

In this sense, the federal balance has the potential to be an important restraint on the deployment of power. In that respect, federalism is a concept of constitutional government especially important in the current age. By this decision, the majority deals another serious blow to the federal character of the Australian Constitution. We should not so lightly turn our backs on the repeatedly expressed will of the Australian electors and the wisdom of our predecessors concerning our governance.

613 The United States Supreme Court has lately found innovative ways to uphold the role of the States within the federal system and to enforce limits on the powers of Congress without doing undue damage to the national demands of efficiency, prosperity and security⁶⁹⁵. Efforts like these balance the competing values that frame the American constitutional system. This Court should be no less attentive to the federal character of the Australian Constitution.

614 *Limiting the corporations power*: The precise constitutional issue now presented has not previously been decided by this Court because, for most of the past century, its resolution was regarded as axiomatic. It was self-evident that the corporations power did not extend so far as the majority now holds it to do. It was for this reason that, through referendums, successive governments sought – without success – popular approval for the enlargement of federal power with respect to industrial disputes. The repeated negative voice of the Australian people, as electors, in votes on these referendums, is now effectively ignored or treated as irrelevant by the majority. 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

Context of the New Judicial Federalism", (1995) 26 *Rutgers Law Journal* 913; Guy, "Overcoming the Institutional and Constitutional Constraints of Australian Federalism: Developing a New Social Democratic Approach to the Federal Framework", (2006) 34 *Federal Law Review* 319 at 325.

695 *National League of Cities v Usery* 426 US 833 (1976); *Hughes v Alexandria Scrap Corp* 426 US 794 (1976); *Reeves, Inc v Stake* 447 US 429 (1980); *White v Massachusetts Council of Construction Employers, Inc* 460 US 204 (1983); *United States v Lopez* 514 US 549 (1995); *United States v Morrison* 529 US 598 (2000); Sanders, "The 'New Judicial Federalism' Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline", (2005) 55 *American University Law Review* 457.

duty is to uphold the limits. Once a constitutional Rubicon such as this is crossed, there is rarely a going back.

615 That is why this is such an important case for the content of constitutional power in Australia. The majority concludes that not a single one of the myriad constitutional arguments of the States succeeds. Truly, this reveals the apogee of federal constitutional power and a profound weakness in the legal checks and balances which the founders sought to provide to the Australian Commonwealth. In my view, particular provisions of the challenged legislation, which, if enacted separately, might be valid, fall with the overall design of the new law. Severance is not possible without imposing on this Court an impermissible function of making a new law with a different focus and purpose. The entire Amending Act is constitutionally invalid. This Court should so hold.

Orders

616 The Commonwealth's demurrer to the plaintiffs' statements of claim in each action should be overruled. There should be judgment in each action for the plaintiffs. This Court should declare the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) invalid in its entirety under the Constitution. The Commonwealth should pay the costs of the plaintiffs in each action.