Australia: High Court clears way for expansion of federal power

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20 December 2006

The Australian High Court last month handed down a ruling that opens the door for a major restructuring of the national economic and political framework, accompanied by a further expansion of the federal government's executive power. While the immediate effect of the decision in *New South Wales v Commonwealth of Australia* was to uphold the Howard government's draconian WorkChoices industrial relations laws, the federal cabinet has also been handed almost unlimited power to override state laws, and to rule by executive fiat.

By a 5 to 2 majority, the judges ruled that Canberra could use the "corporations" power of the Constitution to sweep aside state and territory legislation over entire areas of economic and social life, undermining the federal-state division of powers enshrined in the Constitution at Federation in 1901. Led by Chief Justice Murray Gleeson, the majority also approved sweeping regulation-making powers that permit the federal cabinet to govern with minimal parliamentary scrutiny.

As is invariably the case with judicial decisions, the law has been interpreted—and in this instance considerably re-interpreted—to meet definite socio-economic requirements. In essence, the majority decision expresses the interests of the most powerful sections of the corporate elite, who are demanding the re-casting of federalism in line with the dictates of global competition, and a new wave of free-market "reform"—privatisation, de-regulation, outsourcing and asset-stripping—at the expense of the jobs, living standards and working conditions of ordinary people.

These interests were voiced in the lead-up to the decision by the release of a report by the Business Council of Australia, representing the country's 100 largest firms. It claimed that "overlap, duplication and cost shifting between the Commonwealth and the states, unnecessary state taxes and overspending on programs because of lack of oversight or accountability" were costing the economy $9 billion per year.

While claiming that their ruling was a purely legal one, without regard for the "possible social consequences," the High Court majority insisted that the law had to recognise the "radically different" place of corporations in Australia's economic life compared to 1901.

The two dissenting judges—Michael Kirby, generally regarded as a small "l" liberal, and Ian Callinan, a traditional "states' rights" conservative—voiced vehement opposition. Their views reflect the positions of generally smaller, state-based and less competitive sections of industry which seek to retain the considerable range of powers that have been held by the state governments since 1901, when six former British colonies joined to constitute Australia.

Callinan declared that the federal government was "trespassing" and "intruding" into "the industrial and commercial affairs of the states". Their parliaments would be reduced to "impotent debating societies," with "far-reaching" consequences for "the future integrity of the federation". Kirby said the decision revealed "a profound weakness in the legal checks and balances which the founders sought to provide to the Australian Commonwealth."

Kirby also expressed serious concerns about the use of regulations to by-pass parliament, and the potentially destabilising consequences of tearing down the century-old system of industrial arbitration. He harked back to the great maritime and shearers' strikes of the 1890s, which over-shadowed the negotiations over Federation:

"In the wake of the lessons learned from the widespread industrial strikes late in the nineteenth century, which evidence how market forces, unaided, would resolve (or fail to resolve) 'industrial disputes' over wages and conditions, the idea of compulsory conciliation and arbitration was born. It emerged as an institution and a process that would prove very important to the societal and industrial balances struck thereafter in the Australian Commonwealth."

Despite the intensity of the two dissents, the majority decision was hardly unexpected. Previous High Court rulings since the Engineer's Case of 1920 had already enshrined the expansion of federal power into fields formally reserved for the states, and from the 1970s the court sanctioned the use of the federal "trade and commerce" and "external affairs" powers to regulate economic activity.

Nevertheless, last month's ruling was the first to give clear and unequivocal support to the almost boundless application of section 51(xx) of the Constitution, which gives the federal parliament the right to legislate with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

For nearly 57 years, until the Concrete Pipes Case of 1971, this power remained largely dormant and unused because of previous narrow interpretations by the High Court. The court has now given the "corporations power" an almost opposite interpretation. According to the majority judges, this power can be used to introduce laws and regulations on any subject matter whatsoever, as long as it touches on the activities of corporations.

The judges left open the definition of "corporation," while noting that it could extend far beyond companies to include a range of entities—municipal councils, universities, trade unions, hospitals, schools, charities, religious and sporting bodies, and other not-for-profit organisations—that have any "trading" or "financial" activities.

Because of the privatisation and outsourcing of many activities formerly conducted by state governments, the power could cover public and private hospitals and medical services, universities, tertiary colleges and private schools, and private security services. In his

dissent, Kirby listed many other examples, including town planning, transport, energy, environmental protection, aged and disability services, water, agriculture, jails, gaming and racing, sport and recreation, fisheries and Aboriginal activities.

The majority said the Howard government could rely on the corporations power for its WorkChoices industrial relations laws, regardless of the limits set by the more specific paragraph (xxxv) of section 51 referring to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". This also overturned a century of constitutional interpretation.

Until the Keating government's "enterprise bargaining" laws of 1993, High Court judges repeatedly ruled that the "conciliation and arbitration" clause restricted federal industrial relations laws to dealing with industrial disputes that crossed state boundaries.

The majority judges permitted the WorkChoices Act's regulation-making clauses, giving Howard's cabinet the power to outlaw a long list of basic workers' rights and conditions without passing any further legislation. The Act leaves it up to the regulations to specify the "prohibited content"—such as the right to take industrial action—that must not be included in workplace agreements. These regulations can even amend the Act itself.

All such regulations can take effect immediately, and remain in force unless later disallowed by a majority vote in the Senate. If the government controls the Senate, as the Howard government currently does, even this limited oversight is nullified.

Such powers, condemned by Kirby as "vague, indeterminate and open-ended," can be used freely in any federal legislation. They have a deeply anti-democratic character, allowing the government to outlaw conduct with virtually no notice, and make it difficult for those affected to even locate the relevant regulations. These powers erode formal parliamentary democracy, and virtually immunise much government decision-making from judicial review.

Another anti-democratic feature of the decision was the majority's dismissal of the fact that voters had repeatedly rejected referenda over the past century—in 1910, 1912, 1926 and 1946—to broaden the scope of the corporations and industrial relations powers. Callinan accused the majority of "subverting" the "sacred and exclusive role of the people" to amend the Constitution by referenda. But Gleeson and his four colleagues declared: "It is altogether too simple to treat each of those rejections as the informed choice of electors between clearly identified constitutional alternatives."

From the standpoint of rational economic life, sweeping aside outmoded and parochial state-based barriers, duplications and overlaps and developing national, as well as international, coordination in the delivery of products and services has a profoundly progressive character. It goes without saying, however, that the High Court is not seeking to clear the path for harmonious planning in the interests of ordinary people.

On the contrary, its decision echoes the dictates of the market, including the removal of all limits on the free flow of investment and a rapid acceleration in the assault on the social position of the working class. Over the past decade, the business and media establishment has become increasingly dissatisfied with the pace of "market reform" delivered by Howard's Liberal-National government in partnership with the state Labor governments.

At both state and federal levels, the major parties have committed themselves to this corporate agenda, but the existence of state jurisdictions has made the process cumbersome. An *Australian Financial Review* editorial immediately hailed the High Court's ruling for giving Canberra a literal carte blanche to extend the "national reform agenda"—a package of further "free-market" privatisation and profit-boosting measures agreed between Howard and the state and territory Labor leaders at this year's Council of Australian Governments (COAG) meeting.

The *Australian*, Murdoch's national flagship, praised the decision for "providing the Commonwealth with a big stick to push things along" and "throwing down the gauntlet to state governments to get serious or perish". Subsequent *Australian* editorials have lauded the new Labor leader Kevin Rudd for invoking the court's ruling to pledge to make federal-state relations a centrepiece of his drive to renew the pro-market restructuring carried through by the Hawke and Keating Labor governments from 1983 to 1996.

Rudd's promises closely mirror the Business Council's report, *Reshaping Australia's Federation: A New Contract for Federal-State Relations*, which proposes a 12-point plan, including a federal constitutional convention to redraw the division of powers. The priority, according to the report, is the creation of a "common market" that allows the "free flow of people, goods and services around the country". It highlights education, health, infrastructure and taxation as among the key corporate targets.

Already, the media and various Howard ministers have suggested using the newly-defined powers of the federal government to impose "performance benchmarks" on state government-run public hospitals and schools, which would accelerate the running down of poorly-funded institutions and boost the creeping privatisation of health and education. Other proposals would dismantle what remains of state-run water and power supply utilities, opening the door to private market operators, and override public objections to the construction of nuclear power stations and waste dumps.

This agenda is vastly widening the social gulf between the wealthy elite and the majority of the population and can be imposed only through anti-democratic and authoritarian methods. Over the past five years, the High Court has also rubberstamped an enormous growth of executive power. It has upheld the military deportation of the Tampa refugees to Nauru, initially without any legislative authority; the indefinite detention of rejected asylum seekers, even for life; and the spending of millions of dollars on government advertising to promote its legislation (WorkChoices).

The barrage of anti-terrorism laws passed over the same period, handing police-state powers to the federal and state governments, has yet to be tested in the High Court, but last month's decision confirms a pattern of the judges approving every extension of executive power and every new inroad into basic legal and democratic rights.