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High Court challenge against new IR laws begins

Reporter: Heather Ewart

KERRY O'BRIEN: Tomorrow, the Federal Government's industrial relations laws will confront, arguably, their toughest test when the High Court begins hearing a challenge to their validity. The challenge has united all State governments and some unions against the Federal Government, which is nonetheless, confident of the outcome. But the states plan to argue that the industrial laws will open the door for the Commonwealth to take over State responsibilities, which they say goes to the heart of constitutional guarantees of states' rights. Heather Ewart reports.

HEATHER EWART: As workers turned out in record numbers at Brisbane's annual Labor Day march this week, Labor leaders around the country hailed it as a powerful protest against the Federal Government's new industrial relations laws. For state premiers, it vindicated the next step in their campaign, which tomorrow goes to the highest court in the land.

PETER BEATTIE, QLD PREMIER: We'll challenge them in the High Court, and know we've got a fight on our hands.

STEVE BRACKS, VICTORIAN PREMIER: I think there is quite a deal at stake, and that is sovereignty.

PAUL LENNON, TASMANIAN PREMIER: Our advice is we've got a strong case.

MORRIS IEMMA, NSW PREMIER: It's an arguable case, so we owe it to workers and their families to prosecute the case.

MIKE RANN, SOUTH AUSTRALIAN PREMIER: This is very serious for South Australia.

ALAN CARPENTER, WA PREMIER: The Commonwealth can't just come in and take away the responsibilities of state governments. Otherwise, we're going to end up just being an out post of Canberra, and people have to think about that.

HEATHER EWART: They may not be thinking about it yet, but they soon will be if premiers succeed in ramming home their claims that the Federal Government's IR overhaul is not just about the workplace, but is also an attack on the right of states to exist. That's the thrust of their High Court challenge to the Federal Government's use of the corporations power the constitution to take over state industrial relations systems.

PROFESSOR GREG CRAVEN, CONSTITUTIONAL LAW, CURTIN UNIVERSITY: think this is probably one of the most important, if not the most important constitutional case in the last 50 years, because it is effectively going to decide whether the Commonwealth can do whatever it likes under our constitution.

KEVIN ANDREWS, FEDERAL WORKPLACE RELATIONS MINISTER: We've had consistent legal and constitutional advice about this matter and that advice is that we are on sound constitutional grounds in using the corporations power.

HEATHER EWART: That will be tested over the next week by every State and some sections of the union movement, who'll have legal representation in the High Court in a case that's expected to cost hundreds of thousands of dollars. But, say the states, it's a cost well worth it.

ALAN CARPENTER: The states can't afford not to challenge, because otherwise we just lie down and get the Commonwealth to roll in over the top and take all our responsibilities away from us. And that's not on.

STEVE BRACKS: This is a takeover by one level of government to another. Why? For this very reason - because they've got the power and they want to use it.

KEVIN ANDREWS: Oh, look, that's a very predictable sort of argument that you get from time to time by the states. I mean we, for

example, have ruled out taking over the health system of the states. I think we've said we're not interested in taking over the education system, it's run by the states. If that's their best argument, then it's not much of an argument.

HEATHER EWART: Do you accept that if you do win this case, it does leave you room to take over areas like this in the future if you see fit?

KEVIN ANDREWS: Well, as I said, there are a number of major areas of state responsibility that we have no intention of taking over.

HEATHER EWART: No intention now maybe, but the Federal Government is pushing for an expansive interpretation of the Commonwealth corporations power, and what they could mean down the track is the subject of growing debate amongst constitutional experts.

PROFESSOR GREG CRAVEN: This is a case about who controls Australia. This really is a case about whether or not the Commonwealth has, if not a blank cheque, then a cheque for about as much power as it could ever want to have. This really is the end game for federalism under our constitution.

JULIAN LESER, EXECUTIVE DIRECTOR, MENZIES RESEARCH CENTRE: It's certainly not going to be the end of the states, as some people have suggested. The states continue to have a vigorous and important role within the Federation.

PROFESSOR GREG CRAVEN: If one accepts that the corporations power allows the Commonwealth to control anything that touches upon a trading corporation, I think it follows that the Commonwealth can completely control universities, completely control private schools, private hospitals, control large aspects of town planning, significant aspects of local government.

JULIAN LESER: This Federal Government doesn't want to see the end of the states. Indeed, the Federal Government has probably been the most generous to states of any government since the war, giving all the GST revenue to them.

HEATHER EWART: Julian Leser was a constitutional legal adviser to the Federal Attorney-General and he's adamant the Commonwealth is on safe ground.

JULIAN LESER: It's not a revolutionary idea and it hasn't been dreamt up overnight. It's an idea that's been used by the Labor Government before, when Paul Keating was Prime Minister in 1993. He used the corporations power to put forward the Enterprise Bargaining Act.

HEATHER EWART: But the states argue the latest move goes much further and at least one Federal Government minister fears they may be right. Gone, it seems, is the long-held tradition of the Liberal Party staunchly supporting the principles of federalism and states' rights. But a few months back, there was a lone voice in the wilderness, when Nick Minchin addressed the HR Nicholls Society and spoke of the line he took in Cabinet.

SENATOR NICK MINCHIN: I can assure you that one of the things I did on every occasion of discussing this was to test Ruddock and Andrews, to the best of my ability, on the status of their legal advice on this question of whether or not the Corporations power really did support and substantiate these sorts of changes. And I continue to have my doubts.

HEATHER EWART: Not surprisingly, he's keeping those doubts to himself these days, but he did also raise concerns at the HR Nicholls Society gathering that the conservative make-up of the High Court bench would not necessarily work in the Federal Government's favour. While the common view in legal circles is the states don't have a hope in hell of winning, there are reservations.

JULIAN LESER: It's difficult to speculate. It really is. We've got a number of judges who have not made any pronouncements on this before.

PROFESSOR GREG CRAVEN: I suspect that what will be happening is that there will be something of a tension on the court between their usual approach to these cases, which tends to be expansive of Commonwealth power, but a genuine worry that maybe this time, you really are letting the genie out of the bottle in circumstances where you're never going to be able to put it back.

HEATHER EWART: For now, the odds look stacked against the states. But there's been no shortage of surprises in the High Court in the past. It's expected to be several months before the bench hands down its decision.

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