that fairness is available to all. Many submissions from those representing vulnerable employment groups spoke of increased fear within their membership of a marked decrease in job security. To achieve a fair system they saw the need for stronger legal protections, an active inspectorate and education as ways of providing greater job security. These included the Youth Action Policy Association, the Women’s Electoral Lobby, the Textile Clothing and Footwear Union, the Transport Workers Union of NSW, FairWear NSW, and Asian Women at Work.\(^15\)

The BCA argued for fairness to be viewed somewhat differently. In its view, ‘while Australia needs an equitable system which includes a genuine safety net, the fairness of Australia’s society more broadly is best dealt with through the tax-transfer system rather than narrowly targeting the workplace’, and further ‘the results of using workplace relations to achieve fairness through
restrictive and overregulated workplace practices are often the opposite of those intended: fewer jobs are created; unemployment is higher … and average incomes are lower'.

By contrast, in its industrial relations policy, the ACTU makes it clear that fairness in industrial relations can only be achieved by ensuring that particular mechanisms and rules are in place, including collective bargaining in good faith, protection for workers from arbitrary decision making, union membership and representation, right to industrial action, need for an independent tribunal, and legislated minimum wages and conditions.

Professor Ron McCallum of the University of Sydney took a similar position, stating:

the purpose of labour law [is] the establishment and maintenance of a series of legal rules to ensure that working women and men receive fair and appropriate wages and other terms and conditions of employment in return for their labour. These labour law rules are necessary because employers who accumulate capital almost always possess greater bargaining power than do workers who sell their labour to support themselves and their families.

Drawing on both the source documents and the views expressed to the Inquiry, the following elements are required to ensure that any industrial relations framework is fair:

• the rights of participants (including workers, employers and industrial associations) must be acknowledged and respected, with all treated impartially, ethically and with dignity,

• there must be equal opportunity and non-discriminatory treatment for all participants, and

• there is a need for independent checks and balances founded upon transparency and accountability to ensure just and consistent outcomes to give all a ‘fair go’.

In the industrial relations context this could, for example, require:

• a framework for the conduct of industrial relations that is fair and just,

• preventing and eliminating discrimination in the workplace, and in particular ensuring equal remuneration for men and women doing work of comparable value,

• providing for the resolution of some or all industrial disputes by conciliation and, if necessary, by arbitration in a prompt and fair manner and with a minimum of legal technicality,

• encouraging participation in industrial relations by representative bodies of employees and employers and encouraging the responsible management and democratic control of those bodies, and

• facilitating appropriate regulation of employment through awards, enterprise agreements and other industrial instruments.

5.3.2 Efficient

(simple, certain, easy to comply with, economical, timely)

Efficiency was an important consideration for many participants in the consultation process. However there were distinct and varied views on the approaches and elements that would be required to produce such a quality.

For the BCA, more efficient workplace regulation is a key issue. The BCA stated that:

In the context of this Inquiry, it is the poorly designed structure of the workplace relations system, leading to regulatory overlap and duplication which needs to be improved. Overlapping and inefficient
regulation … imposes deadweight costs … and burdens that must be removed.\textsuperscript{19}

A unified workplace relations system is essential in order for more efficient workplace relations regulation to be achieved … The costs associated with the duplication of workplace regulation and the lack of harmonisation across jurisdictions undermines enterprise performance, productivity, job creation and, ultimately, Australia’s economic performance.\textsuperscript{20}

In its 2002 Blueprint, the Australian Chamber of Commerce and Industry (ACCI) described the regulatory burden on business of complying with a vast array of requirements under both State and federal industrial relations systems.\textsuperscript{21} It went on to say that the goals of industrial relations regulation should include ‘simplified regulatory obligations and reduced prescription’ and ‘a reduction in the need to comply with multiple regulatory instruments drawn from both the federal and state jurisdictions’.\textsuperscript{22}

The submission of the Master Builders Association of NSW (MBA) was accompanied by its Blueprint for workplace relations, and in its submission the MBA drew attention to the first principle in the Blueprint that the system should be structured so that it ‘provides a legal framework which is simple, readily accessible and easily understood.’\textsuperscript{23}

Professor John Nevile of the University of New South Wales drew attention to the fact that an efficient structure does not necessarily come at the cost of fairness and equity, referring to a statement by Professor Richard Freeman of Harvard University: ‘Studies of minimum wages … of employment protection legislation … and of diverse other social protection programs … find little or no impact of these institutional interventions on economic efficiency’.\textsuperscript{24}

The European Union Employment Guidelines 2005-2008 promote full employment, improving quality and productivity at work, and strengthening social and territorial cohesion. The Guidelines also encourage increasing participation in the labour force, efforts to expand and improve investment in human capital, promote flexibility with employment security and reduce labour market segmentation.

The ACTU\textsuperscript{25} and the Australian Institute of Employment Rights\textsuperscript{26} called for certainty through establishing minimum standards for employment and working conditions. They also emphasised the need for an independent body to set the minimum standards and independent tribunals to resolve disputes effectively and simply.

The Youth Action Policy Association saw an efficient structure not only assisting young people, many of whom do not understand their terms and conditions of employment, but also the large number of youth services across NSW that would benefit from a workplace structure that is simple, certain and easy to comply with.\textsuperscript{27}

Drawing on these views, an efficient structure needs to:

• be simple to understand and apply,
• provide clear guidance on the rights and responsibilities of participants,
• be easy to comply with and promote certainty,
• operate in a cost effective and timely way for participants and at a reasonable cost to tax payers,
• minimise regulatory burden,
• promote productivity and prosperity, and
• have a sound framework that is viable and predictable in its administration.
In the industrial relations context this could, for example, require:

- decreasing costs, complexity, uncertainties and reducing the regulatory burden on all participants in the system,
- encouraging and facilitating cooperative workplace reform and equitable, innovative and productive industrial relations,
- promoting participation in industrial relations by employees and employers at the enterprise or workplace level,
- minimising legal technicality and using 'plain English' drafting, and
- reducing multiple government agencies and overlapping roles.

5.3.3 Universally accessible
(comprehensive, integrated, accommodates diverse users, facilitative, ease of participation)

In its 2006 Industrial Relations Policy, the ACTU identified two key access-oriented principles for a future structure: that it should apply consistently to employers, employees and contractors; and that rights and entitlements should apply without discrimination.28

The Centre for Employment and Labour Relations Law highlighted the importance of including those vulnerable workers who often do not enjoy the benefit of many legislated or award driven entitlements, including independent contractors, fixed term employees and casual workers. It stated that any new system must be capable of generating standards of broad application directed at all persons engaged in work rather than merely employees. This submission asserted that a system of national uniform minimum standards also requires the maintenance of national dispute resolution and enforcement agencies.29

The Women’s Electoral Lobby called for the provision of a national, comprehensive set of rights and entitlements that covers all sectors of the workforce, that avoids gaps and anomalies in coverage, and cannot be evaded or undermined by false categorisation of employment arrangements.30

A number of other submissions were concerned with the possibility that categories of workers falling outside the conception of ‘standard work’ might miss out on protection unless there was care to ensure that the system was universally accessible. These included the Transport Workers Union which focused particular attention on the needs of owner-drivers who are not, at common law, regarded as employees, but have special protections under the laws of some States, for example, Chapter 6 of the Industrial Relations Act 1996 (NSW),31 and a number of groups concerned with the situation of clothing outworkers.32

The Australian Chamber of Commerce and Industry proposed that a rationalisation of the current systems should reflect Australia’s regional variance by providing for local matters to be dealt with by State divisions of a single tribunal.33 Similarly, in its 2005 workplace relations policy, the BCA advocated greater clarity in the roles, responsibilities, rights and accountabilities of the respective elements of the industrial relations systems, as a means of improving their utility and accessibility to business.34 And the AiG has advocated that the system must suit the needs of all workplaces – large and small, unionised and non-unionised.35

A universally accessible structure therefore needs to be:

- a comprehensive structure that avoids gaps and anomalies in coverage,
- integrated, so that for the user it is jurisdictionally seamless,
inclusive of diversity by accommodating all participants, and
- easy and simple to understand and to participate in, with multiple entry points.

In the industrial relations context this could, for example, require:

- providing a set of rules and perhaps even minima for all workers, regardless of employment status, award coverage or industrial instrument, and providing rights and responsibilities for employers regardless of jurisdiction,
- avoiding the ‘run around’ from federal and State agencies by providing ‘one stop’ information sources regardless of the jurisdiction,
- making the structure as easy to use for; and as likely to be used by, young workers, older workers, and workers from culturally and linguistically diverse backgrounds, and people who support workers (such as parents, advocates and carers) as for other workers, and
- making the structure as easy to understand and use, by small business as well as big business.

5.3.4 Adaptive

(dynamic, flexible, evolutionary, responsive)

Although the language varies, the submissions and feedback received by the Inquiry consistently advocated that a key element of an industrial relations structure is that it be adaptive.

ACCI prioritised reform driven by the needs of workers and employers.36 The BCA put adaptation alongside innovation as a means to realising competitive advantage, and in doing so asserted that local variance in industrial relations arrangements is needed to compete effectively in global markets.37

The Centre for Employment and Labour Law noted that employment forms have diversified and the nature of work has become more complex. It said an industrial relations structure must encompass an open process for the careful monitoring and revision, where necessary, of the various rules and standards which regulate working conditions to ensure that those labour standards are dynamic and evolving.38

The Australian Catholic Council for Employment Rights took a broad view of system flexibility, advocating that in addition to it being a means of achieving economic goals, an industrial relations structure should be able to adjust to and reflect changing community standards and changing cultural and gender relations.39

AiG also saw that an integral feature of an industrial relations structure was the capacity to adapt to take account of the increasing diversity of the workforce, that is, people’s more varied workforce participation profiles, work and study patterns, preferences for leisure time and retirement, and family dynamics.40

However, while adaptability was acknowledged as a crucial aspect of system maintenance, just as important was the achievement of long term stability in the regulatory settings. In other words, an effective industrial relations system needs to be adaptive, within a stable framework. For example, the BCA argued for a framework for workplace regulation that ‘provides for certainty and simplicity in day to day operations’.41 The Australian Services Union was concerned that any future system should provide ‘mechanisms to address destabilisation which is currently ‘in the pipeline’ but not yet realised’ (this was a reference to the transitional provisions under Work Choices which will mean further movement of employers and employees from one jurisdiction to another in future years).42

An adaptive structure therefore needs to be:

- accommodating of and readily responsive to change (social, technological and economic),
• a stable legal regime also capable of amendment,
• reflective of lifecycles, business cycles and demographic changes,
• innovative, promoting opportunities and growth for individuals, business and the economy, and
• future-proof, meeting emerging and prospective needs.

In the industrial relations context this could, for example, require:
• creating a structure capable of adapting to change at the national and local levels, and at industry, occupation and workplace levels,
• responding to and being inclusive of lifecycle and demographic changes and needs at the workplace and within the economy,
• promoting innovation, opportunities and growth for individuals, business and the economy, and
• providing systemic mechanisms to reflect new needs and social standards, including changing technology, new forms of work, new types of occupations and industries and changing cultural and gender relations.

5.3.5 Cooperative
(supportive, collaborative, participatory)

Cooperation in the industrial relations structure between different jurisdictions, governments and at the workplace, was encouraged by most submissions.

At the governmental level, ACCI and the BCA promoted coordinated legislative reform through harmonising Commonwealth and State industrial relations structures, and cooperation amongst various levels of government regarding roles, responsibilities and accountabilities. ACCI also advocated devolution of regulation, with one level of government responsible for a particular matter, as well as bringing State tribunals within the framework of a harmonised structure, and local matters being dealt with by local tribunals. It encouraged cooperation at the workplace level through employers and employees to work together, and basing workplace decisions on shared interests.

The Australian Institute of Employment Rights submission was based on the proposition that any new truly national industrial relations system necessarily requires cooperation between the Commonwealth and the States, and at least consensus as to the broad shape of the fundamental elements of the system.

Cooperation between different jurisdictions is encouraged by international institutions such as the United Nations and International Labour Organisation in order to achieve international standards of human rights and work rights.

FairWear NSW stated its support for a cooperative upward harmonisation of the different State and federal jurisdictions so that all outworkers benefit from the protections that have been achieved thus far at the State level.

The Centre for Employment and Labour Relations Law at the University of Melbourne supported a cooperative structure that engages with participants. Participants were identified as governments, employers, trade unions and industry associations, community organisations, individuals and communities. In referring to cooperative or collaborative approaches, the Centre clarified that it was referring to approaches which entail high levels of participation by employees or employee representatives in decision making about employment, job functions and organisational strategy in an environment which offers explicit or implicit employment security and mutual gains.
A cooperative structure therefore needs to:

- focus on cooperation, not coercion between participants (governments, individuals, organisations and communities),
- build consensus and find mutually acceptable solutions and arrangements,
- provide checks on abuses and excessive concentrations of power,
- devolve decision making to the local level,
- share participation and responsibility,
- work towards shared goals, and
- be pragmatic in terms of acknowledging the realities of our federal structure with a role for States and Commonwealth in key decisions, policy formulation and enforcement.

In the industrial relations context this could, for example, require:

- encouraging and facilitating cooperative workplace reform and equitable, innovative and productive industrial relations,
- achieving broad consensus between governments as to what a unified structure of industrial relations should achieve,
- having local matters dealt with by local bodies,
- promoting participation in industrial relations by employees and employers at the enterprise or workplace level,
- promoting workplace democracy, and
- allowing governments, employers, workers, unions and employer associations to work together to achieve economic prosperity and social justice.

5.4 HOW DOES THE CURRENT STRUCTURE FARE?

Assessing the current federal, State and Territory industrial relations systems against the five principles identifies a number of deficiencies. Unless these shortfalls are addressed, it will be difficult to achieve an effective national structure of industrial relations.

Chapter 2 described a variety of issues arising out of the Work Choices and State systems. The unilateral way Work Choices was introduced and imposed on employers and employees, its inability to capture all workers and the subsequent anomalies this introduces, the difficulty of determining who is in and who is out of the federal system, and the increased legislative complexity and regulatory burden on employers are all elements of concern. The reliance on the corporations power also creates challenges.

Bearing these issues in mind, it is clear that the current industrial relations framework does not meet the principles: it is not fair, it is not efficient, it is not universally accessible, it is not readily adaptive, and it is not cooperative.

In a fair and reasonable industrial relations structure, rights and entitlements should apply without discrimination. Under the current federal structure, there is great variability in the application of rights and entitlements depending on the nature of the agreement an employee may be under and who the worker is employed by. Two people performing identical work (such as a teacher in a public school and a teacher in a corporate private school) can find themselves subject to radically different rules and protections as a result of the different status of their employers. Chapter 2 also gave examples from the local government and charitable sectors, amongst others, where the status of the employer as a constitutional corporation may be unclear. A fair system would
provide equitable coverage for all workers. The current structure fails to do so.

Founding industrial relations laws on a constitutional power which has no particular industrial character of its own does not bode well for the system to be deemed fair. Professor McCallum submitted that ‘the Parliament’s reliance upon the corporations power … will inevitably lead to the corporatisation of labour law which will deflect it from its primary purpose of protecting employees.’

However, the structure that operated before the introduction of Work Choices also presented challenges when considering whether that structure was fair. Many of the challenges identified with the current structure in Chapter 2 also arose under the prior structure, for example the problem of inadequate coverage.

The fact that the current federal structure was not the outcome of a cooperative endeavour between the Commonwealth and the States meant that there was little likelihood that the legislation would achieve simplicity or efficiency. Employers increasingly need to seek legal advice to make decisions concerning their business, which they would otherwise be confident to make on their own.

The existing system does not promote certainty. There has been a great deal of change and instability, with employers needing to amend their employment arrangements to fit in with changing regulatory settings as new governments seek to stamp their policy mark on the direction of industrial relations. Some employers have needed to take expensive and lengthy legal proceedings to determine which system applies to them.

The industrial relations structure in place prior to Work Choices also had its inefficiencies. Employers, unions and workplaces had scope to choose which structure best suited their needs and sometimes ‘forum shopped’ in and out of these jurisdictions. The requirement to maintain and manage seven separate systems of industrial relations created inefficiencies and unnecessary duplication.

Nor is Work Choices accessible to all. It is neither a national nor unitary structure. In Chapter 2, the available statistics were examined and it was concluded that Work Choices has, at most, 75 per cent coverage of Australian employees. It is only able to cover employees of trading and financial constitutional corporations. Uncertainty exists about its coverage of, for example, local government and not-for-profit organisations.

The accessibility of Work Choices is also limited by the comparative costliness of using it. Employers have had to expend resources on learning and applying the new laws, seeking professional legal advice to understand the 1,700 pages of
prescriptive legislation dictating the detailed rights and responsibilities of employers and employees. The emphasis on legal rights and obligations means that rather than being able to seek timely, low cost dispute resolution in the industrial relations tribunals (as was the case under earlier industrial relations schemes), court action is often necessary. Employees on their own, or even with the assistance of their union, are hard pressed to be able to afford the costs required to take matters to a federal court for resolution.

Work Choices could be viewed as adaptive in that it is easily amended, particularly with the federal government’s control of the Senate. There is a preponderance of provisions which empower the responsible Minister to make regulations that change the operation or effect of the legislative provision. However the Inquiry’s appreciation of what constitutes an adaptive structure is not reflected in the current system.

The prescriptive nature of Work Choices, particularly around bargaining, restricts it from being an adaptive structure. This has been noted by Professor Freeman of Harvard University, who commented on Work Choices in September 2007:

> It’s a huge document. It’s got all kinds of ‘cannots’—business cannot do this, union cannot do this, people cannot do that. That is not a deregulation of the kind that you were talking about that increases flexibility. This reduces the flexibility of people to make contracts. If I’m a business and I want to make a certain kind of contract with my workers, I have to check this law and I always have to be worried that some minister might step in and say, ‘No, you really shouldn’t write that kind of contract’. So this is not the type of deregulation that introduces flexibility, this is the type of regulation that actually reduces it.50

Similarly in a speech in Sydney in October 2006, Professor McCallum stated that ‘American employers would rightfully regard a list of prohibited bargaining matters specified by Congress as a gross interference upon their liberty to contract with trade unions’.51

The *Workplace Relations Act 1996* cites the ‘development of a regulatory framework of cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia’.52 However, in light of the way it was introduced, it is not surprising that it has created significant gaps and shortfalls which negate the achievement of this.

The current structure does not foster cooperative relationships between industrial relations participants. The polarised views on industrial relations between State and federal governments are exacerbated by the federal government’s position on cooperative federalism in relation to industrial relations. No effort was made to either advise or consult with the States about the massive changes to the coverage of their jurisdictions that was introduced by Work Choices.

When tested against these five fundamental principles, the current structure has significant shortfalls. These problems provide important lessons in determining a better approach to achieving a cooperative national industrial relations system.
ENDNOTES

3 Submission 29, Australian Institute of Employment Rights, p.7.
4 Submission 2, Professor Andrew Stewart, p.6, refers to S. Argy and M. Johnston, Mechanisms for Improving the Quality of Regulations: Australia in an International Context, Productivity Commission Staff Research Paper, Melbourne, 2003, p.6.
5 Submission 2, Professor Andrew Stewart, pp.7-9.
6 Submission 32, Centre for Employment and Labour Relations Law, p.2; see also Submission 12, Members of the Public Service Association employed at the NSW Industrial Relations Commission, p.4.
7 Submission 18, Australian Business Industrial, p.8.
8 Submission 18, Australian Business Industrial, p.8.
9 Submission 20, NSW Teachers Federation, p.4.
10 Submission 17, Unions NSW, p.7.
13 Submission 7, Catholic Commission for Employment Relations, p.3.
14 Submission 7, Catholic Commission for Employment Relations, p.3-4.
15 Submission 6, Youth Action Policy Association, p.2; Submission 3, Women’s Electoral Lobby Australia Inc, p.3; Submission 16, Textile Clothing and Footwear Union, p.1; Submission 19, Transport Workers Union of NSW, p.4; Submission 25, FairWear NSW, p.1; Submission 26, Asian Women at Work, p.1.
18 Submission 28, Professor Ron McCallum, pp.1-2.
20 Submission 30, Business Council of Australia, p.3.
21 Australian Chamber of Commerce and Industry, Modern Workplace: Modern Future – A Blueprint for the Australian Workplace Relations System 2002-2010, p.28.
22 Australian Chamber of Commerce and Industry, Modern Workplace: Modern Future – A Blueprint for the Australian Workplace Relations System 2002-2010, p.28.
23 Submission 1, Master Builders Association of NSW, p.6.
27 Submission 6, Youth Action Policy Association, p.3.
30 Submission 3, Women’s Electoral Lobby Australia Incorporated, p.5.
31 Submission 19, Transport Workers Union of NSW.
38 Submission 32, Centre for Employment and Labour Relations Law, p.2.
41 Submission 30, Business Council of Australia, p.3.
42 Submission 31, Australian Services Union, p.5.
44 Submission 30, Business Council of Australia, p.3.
45 the Australian Chamber of Commerce and Industry’s Modern Workplace: Modern Future 2002-2010, p.161; see also Submission 24, DR Connochie, p.4.
47 Submission 25, FairWear NSW, p.2.
48 Submission 32, Centre for Employment and Labour Relations Law, p.3.
49 Submission 28, Professor Ron McCallum, p.2.
52 Workplace Relations Act 1996, section 3.
6.1 INTRODUCTION

This Inquiry was established because of concerns about the structural problems created for the regulation of industrial relations by the federal government’s Work Choices legislation. It was also established due to the expectation that, through cooperation between jurisdictions, a less complex and more certain system could be forged.

Chapter 2 of this Report has described the nature and range of the current problems. The terms of reference for the Inquiry require that, after considering the principles that should underpin a harmonised and cooperative national industrial relations system (see Chapter 5) and examining the range of possible avenues for progressing towards this objective (see Chapters 3 and 4), an optimum model should be recommended.

The Inquiry has sought to describe the constitutional, legal and intergovernmental architecture of a future harmonised and cooperative system, rather than the elements or detail of the industrial relations system itself. The optimum model presented in this Chapter provides a framework that will enable participating governments to agree on the specific elements of a preferred system.

The Inquiry’s Issues Paper put forward six options for the architecture within which a harmonised and cooperative national industrial relations system could be created. These options are described further below. After receiving written submissions and meeting with people and organisations around Australia about the principles and options put forward in the Issues Paper, it is now possible to present an optimum model that is essentially an amalgam of the best of each of the options originally described.

The optimum model combines flexibility and stability. Each government will have flexibility in deciding both the basis and extent of its participation. Stability will come from having both the intergovernmental arrangements and the industrial relations system itself bedded down in agreed legislative terms.

6.2 THE OPTIONS

The Issues Paper put forward six options for consideration:

1A Full Referral: States refer all power over industrial relations to the Commonwealth but build a strong intergovernmental decision making role that ensures that they can continue to represent the needs of their communities and are able to influence the development of the national industrial relations system.

1B Limited Referral: States refer defined powers to the Commonwealth, retaining other powers for themselves and including a strong intergovernmental decision making role that ensures that they can continue to represent the needs of their communities and are able to influence the development of the national industrial relations system.

2A Mirror Legislation, State Enforcement: The Commonwealth enacts a model industrial relations law within one of the Territories; then in accordance with an intergovernmental agreement, that legislation is adopted in each State. A strong governance model ensures that the States continue to be able to represent the needs of their communities and are able to influence the development and adjustment of the national industrial relations system. In the short to medium term each State enforces its own laws to avoid the constitutional problems identified by the High Court.

2B Mirror Legislation, Federal Enforcement: A referendum proposal is developed to put an end to the power sharing problems identified
by the High Court. The model has the same approach to legislation and continued shared oversight as proposed in the Mirror Legislation, State Enforcement model but with the capacity of Commonwealth courts and enforcement bodies to carry out judicial and enforcement functions.

2C **Common Legislation, Shared Enforcement**: A Commonwealth framework law is developed that the States adopt through their own legislation, much like the consumer protection model, but with stronger governance to ensure as much consistency as possible. Each jurisdiction would enforce its own laws.

3 **State systems underpinned by national standards**: The Commonwealth legislates to create a safety net of national minimum employment conditions using its external affairs power or a limited referral of State power. State systems would continue to operate, but would not be able to undermine the national standards. Bargaining would be available at both the State and federal level. Each jurisdiction would have separate enforcement functions and judicial arrangements.

6.3 **THE SUBMISSIONS AND THE OPTIONS**

Thirty two written submissions were received by the Inquiry. In addition, the Inquiry held 54 meetings with a range of people and organisations to canvass their views. Organisations and individuals who provided input to the Inquiry, either through formal submissions or face to face meetings, included unions, employer groups, lawyers, academics, government officials and political leaders.

A full list of the written submissions received by the Inquiry is in Appendix 1, while the full list of meetings held by the Inquiry is in Appendix 2. The views expressed to the Inquiry were invaluable to the development of the optimum model put forward in this report. A clear indicator of the value of this input is the fact that no single one of the options put forward in the Issues Paper has been adopted. The critique from interested parties demonstrated that each model had both strengths and weaknesses. As a result, it became clear that the best way forward was to design a new model that drew upon the best points of the options and was most likely to enable the participating governments to agree on, develop, implement and maintain a stable industrial relations system for the nation.

As described earlier, the key task for the Inquiry has been to identify the framework for creating a cooperative national system, rather than engaging with the details of the system that might be adopted. However, as the submissions made clear, it is very difficult to completely separate the two issues. For the most part, submissions were framed in terms of what the submitting party viewed as the most desirable industrial relations system. Those who regarded Work Choices as having been beneficial by and large preferred a unitary system with as little State involvement as possible because they saw that as the best way of retaining the key features of Work Choices. On the other hand, those who were concerned about the new system created by Work Choices preferred to retain as much of the existing State systems as possible, which they regarded as the best way of ensuring fair and productive outcomes.

The Master Builders Association of NSW (MBA), for example, acknowledged that the Inquiry was not about the benefits or deficiencies of Work Choices but asserted its view that the reforms wrought by Work Choices were highly favourable for the building and construction industry. The MBA recognised that States might have historical reasons for wishing to retain a residual workplace relations system and therefore be inclined not to fully refer their powers to the Commonwealth.
However, it could identify no rational economic reason for the States retaining any portion of their current systems and argued that a single system was the best outcome for the nation. The MBA proposed that an economic study should be undertaken that would show the categorical benefits, in the current environment, for the economy of such a step. The MBA did envisage some ongoing role for the States: ‘The States should be consulted on major changes to the industrial relations framework, via COAG or similar intergovernmental framework, but a unitary system should be created and maintained.’

Australian Business Industrial (ABI) took a similar view, arguing that a single national industrial relations system, with the federal government accepting full responsibility for its operation, was to be preferred. Nevertheless, ‘ABI can see value in a continuing and significant role for the council of Ministers to monitor, research and discuss industrial regulation and possible changes, perhaps with an independent secretariat down the road’.

The Business Council of Australia (BCA) was strongly of the view that ‘workplace relations is a key area that should be controlled by one level of government as this is the only way of achieving a true unitary system’. The BCA felt that all the models other than full referral ‘run the risk of creating differing laws across the country and give rise to various concerns, a number of which are highlighted in the issues paper’.

These concerns include different approaches to administration and enforcement of legislation. The BCA noted that in addition to the Issues Paper option of referral, the Commonwealth could be given exclusive power over industrial relations by way of a referendum, but also acknowledged the low likelihood of such a referendum succeeding. Thus it preferred a referral by States, which would necessarily involve some kind of intergovernmental agreement, but remained concerned that ‘any unitary system that is developed must not lose the advantage of the unitary model through inappropriate and restrictive governance arrangements’.

The Australian Industry Group expressed similarly strong views about the desirability of a single system run by the Commonwealth, and seemed to see little need for the ongoing involvement of the States in overseeing that system.

Although a preference for a unitary system modelled on Work Choices with limited State involvement was demonstrated by most of the submissions from employer organisations, this was not universally the case. For example, the Local Government Association of NSW (LGA) informed the Inquiry that it had recently written to the federal Minister for Employment and Workplace Relations to request that Work Choices be amended to explicitly exclude local government because of the ongoing confusion and uncertainty about whether Work Choices actually applies to local government. The LGA stated that its members had a ‘strong desire’ for ongoing access to the ‘orderly industrial reform and improved productivity’ that had been achieved by councils in the NSW jurisdiction. From the LGA’s point of view the one size fits all nature of the Work Choices system ‘failed to account for and appreciate the scope, complexity, and uniqueness of industrial relations in industries such as NSW local government’.

A different employer perspective came from the Catholic Commission for Employment Relations (CCER), which acknowledged that it is ‘open to the possibility of a harmonised national industrial relations system, provided that this national system ensure the basic rights of workers are protected, and that vulnerable and disadvantaged workers are provided with an adequate safety net’.
The CCER went on:

The fundamental concern of the [Catholic] Church is not so much about how such a system might be structured, but the principles upon which such a system is established and the outcomes that it achieves.11

For the CCER, ‘on a philosophical level, the concept of a single harmonious industrial relations system for Australia seems desirable’, but it identified a range of practical and political obstacles to achieving this.12  The way forward lay through open consultation, giving people time to think through all the options, and developing a strategic approach to building ‘the nation-wide impetus that is needed for an undertaking of this scale’.13  Ongoing State and federal involvement in industrial relations was regarded as desirable, although preference was not given to any particular option outlined in the Issues Paper given the brief timeframe for the making of submissions.14

Unions NSW started from a similar premise as the CCER, focusing not on the type of system but on the capacity to achieve desirable outcomes:

Unions NSW and its affiliates support the development of a system that is fair and allows working people to obtain and maintain decent working conditions.  We could not support any system be it national or otherwise, that would see a loss of entitlements or a reduction in benefits enjoyed by those whose benefits are currently derived from the NSW system.15

In the development of its argument it was clear that Unions NSW saw the retention of State laws as being the best way to ensure that the most valuable aspects of current systems are retained. These desirable elements included their ability to deliver fair conditions to all employees, especially the most vulnerable and least able to organise in their own interest16 and the broad discretion of the State industrial relations tribunals to establish general standards for conditions of employment as well as to resolve particular instances of disputation or difference.17

The Unions NSW submission took a pragmatic approach, noting that discussion of how to build a new industrial relations system for the country did not commence with a blank slate:

There are six industrial relations systems in place throughout Australia, all with their particular history of legislation, regulation, tribunal decisions, industrial standards, customs and practices. Trying to replace these systems, that have developed separately over 100 years, with a new single system is fraught with many problems.18

In this context Unions NSW argued that it makes more sense to preserve what currently exists. It was argued that Option 3 would present the least amount of change, and is therefore the most realistic option.19  This was supported by a number of the affiliates of Unions NSW, who drew particular attention to the benefits of the State industrial relations system for their members.20

In addition, Unions NSW and its affiliates with members employed by the NSW Government argued that ‘State Government Employees, broadly defined, and local government bodies – however so defined, the community and social sector and the independent education sector and State owned corporations, remain within the NSW system’.21

The Australian Services Union mounted a similar argument in favour of retaining the whole of the social and community services sector within the jurisdiction of the State for the purposes of industrial regulation.22

As the above makes clear, most submissions focused on either Option 1A (full referral) or Option 3 (State systems underpinned by national
standards) as aligning most closely with the achievement of a preferred outcome. However, there were a number of submissions that canvassed the range of options more closely or provided alternative ways of approaching the issue.

The submission of the Construction Forestry Mining and Energy Union, Mining and Energy Division (CFMEU) drew upon that union’s experience with a prior model for federal/State cooperation, the Coal Industry Tribunal (CIT). The CFMEU saw this as an effective way to facilitate cooperative arrangements between Commonwealth and State industrial tribunals. The CIT was upheld as valid by the High Court in the *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd.*

An important aspect of the CIT scheme (which existed between 1945 and 1995) was that it managed to combine uniformity at the legislative level with a sensitivity to local needs and requirements by establishing decentralised outposts of the central body (local authorities and boards of reference). This led to greater ‘ownership’ of the outcomes by all involved – ‘it was not possible to blame a geographically remote and largely anonymous institution for an inappropriate outcome’ – and ‘enhanced the development of practical, common sense solutions to industrial disputes’. The CFMEU argued that:

The model used by the CIT scheme is a potential blueprint for a national industrial relations framework in which a Commonwealth tribunal could be charged with State jurisdiction, to the extent of any shortfall in power. Moreover, the CIT scheme demonstrates that such an approach is able to be applied on an industry or sector basis, allowing the possibility of the retention of significant areas of State jurisdiction, by agreement.

Professor Ron McCallum of University of Sydney suggested that while State referral might be the neatest way of establishing a national system, ‘a cooperative model based upon the NCSC [National Companies and Securities Commission] regime of the 1980s seems to me at least, politically easier to implement. It could allow some local variations in State systems’.

Professor Andrew Stewart of Flinders University, while clearly viewing referral as the preferable means of creating a national system, was equally convinced that the only way to achieve this in a sustainable fashion was via cooperation and the key to this was a strong governance model. Professor Stewart said:

I agree with what is said about the desirability of establishing a ‘strong’ governance arrangement that seeks to ensure that the States have an ongoing role in monitoring the operation of the national system and deciding on any changes. One great virtue of this would be to make the resulting system much more stable, something for which employers have been crying out.

Professor Stewart went on to say, however, that adoption of a strong governance model had implications for the approach that should be taken to drafting the new national law. He quoted his previous observations on the complexity of the federal industrial relations legislation as being ‘bloated, convoluted and in parts almost unintelligible’. He suggested this is due in part to a drafting style which displays excessive anxiety about the possibility of constitutional challenge, but mainly to ‘a loss of trust by successive governments in the institutions responsible for administering the federal system’. This means that instead of broad facilitative provisions, the Act is full of provisions ‘that direct the Commission as to what it must
and must not do, what factors to treat as relevant or irrelevant, whose views to seek and whose to disregard, when things must be done – and so on, ad infinitum’. 30

If a strong governance model overseeing a national industrial relations system is to succeed, the new national law should be ‘shorter and expressed in plainer language’, it should ‘express broad principles and repose appropriate trust in courts and administrative agencies to exercise their powers in accordance with statutory objectives’. While this would be a laudable approach for any legislative drafting process, it was particularly important in the context of the strong governance model because:

Under arrangements of the type canvassed in the Issues Paper, the national law would be relatively hard to amend. As I have indicated, that is desirable in so far as it promotes a degree of stability and certainty for all those affected by the law. But it is not a system that would work if the law looked anything like the WR Act in its current form. A law drafted in that way needs constant amendment, because its very size and complexity mean that problems are constantly emerging. The obvious solution is not to make the law easier to amend, but to draft it differently, so that it does not need to be amended every few months.31

A different take on the options was proposed by the Australian Institute of Employment Rights (AIER), which suggested that rather than referring general power over industrial relations, the States could consider a text based referral, in other words the referral to the Commonwealth by the States of the actual text of the agreed national law:

If a text based referral was agreed to, the agreed principles would be used to guide the Commonwealth and the States to agree upon the text of the proposed Commonwealth legislation. A text based referral may be accompanied by an additional limited referral of power which would enable future legislative adjustments to be made, but in a manner consistent with the agreed principles.32

The AIER commented that Options 2A, 2B and 2C would similarly depend on there being an agreed common text for the legislation.33

Meetings with political leaders and departmental officers from the various jurisdictions indicated a range of views about the most productive ways of moving towards a more harmonised industrial relations system for the country, indicating that while there might be some States for which referral was a realistic option, for others there was a distinct preference for maintaining State-based laws. A great deal of insight was provided about how previous and current intergovernmental agreements had or had not worked.

The following observations are made in light of the submissions and views expressed during the course of the Inquiry, and the evidence obtained about other models for cooperative Commonwealth-State endeavours:

• While it may be arguable that full referral of general powers is the ‘neatest’ way to achieve a unitary model, it would likely rule the States out of future practical engagement with the industrial relations system, despite the fact that their communities might demand that they take some responsibility for workplace issues and that States feel an economic imperative to be able to manage aspects of industrial relations in locally appropriate ways.

• The political reality is that some States are very unlikely to agree to a full referral, so even if it were the preferred model it is unlikely to be achieved.
• A number of risks are attached to the concept of full referral to the Commonwealth:
  - Without the checks and balances that come from including the States in decision making about the shape of the system, the industrial relations system will be less stable in the sense that a change of government at the Commonwealth level can easily result in the wholesale restructuring of the industrial relations settings, thereby putting at risk desirable elements of the system.
  - The architects and administrators may be more remote, in both the geographic and conceptual sense, from the day to day concerns of the parties and local communities.
• Rather than referring general powers over industrial relations which leaves it open to the Commonwealth to exercise those powers as it sees fit, some States might prefer a text-based referral option which would involve referral of the actual legislative provisions. For States unwilling to refer, this agreed text could be the basis for State mirror or uniform laws.
• There appear to be particular areas of regulation which are arguably best left to the States. Different States may have different views about which these should be (for example, many States may wish to retain their public sectors within State based industrial relations systems — while Victoria is already operating under the federal system and may wish to retain that position). Any settlement on how to move to a future industrial relations settlement for Australia must be explicit about the demarcation between the States and the Commonwealth in such areas to avoid the confusion and complexity which confronts parties at present.
• Some States may be cautious about how much of their jurisdictions they give over to a national model in the first instance and what is needed is a structure that enables greater harmonisation as time goes by.
• While a good deal of the complexity and uncertainty that accompanies the present interaction of the Commonwealth and State industrial relations systems is the result of the limits on Commonwealth constitutional powers, a substantial proportion arises from the style of regulation and drafting adopted by the Commonwealth, which is highly prescriptive. Both the framework for and the elements of any future industrial relations system should adopt a less prescriptive and more straightforward approach to drafting and regulating that does not envisage the need for constant readjustment and amendment to cope with unforeseen workplace situations.
• The Commonwealth has not yet sought to exercise the full range of its constitutional powers (nor even the full scope of its corporations power, as laid out by the High Court in the Work Choices Case). Should a future federal government be minded to do so, it could greatly extend the coverage of its industrial relations system (although it would still fall short of total coverage). In light of this potential, it is not a viable long term position for the States to simply defend what remains of their jurisdictions. The terms of reference for the Inquiry indicate an acceptance of the need for some level of cooperation and an attempt to achieve unity of purpose on at least some elements. This would be a more proactive and productive approach that would have benefits not only for both levels of government but also for the participants in the industrial relations system.
6.4 THE OPTIMUM MODEL

The optimum model now presented draws upon the insights gained from the submissions and discussions around the Issues Paper as well as the lessons to be learnt from other cooperative projects between the Commonwealth and the States. In accordance with the terms of reference, the optimum model has been designed to take account of the principles required for a harmonised and participatory national system of industrial relations.

The optimum model aims to achieve:

• long term stability by providing for Commonwealth and State negotiation of the terms of the new system and requiring a special majority for the approval of future amendments,
• flexibility by giving the States a choice of mechanism whereby they can participate in the national system and by permitting the States to agree with the Commonwealth on defined exclusions, and
• accountability and responsiveness through all jurisdictions being kept engaged in policy development and decision making, along with the potential for a continuing role in the day-to-day operation of the industrial relations system.

The optimum model does not prescribe the content of a preferred industrial relations model. However, in order to give practical meaning to various aspects of the framework, it has proved necessary to make some assumptions about the likely fundamentals of any industrial relations system for Australia. These assumptions should be unexceptionable as they are based on the elements found in the existing law and in the policy statements made by the major federal political parties. The underlying assumptions are that:

• there will still be awards of some kind,
• there will be a facility for agreement making (whether collective or individual),
• there will be some role for a non-judicial tribunal or commission (whether in setting standards by way of award making or agreement approving, or simply as a dispute resolution body), and
• there will be a role for a court (such as to enforce the minimum standards and any other enforceable entitlements or obligations).

The elements of the optimum model are as follows:

6.4.1 Form of agreement

The path to and operation of a national industrial relations law will be set out in an intergovernmental agreement between all participating governments. The agreement will include:

• a process and timetable for bringing about the national law,
• a requirement that the text of the law be approved by all participating governments, along with the option for any government that does not approve the text to opt out of the scheme, and
• governance arrangements and other matters as set out below.

The governance arrangements and other appropriate matters will also be enshrined in the national law. This will not merely be as an appendix containing the intergovernmental agreement, but in a legally enforceable form that in the event of a breach will trigger legal consequences (such as to prevent non-complying amendments from having effect).

The object is not to create a scheme dependent upon goodwill, but one that is based upon a set of clear legal rules. The scheme must be capable
of surviving those times at which there is strong disagreement between the Commonwealth and one or more States or Territories, or indeed disputes between the States and Territories themselves.

6.4.2 Governance

Key decisions will be made by a Ministerial Council composed of a nominated Minister from the Commonwealth and each of the States and Territories, which will replace the existing Workplace Relations Ministers Council. It will meet at least once each year (perhaps more often in the early phases of development) and will be responsible for the ongoing strategic supervision, development and control of the national industrial relations system. The Council will:

- approve any non-trivial legislative and policy changes,
- direct the activities of its secretariat, commissioning research and advice as necessary, and
- make tribunal and other appointments.

Each participating government will have the right to put forward policy or other proposals for consideration by the Ministerial Council and to have issues included on the agenda for Council meetings.

The Chair of the Ministerial Council will be filled for a one year term on a rotating basis. The Commonwealth will occupy the position every second year, with the other participating governments dividing up the other years as agreed between them.

The Ministerial Council will be supported by an independent secretariat which will report to the Chair rather than to any one participating government. The chief executive of the secretariat will be nominated by the Commonwealth and appointed by a majority vote of the Ministerial Council (that is, if all States and Territories take part in the scheme, five out of nine votes). The secretariat will be constituted as a permanent statutory agency. Secretariat staff will be employed as Commonwealth public servants and be drawn from a variety of backgrounds such as government (State, Territory and federal), employer bodies, trade unions, the legal profession and academia.

The independent secretariat will develop policy and amendments relating to the national industrial relations law for approval by the Ministerial Council. It will not be a regulatory agency, but a co-ordinating body responsible for matters such as:

- preparing comparative data about the operation and enforcement of the national industrial relations law in each participating jurisdiction,
- overseeing the implementation of decisions of the Ministerial Council,
- conducting research for, and formulating advice to, the Ministerial Council,
- consulting with stakeholders as directed by the Ministerial Council, and
- developing reports generally for the Ministerial Council, including as to the judicial enforcement of the law.

The secretariat need not be based in Canberra. State, Territory and Commonwealth industrial relations Ministers will continue their present role of having carriage of industrial relations policy and related legislation for their respective governments. Departmental support in each case will be necessary to ensure that participating Ministers are suitably informed and advised of policy and other issues, such as emerging local industrial relations developments. Participating governments might also establish advisory councils or other consultative bodies to inform Ministers of the views of local or national stakeholders such as unions and employer associations.
Regular meetings should be scheduled between the senior officers of each participating government and the national secretariat.

The operation of the Ministerial Council and the national secretariat should be funded by all participating governments.

6.4.3 Mechanisms for State involvement

Each of the mechanisms set out below require the enactment of a new law by the State Parliaments. Other enactments will be necessary to amend or repeal existing State industrial relations laws.

The first mechanism (text-based referral) allows a State to take part in the national law by making two references of power under section 51(37) of the Constitution. The first reference will allow the Commonwealth, on a one-off basis, to enact the exact agreed text of new national industrial relations law. The second reference will allow the Commonwealth to amend that law, but only in strict accordance with the amendment process set out below. Both referrals will provide that they may be repealed by the relevant State Parliament after giving six months notice to all other participating jurisdictions.

The second mechanism (uniform legislation) requires the Commonwealth to enact template legislation to then be adopted (along automatically with any future amendments that are made in accordance with the amendment process set out below) by laws enacted by the State Parliaments.34

In either case, only one national law will be enacted by the Commonwealth. The text of that law will be agreed upon by all participating jurisdictions, and will amend or repeal the Commonwealth’s present industrial relations law and set out new law. The national law will operate directly in a State where based upon a referral, or will otherwise be applied in a State due to the State’s uniform application legislation.

Both mechanisms allow the Commonwealth to enact a comprehensive law (comprising one or more separate statutes) for industrial relations that falls outside of its current powers (both as to the coverage of the law and the use of matters like common rule awards). Amendments to the law will be enacted by the Commonwealth Parliament for all participating jurisdictions. The amendments will operate directly in those States that have referred power, and will operate by way of automatic adoption in those States that choose the uniform legislation model.

6.4.4 Amendments

Amendments of a purely technical or machinery nature may be certified as such by the Commonwealth and enacted unilaterally by it. The Commonwealth must provide the text of such an amendment to each participating government 28 days before its introduction into Parliament, unless this requirement has been waived by each jurisdiction. Where any State or Territory notifies the Commonwealth during this period that the amendment is not of a technical or machinery nature, it must be referred to the Ministerial Council for approval.

In this case and for all other amendments, the change requires the consent of a two thirds majority of the Ministerial Council, including a majority of the States (that is, if all governments take part, six of the nine jurisdictions including at least four States). In practical terms, while the Commonwealth does not have a power of veto, securing the passage of an amendment through the Australian Parliament may prove difficult unless the Commonwealth government consents to the change. It is not possible, nor in any event appropriate, to place a legal obligation on the Australian Parliament to enact a change to which the Commonwealth does not concur.
Each jurisdiction will indicate consent to an amendment through an instrument like, in the case of a State, an order of the Governor in Council published in the government gazette. Consent may not be implied from inaction. Alternatively, consent may be obtained by the Chair of the Ministerial Council certifying that the required level of consent has been obtained at a meeting of the Council.

Both of the mechanisms used by the States to take part in the scheme will provide that where the Commonwealth makes an amendment to the national law that does not have the required level of consent, the referral or uniform legislation will not give the amendment legal force. This will apply only to amendments to the text of the national law and not to other Commonwealth statutes.

### 6.4.5 Regulations

The text of the regulations to be initially made under the national law will be agreed to, along with the text of the law itself, by all governments. This need not happen simultaneously as regulations can often be made after the passage of the enabling law.

Subsequent amendments to the regulations will be made by the Commonwealth. The Commonwealth will be required to provide the text of any change to participating jurisdictions for 28 days consideration. If a majority of jurisdictions disallows the amendment to the regulations, such as by order of the Governor in Council published in the government gazette, the amendment will have no legal effect. Otherwise, the amendment will come into force immediately on the expiry of the 28 day period.

The Commonwealth will be able to make trivial or urgent amendments (as certified by it) to the regulations with immediate effect. However, participating governments will still have 28 days within which to consider such amendments, and by majority to disallow them.

### 6.4.6 Excluded matters

The national industrial relations law will be capable of excluding three types of matters:

- general exclusions applying to all States and Territories written into the text of the law at the time of its drafting,
- jurisdiction-specific exclusions applying only to one or more States or Territories written into the text of the law (as a schedule) at the time of its drafting, and
- later exclusions of a general or jurisdiction-specific nature made by amendment to the law by the process set out above.

Jurisdiction-specific exclusions may subsequently be withdrawn by the jurisdiction through a means such as an act of Parliament or order of the Governor published in the government gazette. This would allow a jurisdiction to join the national system through a staged process over a period of time.

The matters excluded in each case could include:

- categories of workers (such as those in the public sector),
- areas of regulation (such as workers compensation or State-based registration of industrial associations), and
- specific laws (such as a law that preserves an entitlement or restriction).

### 6.4.7 Interaction of the National law and State and Territory laws

The national law will provide that it is not intended to exclude or limit the concurrent operation of State or Territory laws (so that it does not ‘cover the field’ for the purposes of section 109 of the Constitution). The object is not to provide a ‘back door’ method for the States to provide additional industrial relations regulation on top of the national law (this being dealt with solely by
the exclusion mechanisms set out above). Instead, the aim is to prevent State laws on other topics, such as anti-discrimination, being inadvertently overridden by the national law.

Part 1.1A of the Corporations Act 2001 (Cth) (set out in Appendix 3) provides a useful starting point. However, provisions such as sections 5F and 5G of the Corporations Act will not be included. These provide, respectively, that the national law does not apply to matters declared by State or Territory law to be excluded matters and that a State can avoid inconsistency arising between the national law and one of its laws. This form of interaction of State and federal laws is instead dealt with by the exclusion mechanisms set out above.

6.4.8 Administration and enforcement

The institutional and other aspects of the national law will need to be agreed upon by all participating governments as part of the drafting of the national law.

A national tribunal or other like body exercising non-judicial powers might be established as follows:

- the national body could be composed of divisions within each State and Territory, providing thereby local action and enforcement,
- any national apparatus to co-ordinate the work of the divisions could be appointed by the Commonwealth, except for its board which will be appointed 50 per cent by the Commonwealth and 50 per cent by the States and Territories,
- each division might be constituted by the transfer of the personnel of the current State or Territory industrial relations commission or other body,
- subsequent appointments to each division might be made 50 per cent by the Commonwealth and 50 per cent by the relevant State or Territory, with the Commonwealth being able to appoint the head of each division subject to a veto by the State or Territory,
- each division could be vested with power under the national law, and
- each division (or specified members) could also be vested with power, in accordance with the decision of the High Court in R v Duncan; Ex parte Australian Iron and Steel Pty Ltd, by the relevant State and Territory in regard to excluded matters within that jurisdiction.

Inspection, compliance and other service delivery work should be contracted out by the Commonwealth to State and Territory agencies as part of a suitable funding arrangement. These agencies would undertake functions at the local level in each jurisdiction with regard both to the national law and any State excluded matters.

The national law will also require judicial enforcement. In the case of States making a text-based referral, the jurisdiction to deal with legal issues will be vested in both federal and State courts.

In the case of States adopting uniform legislation, the jurisdiction to decide disputes will be vested only in State courts due to the High Court’s decision in Re Wakim; Ex parte McNally. This could give rise to extra cost, inconvenience and inconsistencies in the judicial application of the law. These problems mean that uniform legislation may only be a short term option unless the restriction on cooperation in the Constitution is removed by a referendum that would permit federal judicial enforcement of State laws (see 3.4.2). The amendment should also address the High Court’s decision in R v Hughes by permitting Commonwealth officers to validly exercise State functions imposed on them under the uniform State laws.
6.4.9 Form of the legislation

The text of the new national law (which will operate directly in States that choose to refer, or will operate by way of uniform State law in States that prefer that option) will be drafted after participating governments have agreed on the key elements of the industrial relations system. The text will be as succinct as possible and expressed in plain language. It will set clear statutory objectives and contain broad guidelines for the tribunals, agencies, courts and any other bodies established to carry out, administer and enforce the law, rather than entering into meticulous detail about what is and is not permitted to be done by such bodies, or by the workplace parties.

These characteristics of plain language and broad discretions in the hands of respected people are preferable in terms of making the law more easily understood (by, for example, small businesses and employee representatives) and applied by them. Drafting the text of the law in this way will be an important contribution to the success of a system requiring ongoing interaction between governments and incorporating a process for amendments not conducive to constant, rapid use.

6.5 THE OPTIMUM MODEL AND THE PRINCIPLES

The Inquiry proposes the optimum model as the best means for giving expression to the principles identified in Chapter 5, which achieved a high level of support from the submissions. Significantly, the shortcomings of the current structure identified in Chapter 2 are not present in this model. Issues of inadequate coverage, who is in and who is not, the legal complexities and the inefficiencies of relying on the corporations power will all be resolved should this optimum model be implemented.

6.5.1 Fair

Whether or not fairness in a workplace sense is achieved will depend more upon the text of the industrial relations legislation that the participating governments agree on than the architecture proposed by the optimum model. However, the model that is now proposed has been designed to ensure to the greatest extent possible that fairness is not only an achievable outcome, but also the most likely outcome.

The following features of the model will be conducive to fair outcomes:

- The establishment of an agreed legislative text that applies in all jurisdictions (whether by way of referral or by way of State based legislation) means that there will effectively be one law that applies to all employers and employees equally, wherever they might live and work.

- By bringing together all the jurisdictions, a variety of views, experiences and achievements will be shared, providing the capacity to create a single industrial relations system that adopts the best of each jurisdiction.

- Maintaining an ongoing role for all governments, State, Territory and Commonwealth, achieves democratic accountability and maximises the channels whereby business, union and community concerns and input can be heard.

- The risk of concentration of power at one level of government, which is more likely to see large swings of the pendulum from one type of industrial relations system to another each time there is a change of government, is minimised. Requiring ongoing cooperation of all participating governments will produce greater stability and certainty for parties in the workplace about their ongoing rights and obligations to each other.
• The model envisages continued tripartite input, with the independent secretariat drawing from government, business and unions for its staffing.
• Less complex drafting will encourage the development of legislation that places more discretion in tribunals, rather than detailed legislative prescription. This would promote a transparent and independent approach to dealing with industrial issues.

6.5.2 Efficient
The optimum model would bring a far greater measure of stability and certainty to industrial relations in Australia. Apart from any exclusions in particular States that are agreed at the outset, all other matters will be dealt with in the agreed text of the new national law. That law will create a seamless industrial relations system within which employers of all sizes and types will be able to conduct their industrial relations with their employees and/or their representative unions, without worrying about which system they are in or having to beware of jurisdictional impediments that might stand in the way of achieving desired outcomes.

Future amendments to the national law will be made where a two thirds majority vote is achieved, thereby ensuring a measure of stability in an area of regulation that has at many times been driven by partisan politics. Long term stability in a regulatory area is conducive to the maximisation of efficiency for those subject to the regulation. Furthermore, the cooperative governance approach will assist in reducing the duplication being experienced in the existing structure.

A simpler national structure of industrial relations will offer efficiencies as participants within the structure build up trust, knowledge and experience of how the system operates.

The proposal that there be a single body to administer the new national law should ease the compliance burden for employers and avoid difficult questions about where to go for advice and assistance. There will be no confusion as to which State or federal body deals with what particular employment related issue and matters will be able to be dealt with in a more timely fashion.

The proposal for a new approach to drafting, which is necessitated by the governance structure, will result in a simpler, clearer and more certain set of laws. Taking this approach will provide an opportunity to modernise and significantly diminish the record keeping and related compliance burdens required of employers, an issue of considerable importance for small to medium enterprises.

6.5.3 Universally accessible
All employers and employees will be governed by one national structure. There will be no workers who ‘fall through the cracks’ and all users of this comprehensive industrial relations structure will know where to go for information, advice and assistance. The need for legal argument to determine jurisdictional coverage will fall away in this new integrated structure. This will also have the impact of making the structure more affordable and therefore more accessible to those who have not been able to pay for the expense of taking matters of redress to the federal courts in the current structure.

It is acknowledged that ‘who is in and who is out’ of the system will in part be a question of definition to be determined by the participating governments. The governments will need to agree on whether the new system covers only employees in the common law sense of the term, or whether it extends to cover ‘workers’ in the broader sense of persons whose main income is derived from the sale of their labour, whatever legal structure they may use to enter into the contract for their labour. In other words, it will be up to the participating
governments to decide whether dependent contractors, independent contractors, franchisees or licensees or others are to be covered by the new system. But the importance of the proposed cooperative model is that everyone within the definition will be in what is essentially one seamless system of law.

The model proposes a national tribunal or other such body that is able to deliver its services at the localised level. This will provide for ease of participation regardless of whether an employer or worker is subject to a State or federal law. The vesting of Commonwealth and State non-judicial functions in the one tribunal will ensure there is no demarcation in jurisdiction and provides a capacity to accommodate a diverse group of users.

6.5.4 Cooperative

If there is any lesson to be learnt from the unilateral introduction of the Work Choices legislation, it is that without a cooperative strategy a truly national approach to industrial relations cannot be achieved. The Commonwealth can only enact laws on the basis of the constitutional powers available to it, which leaves gaps that are presently filled by the States. Not surprisingly, given the different positions of the various governments on the effects of Work Choices, State governments have acted to do what they can to remedy what they see as the deficiencies of Work Choices. The same employer may thus be subject to different standards emanating from different jurisdictions.

Cooperative federalism requires a participatory approach from States and Territories to collaborate and work with a federal government, which equally has a role to ensure individual State and Territory interests and the needs of local or regional areas are taken into account. The governance model has been designed to ensure that input from all governments is built into both the development and maintenance phases of the new national law.

Up front intergovernmental agreement will be required to initiate the drafting of the new law, and a two thirds majority of the jurisdictions will be required to make any amendments of substance thereafter.

The model builds further on the cooperative approach by proposing that the national tribunal or like body exercising non-judicial powers could use the expertise and experience existing in the present State and federal industrial relations tribunals.

The five step plan for developing and implementing national industrial relations law (set out below) incorporates a cooperative approach at every stage.

6.5.5 Adaptive

The optimum model is adaptive. States and Territories at the time of drafting national legislation can choose to exclude matters that are particular to their jurisdiction, but have the capacity to include those matters in the national system should it become appropriate to do so. It is flexible in that it thus provides for parties to come on board progressively over time.

Once the national law is agreed and implemented, the Ministerial Council will have the capacity to approve amendments by a two thirds majority. This will make the structure more stable and heighten the level of confidence in the system. Importantly, it will not be possible to implement widespread amendment to the agreed national law at the will of any one government.

The Ministerial Council will be the driver of change and each participating government can bring policies and initiatives to the table for discussion and debate. Participating governments will be able to represent their distinct community needs in relation to social, technological and economic changes within their jurisdiction.
6.6  A FIVE STEP PLAN FOR A NATIONAL INDUSTRIAL RELATIONS LAW

The terms of reference for this Inquiry require the development of an implementation strategy for achieving the optimum model. A broad timeframe for achievement of the key milestones is set out below.

Step 1: by March 2008

- States, Territories and the Commonwealth agree on the governmental and other structures, as proposed in this report, to provide the architecture of the scheme.
- Commonwealth to form a national advisory body and the States and Territories local advisory bodies to provide input on the content of the national law and related issues such as excluded matters.

Step 2: by June 2008

- States, Territories and the Commonwealth agree on the principles, core content and general exclusions that will constitute the drafting instructions for the national law.
- States and Territories provide an initial list of any jurisdiction-specific exclusions for the drafting instructions.

Step 3: by December 2008

- National law drafted by the Commonwealth with the assistance of State and Territories.
- States and Territories draft laws to amend existing State and Territory laws and provide for jurisdiction-specific exclusions.
- States, Territories and the Commonwealth agree on the text of the national law.
- States and Territories provide a final list of any jurisdiction-specific exclusions.

Step 4: by June 2009

- Commonwealth Parliament enacts the national law.
- State Parliaments enact referral or uniform legislation.
- State and Territory Parliaments enact legislation to amend existing State and Territory laws and provide for jurisdiction-specific exclusions.
- Process begins of reforming relevant institutions and establishing the administrative and other aspects of the national law.
- Text of the initial regulations drafted and then agreed to before coming to force by the States, Territories and the Commonwealth.

Step 5: January 2010

- National law and State and Territory laws come into force.
ENDNOTES

1 Submission 1, Master Builders NSW, p1.
2 Submission 1, Master Builders NSW, p2.
3 Submission 1, Master Builders NSW, p3.
4 Submission 1, Master Builders NSW, p3.
5 Submission 18, Australian Business Industrial, p7.
7 Submission 30, Business Council of Australia, p3.
8 Submission 30, Business Council of Australia, p5.
9 Submission 23, Australian Industry Group, p3.
10 Submission 8, Local Government Association of NSW, p2.
12 Submission 7, Catholic Commission for Employment Relations, p5.
15 Submission 17, Unions NSW, p3.
16 Submission 32, Centre for Employment and Labour Relations Law, University of Melbourne, p5 also noted the contribution of specific Victorian laws in addressing the poor conditions of outworkers, owner-drivers and forestry workers.
17 Submission 17, Unions NSW, see timeline of NSW milestones pp6-7, p18.
18 Submission 17, Unions NSW, p9.
19 Submission 17, Unions NSW, p13.
20 For example, Submission 16, NSW/SA/Tas Branch of the Textile Clothing and Footwear Union of Australia noted the benefits to outworkers and others in contingent or precarious employment (these were also acknowledged in Submission 25, FairWear NSW and Submission 26, Asian Women at Work Inc). Submission 15, Association of Professional Engineers, Scientists and Managers Australia (NSW Branch) and the Local Government Engineers Association of NSW and Submission 22, United Services Union both emphasised the good outcomes for local government workers of State coverage (also supported by Submission 8, Local Government Association of NSW), and Submission 19, Transport Workers Union of NSW noted the special industrial jurisdiction for owner drivers in NSW.
21 Submission 17, Unions NSW, p17. See also Submission 5, Community and Public Sector Union, State Public Services Federation Group; Submission 14, Police Federation of Australia; Submission 20, NSW Teachers Federation.
22 Submission 31, Australian Services Union of NSW, p8.
23 Submission 9, CFMEU Mining and Energy Division, Introduction. See also Submission 27, Tony Stevin, p3.
24 (1983) 158 CLR 535. See the discussion at 3.2.2.
25 Submission 9, CFMEU Mining and Energy Division, at 7.2.
26 Submission 9, CFMEU Mining and Energy Division at 9.5; note that this submission has informed much of the discussion at 3.2.2 in Chapter 3.
27 The NCSC regime is further described in Chapter 3 at 3.2.3.
28 Submission 28, Professor Ron McCallum AO, p1.
29 Submission 2, Professor Andrew Stewart, p3.
31 Submission 2, Professor Andrew Stewart p6.
## Appendix 1 – List of submissions

1. Master Builders New South Wales
2. Professor Andrew Stewart, School of Law, Flinders University
3. Women’s Electoral Lobby Australia Inc
4. NSW/ACT Independent Education Union
5. Community & Public Sector Union, State Public Services Federation Group
6. Youth Action Policy Association
7. Catholic Commission for Employment Relations
8. Local Government Association of NSW
9. Construction, Forestry, Mining and Energy Union (CFMEU) Mining & Energy Division, National Office
10. Professor John Nevile, Australian School of Business, University of New South Wales
11. Associate Professor Peter Kriesler, School of Economics, University of New South Wales
12. Members of the Public Service Association employed at the NSW Industrial Relations Commission
13. Mr Con Farrugia
14. Police Federation of Australia
15. Association of Professional Engineers, Scientists and Managers, Australia (NSW Branch) [APESMA] and the Local Government Engineers’ Association of New South Wales [LGEA]
16. NSW/SA/TAS Branches of the Textile Clothing & Footwear Union of Australia
17. Unions NSW
18. Australian Business Industrial
19. Transport Workers Union of New South Wales
20. NSW Teachers Federation
21. Motor Traders Association of New South Wales
22. New South Wales Local Government, Clerical, Administrative, Energy, Airlines and Utilities Union
23. Australian Industry Group
24. Mr D R Connochie
25. FairWear NSW
26. Asian Women at Work Inc.
27. Mr Tony Slevin, Barrister, H B Higgins Chambers
28. Professor Ron McCallum, AO, Blake Dawson Waldron Professor in Industrial Law, University of Sydney
29. Australian Institute of Employment Rights
30. Business Council of Australia
31. Australian Services Union
32. Centre for Employment and Labour Relations Law, University of Melbourne
## Appendix 2 – List of consultations

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>27 August 2007</td>
<td>Industrial Relations Commission of New South Wales</td>
</tr>
<tr>
<td>10 September 2007</td>
<td>Meeting with:</td>
</tr>
<tr>
<td></td>
<td>– Department of Premier and Cabinet</td>
</tr>
<tr>
<td></td>
<td>– Department of Commerce</td>
</tr>
<tr>
<td></td>
<td>– Department of Education and Training</td>
</tr>
<tr>
<td></td>
<td>, New South Wales Government</td>
</tr>
<tr>
<td>14 September 2007</td>
<td>Workplace Relations Ministers Council</td>
</tr>
<tr>
<td>21 September 2007</td>
<td>Unions NSW and affiliates, New South Wales Government</td>
</tr>
<tr>
<td>24 September 2007</td>
<td>Mordy Bromberg SC, Barrister, Joan Rosanove Chambers</td>
</tr>
<tr>
<td>(Melbourne)</td>
<td>Pamela Tate, Victorian Solicitor-General, Joan Rosanove Chambers</td>
</tr>
<tr>
<td></td>
<td>David Gregory, General Manager, Workplace Relations Policy</td>
</tr>
<tr>
<td></td>
<td>Victorian Employers Chamber of Commerce and Industry (VECCI)</td>
</tr>
<tr>
<td></td>
<td>Brian Boyd, Secretary, Victorian Trades Hall Council</td>
</tr>
<tr>
<td></td>
<td>Industrial Relations Victoria, Victorian Government</td>
</tr>
<tr>
<td></td>
<td>The Hon Rob Hulls, MP, Minister for Industrial Relations, Victoria</td>
</tr>
<tr>
<td>26 September 2007</td>
<td>Australian Council of Trade Unions (ACTU)</td>
</tr>
<tr>
<td>3 October 2007</td>
<td>Meeting with:</td>
</tr>
<tr>
<td></td>
<td>– Australian Services Union</td>
</tr>
<tr>
<td></td>
<td>– United Services Union</td>
</tr>
<tr>
<td></td>
<td>– Independent Education Union</td>
</tr>
<tr>
<td></td>
<td>The Hon John Hatzistergos, MLC, Attorney General and Minister for Justice (NSW)</td>
</tr>
<tr>
<td></td>
<td>Business Council of Australia</td>
</tr>
<tr>
<td></td>
<td>Professor Ron McCallum, University of Sydney</td>
</tr>
<tr>
<td>5 October 2007</td>
<td>Department of Employment and Industrial Relations Queensland Government</td>
</tr>
<tr>
<td>(Brisbane)</td>
<td>Australian Workers Union</td>
</tr>
<tr>
<td></td>
<td>Queensland Council of Unions and affiliates</td>
</tr>
<tr>
<td></td>
<td>Australian Industry Group (AiG)</td>
</tr>
<tr>
<td>10 October 2007</td>
<td>Industrial Relations Commission of New South Wales</td>
</tr>
<tr>
<td></td>
<td>Department of Premier and Cabinet</td>
</tr>
<tr>
<td></td>
<td>New South Wales Government</td>
</tr>
<tr>
<td></td>
<td>Round Table with:</td>
</tr>
<tr>
<td></td>
<td>– Professor Andrew Stewart, Flinders University</td>
</tr>
<tr>
<td></td>
<td>– The Hon Paul Munro, former Senior Presidential Member of the</td>
</tr>
<tr>
<td></td>
<td>Australian Industrial Relations Commission</td>
</tr>
<tr>
<td></td>
<td>– Associate Professor Joellen Reilly, University of New South Wales</td>
</tr>
<tr>
<td></td>
<td>– Associate Professor Anne Twomey, University of Sydney</td>
</tr>
<tr>
<td>Date</td>
<td>Organisation</td>
</tr>
<tr>
<td>--------------</td>
<td>------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>12 October 2007 (Perth)</td>
<td>Western Australian Industrial Relations Commission</td>
</tr>
<tr>
<td></td>
<td>Chamber of Commerce and Industry Western Australia</td>
</tr>
<tr>
<td></td>
<td>UnionsWA and affiliates</td>
</tr>
<tr>
<td></td>
<td>Department of Consumer and Employment Protection Western Australian Government</td>
</tr>
<tr>
<td></td>
<td>Chief of Staff and Chief Industrial Adviser to the Hon Michelle Roberts MLA, Minister for Employment Protection</td>
</tr>
<tr>
<td>19 October 2007</td>
<td>Public Service Association of New South Wales</td>
</tr>
<tr>
<td>24 October 2007 (Hobart)</td>
<td>Department of Justice, Tasmanian Government</td>
</tr>
<tr>
<td></td>
<td>Tasmanian Industrial Commission</td>
</tr>
<tr>
<td></td>
<td>Unions Tasmania and affiliates</td>
</tr>
<tr>
<td></td>
<td>Advisor to the Hon Paul Lennon, MHA, Premier of Tasmania</td>
</tr>
<tr>
<td></td>
<td>The Hon Steve Kons, MHA, Deputy Premier of Tasmania</td>
</tr>
<tr>
<td></td>
<td>Minister for Justice and Workplace Relations</td>
</tr>
<tr>
<td>26 October 2007</td>
<td>Unions NSW and Affiliates</td>
</tr>
<tr>
<td></td>
<td>Unions NSW</td>
</tr>
<tr>
<td>29 October 2007 (Canberra)</td>
<td>ACT &amp; Region Chamber of Commerce and Industry</td>
</tr>
<tr>
<td></td>
<td>Office of Industrial Relations, Australian Capital Territory</td>
</tr>
<tr>
<td></td>
<td>Unions ACT</td>
</tr>
<tr>
<td></td>
<td>The Hon Andrew Barr, MLA</td>
</tr>
<tr>
<td></td>
<td>Minister for Industrial Relations, Australian Capital Territory</td>
</tr>
<tr>
<td>2 November 2007 (Adelaide)</td>
<td>The Hon Michael Wright, MP</td>
</tr>
<tr>
<td></td>
<td>Minister for Industrial Relations, South Australian Government</td>
</tr>
<tr>
<td></td>
<td>SafeWork SA, South Australian Government</td>
</tr>
<tr>
<td></td>
<td>Attorney General’s Department</td>
</tr>
<tr>
<td></td>
<td>Department of Premier and Cabinet, South Australian Government</td>
</tr>
<tr>
<td>7 November 2007</td>
<td>NT Workplace Advocate, Northern Territory Government</td>
</tr>
<tr>
<td></td>
<td>Professor Andrew Stewart, Flinders University</td>
</tr>
<tr>
<td></td>
<td>Electrical Trades Union, New South Wales Branch</td>
</tr>
<tr>
<td></td>
<td>Department of Consumer and Employment Protection Western Australian Government</td>
</tr>
<tr>
<td>9 November 2007</td>
<td>Department of Employment and Industrial Relations Queensland Government</td>
</tr>
<tr>
<td></td>
<td>Department of Justice, Tasmanian Government</td>
</tr>
<tr>
<td></td>
<td>Industrial Relations Commission of New South Wales</td>
</tr>
<tr>
<td>12 November 2007</td>
<td>SafeWork SA, South Australian Government</td>
</tr>
<tr>
<td></td>
<td>Industrial Relations Commission of New South Wales</td>
</tr>
<tr>
<td>14 November 2007</td>
<td>Industrial Relations Victoria, Victorian Government</td>
</tr>
<tr>
<td>19 November 2007</td>
<td>Western Australian Industrial Relations Commission</td>
</tr>
</tbody>
</table>
PART 1.1A—INTERACTION BETWEEN CORPORATIONS LEGISLATION AND STATE AND TERRITORY LAWS

5D Coverage of Part

(1) This Part applies only to laws of a State or Territory that is in this jurisdiction.

(2) This Part applies only to the following Corporations legislation:
   (a) this Act (including the regulations made under this Act); and
   (b) Part 3 of the ASIC Act; and
   (c) regulations made under the ASIC Act for the purposes of Part 3 of that Act.

(3) This Part does not apply to Part 3 of the ASIC Act, or regulations made under that Act for the purposes of Part 3 of that Act, to the extent to which they operate in relation to a contravention of Division 2 of Part 2 of that Act.

5E Concurrent operation intended

(1) The Corporations legislation is not intended to exclude or limit the concurrent operation of any law of a State or Territory.

(2) Without limiting subsection (1), the Corporations legislation is not intended to exclude or limit the concurrent operation of a law of a State or Territory that:
   (a) imposes additional obligations or liabilities (whether criminal or civil) on:
       (i) a director or other officer of a company or other corporation; or
       (ii) a company or other body; or
   (b) confers additional powers on:
       (i) a director or other officer of a company or other corporation; or
       (ii) a company or other body; or
   (c) provides for the formation of a body corporate; or
   (d) imposes additional limits on the interests a person may hold or acquire in a company or other body; or
   (e) prevents a person from:
       (i) being a director of; or
       (ii) being involved in the management or control of;
           a company or other body; or
   (f) requires a company:
       (i) to have a constitution; or
       (ii) to have particular rules in its constitution.

Note: Paragraph (a)—this includes imposing additional reporting obligations on a company or other body.

(3) Without limiting subsection (2), a reference in that subsection to a law of a State or Territory imposing obligations or liabilities, or conferring powers, includes a reference to a law of a State or Territory imposing obligations or liabilities, or conferring powers, by reference to the State or Territory in which a company is taken to be registered.

(4) This section does not apply to the law of the State or Territory if there is a direct inconsistency between the Corporations legislation and that law.

Note: Section 5G prevents direct inconsistencies arising in some cases by limiting the operation of the Corporations legislation.
If:
(a) an act or omission of a person is both an offence against the Corporations legislation and an offence under the law of a State or Territory; and
(b) the person is convicted of either of those offences;
the person is not liable to be convicted of the other of those offences.

**5F Corporations legislation does not apply to matters declared by State or Territory law to be an excluded matter**

(1) Subsection (2) applies if a provision of a law of a State or Territory declares a matter to be an excluded matter for the purposes of this section in relation to:
(a) the whole of the Corporations legislation; or
(b) a specified provision of the Corporations legislation; or
(c) the Corporations legislation other than a specified provision; or
(d) the Corporations legislation otherwise than to a specified extent.

(2) By force of this subsection:
(a) none of the provisions of the Corporations legislation (other than this section) applies in the State or Territory in relation to the matter if the declaration is one to which paragraph (1)(a) applies; and
(b) the specified provision of the Corporations legislation does not apply in the State or Territory in relation to the matter if the declaration is one to which paragraph (1)(b) applies; and
(c) the provisions of the Corporations legislation (other than this section and the specified provisions) do not apply in the State or Territory in relation to the matter if the declaration is one to which paragraph (1)(c) applies; and
(d) the provisions of the Corporations legislation (other than this section and otherwise than to the specified extent) do not apply in the State or Territory in relation to the matter if the declaration is one to which paragraph (1)(d) applies.

(3) Subsection (2) does not apply to the declaration to the extent to which the regulations provide that that subsection does not apply to that declaration.

(4) By force of this subsection, if:
(a) the Corporations Law, ASC Law or ASIC Law of a State or Territory; or
(b) a provision of that Law;
did not apply to a matter immediately before this Act commenced because a provision of a law of the State or Territory provided that that Law, or that provision, did not apply to the matter, the Corporations legislation, or the provision of the Corporations legislation that corresponds to that provision of that Law, does not apply in the State or Territory to the matter until that law of the State or Territory is omitted or repealed.

(5) Subsection (4) does not apply to the application of the provisions of the Corporations legislation to the matter to the extent to which the regulations provide that that subsection does not apply to the matter.

(6) In this section:
  * **matter** includes act, omission, body, person or thing.
Avoiding direct inconsistency arising between the Corporations legislation and State and Territory laws

Section overrides other provisions of the Corporations legislation

(1) This section has effect despite anything else in the Corporations legislation.

Section does not deal with provisions capable of concurrent operation

(2) This section does not apply to a provision of a law of a State or Territory that is capable of concurrent operation with the Corporations legislation.

Note: This kind of provision is dealt with by section 5E.

When this section applies to a provision of a State or Territory law

(3) This section applies to the interaction between:

(a) a provision of a law of a State or Territory (the State provision); and

(b) a provision of the Corporations legislation (the Commonwealth provision);

only if the State provision meets the conditions set out in the following table:

<table>
<thead>
<tr>
<th>Conditions to be met before section applies</th>
<th>[operative]</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Item</strong></td>
<td><strong>Kind of provision</strong></td>
</tr>
</tbody>
</table>
| 1 | a pre commencement (commenced) provision | (a) the State provision operated, immediately before this Act commenced, despite the provision of:
   | | (i) the Corporations Law of the State or Territory (as in force at that time); or
   | | (ii) the ASC or ASIC Law of the State or Territory (as in force at that time);
   | | that corresponds to the Commonwealth provision; and
   | | (b) the State provision is not declared to be one that this section does not apply to (either generally or specifically in relation to the Commonwealth provision) by:
   | | (i) regulations made under this Act; or
   | | (ii) a law of the State or Territory. |
| 2 | a pre commencement (enacted) provision | (a) the State provision would have operated, immediately before this Act commenced, despite the provision of:
   | | (i) the Corporations Law of the State or Territory (as in force at that time); or
   | | (ii) the ASC or ASIC Law of the State or Territory (as in force at that time);
<p>| | that corresponds to the Commonwealth provision if the State provision had commenced before the commencement of this Act; and |</p>
<table>
<thead>
<tr>
<th>Item</th>
<th>Kind of provision</th>
<th>Conditions to be met</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>(b) the State provision is not declared to be one that this section does not apply to (either generally or specifically in relation to the Commonwealth provision) by:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(i) regulations made under this Act; or</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(ii) a law of the State or Territory.</td>
</tr>
<tr>
<td>3</td>
<td>a post commencement provision</td>
<td>the State provision is declared by a law of the State or Territory to be a Corporations legislation displacement provision for the purposes of this section (either generally or specifically in relation to the Commonwealth provision)</td>
</tr>
<tr>
<td>4</td>
<td>a provision that is materially amended on or after this Act commenced if the amendment was enacted before this Act commenced</td>
<td>(a) the State provision as amended would have operated, immediately before this Act commenced, despite the provision of:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(i) the Corporations Law of the State or Territory (as in force at that time); or</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(ii) the ASC or ASIC Law of the State or Territory (as in force at that time);</td>
</tr>
<tr>
<td></td>
<td></td>
<td>that corresponds to the Commonwealth provision if the amendment had commenced before the commencement of this Act; and</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(b) the State provision is not declared to be one that this section does not apply to (either generally or specifically in relation to the Commonwealth provision) by:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(i) regulations made under this Act; or</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(ii) a law of the State or Territory.</td>
</tr>
<tr>
<td>5</td>
<td>a provision that is materially amended on or after this Act commenced if the amendment is enacted on or after this Act commenced</td>
<td>the State provision as amended is declared by a law of the State or Territory to be a Corporations legislation displacement provision for the purposes of this section (either generally or specifically in relation to the Commonwealth provision)</td>
</tr>
</tbody>
</table>

**Note 1:** Item 1—subsection (12) tells you when a provision is a pre commencement (commenced) provision.

**Note 2:** Item 1 paragraph (a)—For example, a State or Territory provision enacted after the commencement of the Corporations Law might not have operated despite the Corporations Law if it was not expressly provided that the provision was to operate despite a specified provision, or despite any provision, of the Corporations Law (see, for example, section 5 of the Corporations (New South Wales) Act 1990).

**Note 3:** Item 2—subsection (13) tells you when a provision is a pre commencement (enacted) provision.

**Note 4:** Item 3—subsection (14) tells you when a provision is a post commencement provision.

**Note 5:** Subsections (15) to (17) tell you when a provision is materially amended after commencement.
State and Territory laws specifically authorising or requiring act or thing to be done

(4) A provision of the Corporations legislation does not:
(a) prohibit the doing of an act; or
(b) impose a liability (whether civil or criminal) for doing an act;
if a provision of a law of a State or Territory specifically authorises or requires the doing of that act.

Instructions given to directors under State and Territory laws

(5) If a provision of a law of a State or Territory specifically:
(a) authorises a person to give instructions to the directors or other officers of a company or body; or
(b) requires the directors of a company or body to:
   (i) comply with instructions given by a person; or
   (ii) have regard to matters communicated to the company or body by a person; or
(c) provides that a company or body is subject to the control or direction of a person;
a provision of the Corporations legislation does not:
(d) prevent the person from giving an instruction to the directors or exercising control or direction over the company or body; or
(e) without limiting subsection (4):
   (i) prohibit a director from complying with the instruction or direction; or
   (ii) impose a liability (whether civil or criminal) on a director for complying with the instruction or direction.

The person is not taken to be a director of a company or body for the purposes of the Corporations legislation merely because the directors of the company or body are accustomed to act in accordance with the person’s instructions.

Use of names authorised by State and Territory laws

(6) The provisions of Part 2B.6 and Part 5B.3 of this Act do not:
(a) prohibit a company or other body from using a name if the use of the name is expressly provided for, or authorised by, a provision of a law of a State or Territory; or
(b) require a company or other body to use a word as part of its name if the company or body is expressly authorised not to use that word by a provision of a law of a State or Territory.

Meetings held in accordance with requirements of State and Territory laws

(7) The provisions of Chapter 2G of this Act do not apply to the calling or conduct of a meeting of a company to the extent to which the meeting is called or conducted in accordance with a provision of a law of a State or Territory. Any resolutions passed at the meeting are as valid as if the meeting had been called and conducted in accordance with this Act.

External administration under State and Territory laws

(8) The provisions of Chapter 5 of this Act do not apply to a scheme of arrangement, receivership, winding up or other external administration of a company to the extent to which the scheme, receivership, winding up or administration is carried out in accordance with a provision of a law of a State or Territory.
State and Territory laws dealing with company constitutions

(9) If a provision of a law of a State or Territory provides that a provision is included, or taken to be included, in a company’s constitution, the provision is included in the company’s constitution even though the procedures and other requirements of this Act are not complied with in relation to the provision.

(10) If a provision of a law of a State or Territory provides that additional requirements must be met for an alteration of a company’s constitution to take effect, the alteration does not take effect unless those requirements are met.

Other cases

(11) A provision of the Corporations legislation does not operate in a State or Territory to the extent necessary to ensure that no inconsistency arises between:

(a) the provision of the Corporations legislation; and

(b) a provision of a law of the State or Territory that would, but for this subsection, be inconsistent with the provision of the Corporations legislation.

Note 1: A provision of the State or Territory law is not covered by this subsection if one of the earlier subsections in this section applies to the provision: if one of those subsections applies there would be no potential inconsistency to be dealt with by this subsection.

Note 2: The operation of the provision of the State or Territory law will be supported by section 5E to the extent to which it can operate concurrently with the provision of the Corporations legislation.

Pre commencement (commenced) provision

(12) A provision of a law of a State or Territory is a pre commencement (commenced) provision if it:

(a) is enacted, and comes into force, before the commencement of this Act; and

(b) is not a provision that has been materially amended after commencement (see subsections (15) to (17)).

Pre commencement (enacted) provision

(13) A provision of a law of a State or Territory is a pre commencement (enacted) provision if it:

(a) is enacted before, but comes into force on or after, the commencement of this Act; and

(b) is not a provision that has been materially amended after commencement (see subsections (15) to (17)).

Post commencement provision

(14) A provision of a law of a State or Territory is a post commencement provision if it:

(a) is enacted, and comes into force, on or after the commencement of this Act; and

(b) is not a provision that has been materially amended after commencement (see subsections (15) to (17)).

Provision materially amended after commencement

(15) A provision of a law of a State or Territory is materially amended after commencement if:

(a) an amendment of the provision commences on or after the commencement of this Act; and

(b) neither subsection (16) nor subsection (17) applies to the amendment.
(16) A provision of a law of a State or Territory is not *materially amended after commencement* under subsection (15) if the amendment merely:

(a) changes:
   (i) a reference to the Corporations Law or the ASC or ASIC Law, or the Corporations Law or the ASC or ASIC Law of a State or Territory, to a reference to the Corporations Act or the ASIC Act; or
   (ii) a reference to a provision of the Corporations Law or the ASC or ASIC Law, or the Corporations Law or ASC or ASIC Law of a State or Territory, to a reference to a provision of the Corporations Act or the ASIC Act; or
   (iii) a penalty for a contravention of a provision of a law of a State or Territory; or
   (iv) a reference to a particular person or body to a reference to another person or body; or

(b) adds a condition that must be met before a right is conferred, an obligation imposed or a power conferred; or

(c) adds criteria to be taken into account before a power is exercised; or

(d) amends the provision in way declared by the regulations to not constitute a material amendment for the purposes of this subsection.

(17) A provision of a law of a State or Territory is not *materially amended after commencement* under subsection (15) if:

(a) the provision as amended would be inconsistent with a provision of the Corporations legislation but for this section; and

(b) the amendment would not materially reduce the range of persons, acts and circumstances to which the provision of the Corporations legislation applies if this section applied to the provision of the State or Territory law as amended.

5H Registration of body as company on basis of State or Territory law

(1) A body is taken to be registered under this Act as a company of a particular type under section 118 if a law of a State or Territory in this jurisdiction:

(a) provides that the body is a deemed registration company for the purposes of this section; and

(b) specifies:
   (i) the day on which the body is to be taken to be registered (the *registration day*) or the manner in which that day is to be fixed; and
   (ii) the type of company the body is to be registered as under this Act;
   (iii) the company's proposed name (unless the ACN is to be used in its name);
and subsections (2) and (3) are satisfied.

(2) A notice setting out the following details must be lodged before the registration day:

(a) the name and address of each person who is to be a member on registration;

(b) the present given and family name, all former given and family names and the date and place of birth of each person who is to be a director on registration;

(c) the present given and family name, all former given and family names and the date and place of birth of each person who consents in writing to become a company secretary;
the address of each person who is to be a director or company secretary on registration;

(e) the address of the company’s proposed registered office;

(f) for a public company—the proposed opening hours of its registered office (if they are not
the standard opening hours);

(g) the address of the company’s proposed principal place of business (if it is not the address of
the proposed registered office);

(h) for a company limited by shares or an unlimited company—the following:
   (i) the number and class of shares each member agrees in writing to take up;
   (ii) the amount (if any) each member agrees in writing to pay for each share;
   (iii) if that amount is not to be paid in full on registration—the amount (if any) each member
       agrees in writing to be unpaid on each share;

(i) for a public company that is limited by shares or is an unlimited company, if shares will
be issued for non cash consideration—the prescribed particulars about the issue of the
shares, unless the shares will be issued under a written contract and a copy of the contract is
lodged with the application;

(j) for a company limited by guarantee—the proposed amount of the guarantee that each
member agrees to in writing.

(3) If the company:
   (a) is to be a public company; and
   (b) is to have a constitution on registration;

   a copy of the constitution must be lodged before the registration day.

(4) On the registration day, the body is taken:
   (a) to be registered as a company under this Act; and
   (b) to be registered in the State or Territory referred to in subsection (1).

(5) The regulations may modify the operation of this Act to facilitate the registration of the company.

(6) Without limiting subsection (5), the regulations may make provision in relation to:
   (a) the share capital of the company on registration; and
   (b) the issue of a certificate of registration on the basis of the company’s registration.

51 Regulations may modify operation of the Corporations legislation to deal with interaction
between that legislation and State and Territory laws

(1) The regulations may modify the operation of the Corporations legislation so that:
   (a) provisions of the Corporations legislation do not apply to a matter that is dealt with by a law
       of a State or Territory specified in the regulations; or
   (b) no inconsistency arises between the operation of a provision of the Corporations legislation
       and the operation of a provision of a State or Territory law specified in the regulations.

(2) Without limiting subsection (1), regulations made for the purposes of that subsection may provide
that the provision of the Corporations legislation:
   (a) does not apply to:
       (i) a person specified in the regulations; or
(ii) a body specified in the regulations; or
(iii) circumstances specified in the regulations; or
(iv) a person or body specified in the regulations in the circumstances specified in the
regulations; or
(b) does not prohibit an act to the extent to which the prohibition would otherwise give rise to
an inconsistency with the State or Territory law; or
(c) does not require a person to do an act to the extent to which the requirement would
otherwise give rise to an inconsistency with the State or Territory law; or
(d) does not authorise a person to do an act to the extent to which the conferral of that
authority on the person would otherwise give rise to an inconsistency with the State or
Territory law; or
(e) does not impose an obligation on a person to the extent to which complying with that
obligation would require the person to not comply with an obligation imposed on the
person under the State or Territory law; or
(f) authorises a person to do something for the purposes of the Corporations legislation that
the person:
   (i) is authorised to do under the State or Territory law; and
   (ii) would not otherwise be authorised to do under the Corporations legislation; or
(g) will be taken to be satisfied if the State or Territory law is satisfied.

(3) In this section:

*matter* includes act, omission, body, person or thing.