HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

Matter No S592/2005

STATE OF NEW SOUTH WALES — PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA — DEFENDANT

Matter No P66/2005

STATE OF WESTERN AUSTRALIA — PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA — DEFENDANT

Matter No A3/2006

STATE OF SOUTH AUSTRALIA — PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA — DEFENDANT

Matter No B5/2006

STATE OF QUEENSLAND — PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA — DEFENDANT

Matter No B6/2006

AUSTRALIAN WORKERS' UNION & ANOR — PLAINTIFFS

AND

COMMONWEALTH OF AUSTRALIA — DEFENDANT

Matter No S50/2006

UNIONS NSW & ORS PLAINTIFFS

AND

COMMONWEALTH OF AUSTRALIA DEFENDANT

Matter No M21/2006

STATE OF VICTORIA PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA DEFENDANT

New South Wales v Commonwealth of Australia
Western Australia v Commonwealth of Australia
South Australia v Commonwealth of Australia
Queensland v Commonwealth of Australia
Australian Workers' Union v Commonwealth of Australia
Unions NSW v Commonwealth of Australia
Victoria v Commonwealth of Australia
[2006] HCA 52
14 November2006
S592/2005, P66/2005, A3/2006, B5/2006, B6/2006, S50/2006 & M21/2006

ORDER

In each matter:

1. The defendant's demurrer to the statement of claim is allowed.

2. Judgment for the defendant with costs.

Representation

M G Sexton SC, Solicitor-General for the State of New South Wales and B W Walker SC with J K Kirk and I Taylor for the plaintiff in **Matter No S592/2005** (instructed by Crown Solicitor for New South Wales)

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell and D J Matthews for the plaintiff in **Matter No P66/2005** (instructed by State Solicitor for Western Australia)

C J Kourakis QC, Solicitor-General for the State of South Australia with G J Parker and S A McDonald for the plaintiff in **Matter No A3/2006** (instructed by Crown Solicitor for South Australia)

W Sofronoff QC, Solicitor-General of the State of Queensland with G C Martin SC, R W Campbell, S E Brown and J M Horton for the plaintiff in **Matter No B5/2006** (instructed by Crown Solicitor for the State of Queensland)

D F Jackson QC with A K Herbert and N J Owens for the plaintiffs in **Matter No B6/2006** (instructed by Sciacca's Lawyers and Consultants)

N C Hutley SC with N Perram and B L Jones for the plaintiffs in **Matter No S50/2006** (instructed by Jones Staff & Co)

P M Tate SC, Solicitor-General for the State of Victoria with M Bromberg SC, G R Kennett, M K Moshinsky, S J Moore and D I Star for the plaintiff in **Matter No M21/2006** (instructed by Victorian Government Solicitor)

D M J Bennett QC, Solicitor-General of the Commonwealth and R R S Tracey QC and H C Burmester QC with J L Bourke, S B Lloyd and S P Donaghue for the defendant in **all matters** (instructed by Australian Government Solicitor)

Interveners

W C R Bale QC, Solicitor-General of the State of Tasmania with S K Kay intervening on behalf of the Attorney-General of the State of Tasmania in **all matters** (instructed by Solicitor-General of Tasmania)

T I Pauling QC, Solicitor-General for the Northern Territory with S L Brownhill intervening on behalf of the Attorney-General for the Northern Territory in **all matters** (instructed by Solicitor for the Northern Territory)

P M Tate SC, Solicitor-General for the State of Victoria with M Bromberg SC, G R Kennett, M K Moshinsky, S J Moore and D I Star intervening on behalf of the Attorney-General of the State of Victoria in **Matter Nos S592/2005, P66/2005, A3/2006 and B5/2006** (instructed by Victorian Government Solicitor)

S J Gageler SC with G C McCarthy intervening on behalf of the Australian Capital Territory Attorney-General in **all matters** (instructed by Australian Capital Territory Government Solicitor)

CATCHWORDS

New South Wales v Commonwealth of Australia
Western Australia v Commonwealth of Australia
South Australia v Commonwealth of Australia
Queensland v Commonwealth of Australia
Australian Workers' Union v Commonwealth of Australia
Unions NSW v Commonwealth of Australia
Victoria v Commonwealth of Australia

Constitutional Law (Cth) – Powers of federal Parliament – *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) amended *Workplace Relations Act* 1996 (Cth) – Amending Act altered primary constitutional basis of *Workplace Relations Act* 1996 (Cth) so as to place reliance on s 51(xx) instead of s 51(xxxv) of the Constitution – Constitutional validity of *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) – Whether s 51(xx) of the Constitution confers power upon the federal Parliament to regulate the employment relationship between "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth" and their employees.

Constitutional Law (Cth) – Powers of federal Parliament – Section 51(xx) – Whether, to be supported by s 51(xx), the fact that a corporation is a foreign, trading or financial corporation must be significant in the way in which the law relates to it – Whether sufficient for law to be characterised as law with respect to constitutional corporations that it singles out constitutional corporations as the object of statutory command.

Constitutional Law (Cth) – Powers of federal Parliament – Relationship between s 51(xx) and s 51(xxxv) – Whether s 51(xx) confined in its operation by reference to terms of s 51(xxxv) – Whether s 51(xxxv) represents the totality of the federal Parliament's power to make laws with respect to industrial relations, except in relation to employees of the Commonwealth and other limited categories of employees – Whether s 51(xxxv) contains a "positive prohibition or restriction" to which s 51(xx) is subject – Whether s 51(xxxv) contains a "safeguard, restriction or qualification" to which s 51(xx) is subject.

Constitutional Law (Cth) – Powers of federal Parliament – Section 51(xxxv) – Constitutional validity of Sched 6 of *Workplace Relations Act* 1996 (Cth) as amended by *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) ("Amended Act") – Whether Sched 6 supported by s 51(xxxv) of the Constitution.

Constitutional Law (Cth) – Powers of federal Parliament – Section 122 – Amended Act applied to any body corporate incorporated in a Territory and any person or entity that carried on an activity in a Territory so far as the person or entity

employed an individual in connection with the activity – Whether supported by s 122 of the Constitution.

Constitutional Law (Cth) – Powers of federal Parliament – Exclusion of State and Territory laws – Section 16 of Amended Act excluded certain State and Territory laws – Whether s 16 a law with respect to any head of power in s 51 of the Constitution – Whether s 16 amounted to a bare attempt to limit or exclude State legislative power – Whether s 16 impermissibly curtailed the capacity of the States to function as governments.

Constitutional Law (Cth) – Powers of federal Parliament – Section 117 of Amended Act empowered the Australian Industrial Relations Commission to restrain a State industrial authority from dealing with certain matters – Whether s 117 contrary to s 106 of the Constitution – Whether s 117 impermissibly impaired capacity of States to function as governments – Whether s 117 supported by s 51(xx).

Constitutional Law (Cth) – Powers of federal Parliament – Regulation-making powers – Sections 356 and 846(1) of Amended Act together empowered the Governor-General to make regulations specifying matters to be "prohibited content" in relation to workplace agreements made under the Act, without expressly stipulating any relevant criteria – Whether regulation-making power amounted to a "law" – Whether regulation-making power a law with respect to any identifiable head of Commonwealth legislative power.

Constitutional Law (Cth) – Constitutional interpretation – Applicable principles of interpretation – Relevance of failure of proposals to alter Constitution by referendum.

Constitution, ss 51(xx), 51(xxxv), 122.
Workplace Relations Amendment (Work Choices) Act 2005 (Cth).
Workplace Relations Act 1996 (Cth).

GLEESON CJ, GUMMOW, HAYNE, HEYDON AND CRENNAN JJ.

Introduction

1 In December 2005, the Parliament enacted the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) ("the Amending Act"). The Amending Act made extensive amendments to the *Workplace Relations Act* 1996 (Cth) ("the Act"). The Act in its form before those amendments will be referred to as "the previous Act"; the Act in its form after those amendments will be referred to as "the new Act". The most notable change effected by the Amending Act was an alteration of the constitutional basis of the Act. Although certain provisions of the previous Act had been enacted in reliance on the power conferred by s 51(xx) of the Constitution (the corporations power), its general framework was based upon the power conferred by s 51(xxxv) (the conciliation and arbitration power). Although certain provisions of the new Act are still based on the conciliation and arbitration power, and although the Amending Act invoked other heads of Commonwealth legislative power, the new Act is now, in large part, an exercise of the corporations power. The Parliament's capacity to rely upon that power to sustain the legislation is the principal question in issue in these proceedings.

2 The principal amendments to the Act commenced on 27 March 2006. On that day the Workplace Relations Regulations 2006 ("the Regulations") also commenced.

3 These reasons are organised as follows:

PART I – THE LITIGATION AND THE LEGISLATION

1 The litigation

4 Seven actions were commenced in this Court seeking declarations of invalidity of the whole Amending Act, or, alternatively, of specified provisions. Five of the actions were commenced by the States of New South Wales, Victoria, Queensland, South Australia and Western Australia. The other two actions were commenced by trade union organisations. The statements of claim followed a substantially similar form, reciting the impugned legislation, and its legal effect, and asserting its constitutional invalidity. To each statement of claim the Commonwealth demurred, the ground of demurrer being that none of the impugned provisions was invalid. Those demurrers are now before this Court for decision. Although there were some, relatively minor, disagreements between the parties upon various points of construction of the legislation, there are no matters of disputed fact that are claimed to affect the questions of validity that have been argued. That being so, the demurrer is an appropriate procedure for the resolution of the issues of validity that arise. This procedure has been adopted on many past occasions[1], and no question of an advisory opinion or of a hypothetical case arises.

5 After oral argument was concluded the parties agreed upon a joint document setting out the provisions that were challenged, which parties made the particular challenges, and the bases upon which those challenges were made. These reasons have been prepared on the footing that the document contained an exhaustive list of the live issues in the litigation and thus reflected some narrowing of the controversies presented by the pleadings and earlier written submissions.

6 The Attorneys-General of Tasmania, the Northern Territory and the Australian Capital Territory intervened in support of the plaintiffs. The Attorney-General for Victoria intervened in certain of the proceedings. The position of the State of Victoria is affected by the *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic) ("the Referral Act") by which the

---

1 Examples include *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; *The State of Victoria v The Commonwealth* ("the *Second Uniform Tax Case*") (1957) 99 CLR 575; *Attorney-General (Vict) v The Commonwealth* ("the *Marriage Act Case*") (1962) 107 CLR 529; *Victoria v The Commonwealth* ("the *Payroll Tax Case*") (1971) 122 CLR 353; *Victoria v The Commonwealth and Hayden* ("the *Australian Assistance Plan Case*") (1975) 134 CLR 338.

Parliament of Victoria referred powers to the Commonwealth Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes within the limits of the State; agreements about matters pertaining to the relationship between an employer or employers in the State and an employee or employees in the State; and minimum terms and conditions of employment for employees of the State. The Referral Act was subject to a number of exceptions.

2 The legislation

7 The principal object of the new Act is stated in s 3 as follows:

"The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

(a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and

(b) establishing and maintaining a simplified national system of workplace relations; and

(c) providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act; and

(d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and

(e) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances; and

(f) ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of:

(i) employee entitlements; and

(ii) the rights and obligations of employers and employees, and their organisations; and

(g) ensuring that awards provide minimum safety net entitlements for award-reliant employees which are consistent with Australian Fair Pay Commission decisions and which avoid creating disincentives to bargain at the workplace level; and

(h) supporting harmonious and productive workplace relations by providing flexible mechanisms for the voluntary settlement of disputes; and

(i) balancing the right to take industrial action for the purposes of collective bargaining at the workplace level with the need to protect the public interest and appropriately deal with illegitimate and unprotected industrial action; and

(j) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and

(k) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and

(l) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and

(m) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and

(n) assisting in giving effect to Australia's international obligations in relation to labour standards."

8 The constitutional basis upon which the "framework for cooperative workplace relations" is constructed is revealed by the definitions of "employee" and "employer" in ss 5 and 6 of the new Act. Those definitions are central to the operation of much of the new Act. The definition of "employee" in s 5(1) is an individual so far as he or she is employed, or usually employed, as described in the definition of "employer" in s 6(1), by an employer. Section 6(1) provides the "basic definition" of "employer" which applies unless the contrary intention appears (as it does in certain provisions). The definition is:

"(1) In this Act, unless the contrary intention appears:

employer means:

(a) a constitutional corporation, so far as it employs, or usually employs, an individual; or

(b) the Commonwealth, so far as it employs, or usually employs, an individual; or

(c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or

(d) a person or entity (which may be an unincorporated club) so far as the person or entity, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:

(i) a flight crew officer; or

(ii) a maritime employee; or

(iii) a waterside worker; or

(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or

(f) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs, or usually employs, an individual in connection with the activity carried on in the Territory."

9 The term "constitutional corporation" is defined in s 4 to mean a corporation to which s 51(xx) of the Constitution applies. That paragraph refers to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. No doubt there may be room for dispute, in relation to some corporations, about whether they are constitutional corporations within the meaning of the new Act. However, in the application of par (a) of the basic definition of employer, and the corresponding definition of employee, to a given corporation, the hypothesis is that it is a constitutional corporation.

10 The definitions of employee and employer invoke other heads of power as well as the corporations power. Even so, in its practical application the new Act depends in large measure upon the assumption that the corporations power is capable of sustaining the legislative framework. Accordingly, the validity of that assumption was the matter to which the primary submissions of a number of the parties were directed.

11 The system introduced by the Amending Act is intended to cover all employers and employees as defined in s 6(1) and s 5(1), including those formerly bound by State based industrial instruments. It includes transitional provisions designed to cover certain employers and employees bound by federal awards who are not within the ss 6 and 5 definitions. It also contains provisions which preserve for a time the terms and conditions of employment of employees within the s 5(1) definition who would have been bound by, or whose employment would have been subject to, a State industrial instrument.

12 The States and the Commonwealth, for the purposes of the presentation of their arguments, agreed upon a description of the operation of the relevant provisions of the new Act. That agreed description is substantially as follows. The language of the agreement of the parties will be adopted, without supporting references to the specific legislative provisions. It is not intended to foreclose any issues of construction.

13 Part VI of the previous Act dealt with the prevention and settlement of interstate industrial disputes by the processes of conciliation and arbitration engaged in by the Australian Industrial Relations Commission ("the AIRC"). Part VI has been repealed. Parts 7 and 10 of the new Act deal with some matters of a kind formerly dealt with by procedures for prevention and settlement of interstate industrial disputes.

14 Part 7 is headed "The Australian Fair Pay and Conditions Standard". The purpose of the Part is to set out "key minimum entitlements of employment" relating to basic rates of pay and casual loadings, maximum ordinary hours of work, annual leave, personal leave, and parental leave and related entitlements. The provisions of Pt 7 together constitute the Australian Fair Pay and Conditions Standard ("the Pay and Conditions Standard").

15 Central to the operation of Pt 7 is the Australian Fair Pay Commission ("the AFPC"), a body established by s 20 of the new Act. It is unnecessary for present purposes to go into the detail of the constitution of the AFPC save to say that Commissioners are appointed by the Governor-General (s 38) and their terms and conditions of employment are governed by Div 2 of Pt 2 of the Act.

16 The AFPC has what is described as a wage-setting function, which involves conducting wage reviews and exercising its wage-setting powers as necessary depending on the outcomes of wage reviews. The objective of the AFPC in performing this function is to promote the economic prosperity of the people of Australia having regard to specified "wage-setting parameters". Those include providing a safety net for the low paid and providing minimum wages for certain kinds of employee. The AFPC has power to determine the timing, frequency and scope of wage reviews. Division 2 of Pt 7 provides that if the employment of an employee is covered by an Australian Pay and Classification Scale ("APCS") the employee must be paid a specified basic periodic rate of pay. The AFPC adjusts, revokes and determines new APCSs. If the employment is not covered by an APCS, the employee must be paid a rate that is at least equal to the standard Federal Minimum Wage. This is described as a "guarantee of basic rates of pay". Various other "guarantees" as to wages are contained in Div 2 of Pt 7. Similarly, Div 3 of Pt 7 provides what is described as a "guarantee of maximum ordinary hours of work". In brief, an employee must not be required or requested by an employer to work more than 38 hours per week and reasonable additional hours. Factors to be taken into account in determining what is reasonable are specified. Division 4 of Pt 7 deals with annual leave, and contains what is described as a "guarantee of annual leave". Details of the entitlements are set out in s 232. Division 5 of Pt 7 prescribes certain entitlements to various kinds of "personal leave". Division 6 of Pt 7 does the same in relation to parental leave.

17 The details of the various entitlements prescribed by Pt 7 are not material to the principal issues in these proceedings. It suffices to say that the provisions of Pt 7 are much more detailed than appears from the above brief synopsis. Having regard to the scheme of Pt 7, it may be said that one of the principal issues in the case may be stated by asking whether a law that provides that a corporation of a kind referred to in s 51(xx) of the Constitution must pay its employees certain minimum wages, and must provide them with certain leave entitlements, and must not require them to work more than a certain number of hours, is a law with respect to such corporations.

18 On the commencement of Pt 7, employees (as defined in s 5) who were covered by a "pre-reform wage instrument", such as a federal award under the previous Act, or a State award or State law, or Territory law, which contained rates of pay, continued to have a minimum entitlement to those rates of pay as the pay rates, classification, casual loading and coverage provisions of the previous instrument were converted to a "preserved APCS".

19 Part 8 of the new Act is headed "Workplace agreements". It also applies only to s 6(1) employers and their employees. It provides for the making, variation and termination of particular kinds of agreement, called workplace agreements. In the Second Reading Speech it was said that a "central objective of [the Amending Act] is to encourage the further spread of workplace agreements"[2].

20 The previous Act, in Pt VID, provided for Australian workplace agreements ("AWAs"). The relevant Part applied where the employer was a constitutional corporation, or the Commonwealth, or where the employee's primary workplace was in a Territory and in certain other circumstances. It was an example of part of the previous legislation that was based, not on the power given by s 51(xxxv), but on the powers relied upon to support the Amending Act.

21 Part 8 of the new Act provides for certain forms of agreement that may be made between employers, employees and unions which are registered organisations. A workplace agreement may be an AWA, an employee collective agreement (an agreement between an employer and persons employed in a single business or part of a single business), a union collective agreement (an agreement between an employer and one or more organisations of employees), a union greenfields agreement (a collective agreement between an employer and one or more organisations of employees where the agreement relates to a new business), an employer greenfields agreement, or a multiple-business agreement. Workplace agreements become operative when lodged with the Office of the Employment Advocate. As was the case under the previous Act, there is no requirement for certification or approval by the AIRC.

22 In general, workplace agreements are to include dispute settlement procedures chosen by the parties, in the absence of which a model dispute resolution process in Pt 13 will be taken to be included in the agreement. Where applicable, certain protected award conditions are taken to be included in a workplace agreement to the extent that the agreement does not expressly exclude or modify them. Workplace agreements must not contain "prohibited content". This is a topic the subject of a separate issue that will be considered below. What matters are prohibited content is the subject of the Regulations which have prescribed, for example, terms relating to the deduction from wages of union

---

2 Second Reading Speech of the Minister for Employment and Workplace Relations and Minister Assisting the Prime Minister for the Public Service, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 November 2005 at 17.

membership dues, terms which confer a right or remedy in relation to termination of employment for a reason that is harsh, unjust or unreasonable, and terms that deal with matters that do not pertain to the employment relationship. Inclusion of prohibited content results in exposure to civil penalties.

23 Under Pt 8 of the new Act, a party may terminate an agreement that has passed its nominal expiry date by giving 90 days written notice. Under the previous Act, a party could apply to the AIRC to terminate an agreement after the nominal expiry date. The AIRC was required to terminate the agreement unless such an order would be contrary to the public interest. From the date on which a workplace agreement that operated in relation to an employee is terminated until another workplace agreement comes into operation in relation to that employee, neither the terminated agreement nor an award has effect in relation to that employee. Upon termination of a workplace agreement, the minimum terms and conditions of employment are governed by the Pay and Conditions Standard and applicable "protected award conditions". A pre-reform AWA will cease to apply when replaced by a post-reform AWA. The Pay and Conditions Standard prevails over a workplace agreement that operates in relation to an employee to the extent that the Standard provides a more favourable outcome for the employee in a particular respect.

24 Part 9 of the new Act is headed "Industrial action". It applies only to s 6(1) employers and their employees. Division 8 of Pt VIB of the previous Act dealt with negotiations for the making of certified agreements and included a right for a party wishing to make a certified agreement to initiate a bargaining period during which a party could engage in industrial action in relation to which a limited immunity was conferred. The industrial action was described as "protected action". The AIRC had a role in suspending or terminating a bargaining period, and exercising functions of conciliation and arbitration to make an award where agreement could not be reached.

25 Most of Pt 9 of the new Act deals with the taking of lawful industrial action ("protected action") in limited circumstances and for the specific purpose of bargaining for a collective agreement. Part 9 also prohibits industrial action not permitted by the Act and prohibits the making and acceptance of certain payments relating to periods of industrial action. It extends the circumstances in which bargaining for a collective agreement may be terminated by the AIRC. In the event of such termination the AIRC may make a "workplace determination" that provides for the matter in issue. The new Act establishes additional requirements in order for industrial action to be "protected action". The action must be preceded by a "protected action ballot" in which the proposed industrial action is approved by a majority of employees, voting at a secret ballot. The new

Act also confers a power on the Minister to terminate a bargaining period if satisfied of certain matters, including that the industrial action is threatening, or would threaten, to endanger the life, the personal safety, or the health or welfare, of the population or part of it, or to cause significant damage to the Australian economy or an important part of it. The new Act requires the AIRC to make an order that industrial action stop, not occur and not be organised if it appears to the AIRC that industrial action by an employee, employees or an employer is not, or would not be, protected action. The new Act imposes a similar obligation on the AIRC in relation to industrial action taken by employees and employers within the ordinary meaning of those terms who do not fall within s 5(1) and s 6(1) where the industrial action will, or would, be likely to have the effect of causing substantial loss or damage to the business of a constitutional corporation.

26 Part 10 of the new Act is headed "Awards". It applies only to s 6(1) employers and their employees. By definition, an award may be either an award made by the AIRC under s 539 or a pre-reform award. Schedule 4 to the Amending Act dealt with the operation of awards in force before the reform commencement. It provided for the creation of a "pre-reform award", that is, an instrument to take effect from the reform commencement in the same terms as an original award of the AIRC in force immediately before the reform commencement binding relevantly only employees and employers within the meaning of s 5(1) and s 6(1) respectively and each organisation that was bound by the original award immediately before the reform commencement. Awards may be made by the AIRC to give effect to the outcome of an "award rationalisation process" following a request by the Minister. The AIRC can make an award only to give effect to the outcome of an award rationalisation process and not otherwise. Awards, whether pre-reform awards or rationalised awards, as under the previous Act, may only include terms about "allowable award matters", but the number of such matters has been reduced from 20 to 15. The conditions provided for by the Pay and Conditions Standard (including rates of pay) and other prescribed matters cannot be included in awards.

27 Part 12 of the new Act is headed "Minimum entitlements of employees". It supplements the minimum conditions of employment established by the Pay and Conditions Standard provided for by Pt 7. Some of the additional minimum entitlements established by Pt 12 apply to employers and employees as defined in s 6(1) and s 5(1), and the balance apply to all employers and employees. Division 4 of Pt 12 deals with termination of employment. Subdivision B of Div 4 provides that employees as defined in s 5(1), to the extent that they are not otherwise excluded, have a right to make application to the AIRC for relief in respect of the termination of their employment on the ground that the termination was harsh, unjust or unreasonable ("unfair dismissal"). State unfair dismissal

jurisdictions are intended to be excluded by the Act in so far as they apply to s 6(1) employers and their employees. Subdivision C prohibits an employer from terminating an employee's employment for any one of a range of specified reasons ("unlawful dismissal"). Subdivision D enables the AIRC to make orders against an employer where the employer had decided to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature and yet failed to consult each relevant trade union before terminating.

28 Part 13 of the new Act is headed "Dispute resolution processes". Its objects are to encourage employers and employees who are parties to a dispute to resolve it at the workplace level, and to allow the parties to determine the best forum in which to resolve disputes. It includes a model dispute resolution process.

29 Division 5 of Pt 15 is headed "Entry for OHS purposes". In Pt 15 the terms "employer" and "employee" have their ordinary meaning. Division 5 prohibits the exercise by an official of a registered organisation of the right to enter premises conferred by an "OHS law" (that is, an occupational health and safety law of a State or Territory prescribed as such by the Regulations) unless the official holds a permit under Pt 15 of the new Act and exercises the right during working hours. Contravention results in exposure to a civil penalty. The issue of a permit by an Industrial Registrar or Deputy Industrial Registrar depends upon the Registrar's satisfaction that the official is a fit and proper person having regard to certain matters. Division 5 applies, inter alia, to premises that are occupied or otherwise controlled by constitutional corporations or in circumstances where the right of entry under the law of the State or Territory relates to requirements to be met by a constitutional corporation, conduct to be engaged in, or activity undertaken or controlled, by a constitutional corporation, or by an employee of a constitutional corporation, or by a contractor providing services for a constitutional corporation or the Commonwealth, or the exercise of the right will have a direct effect on any such persons.

30 Part 16 of the new Act is headed "Freedom of association". In this Part, the terms "employer" and "employee" have their ordinary meaning. It seeks, among other things, to provide relief to employers and employees and independent contractors who are prevented or inhibited from exercising their rights to freedom of association. Divisions 3 to 8 prohibit a range of conduct by persons in relation to forming, or being or not being a member of, industrial associations, or participating or not participating in industrial action. For example, s 789 prohibits persons from organising or taking (or threatening to organise or take) any action against another person with intent to coerce that

person or a third person to become or not become (or remain or cease to be) an officer or member of an "industrial association". The prohibitions extend to conduct by or against a constitutional corporation; or conduct that adversely affects a constitutional corporation; or conduct carried out with intent to adversely affect a constitutional corporation; or conduct that directly affects (or is carried out with the intent to directly affect) a person in the capacity of an employee, or prospective employee, a contractor, or prospective contractor of a constitutional corporation; or conduct that consists of advising, encouraging or inciting a constitutional corporation to take or not to take (or threaten to take, or not to take) particular action in relation to another person.

31 Part 23 of the new Act is headed "School-based apprentices and trainees". It applies only to s 6(1) employers and their employees. It provides, subject to certain qualifications, for persons who are employed as "school-based apprentices" or "school-based trainees" to be entitled to any additional conditions to which a full-time apprentice or employee doing the same kind of work, in the same location and for the same employer would be entitled, calculated by reference to the proportion of hours worked on the job by the employee.

32 The following provisions of the new Act were also the subject of argument.

33 Section 16 expresses the intention that the new Act is to apply to the exclusion of a range of State and Territory laws that would otherwise apply in relation to an employer and employee. The excluded laws include a "State or Territory industrial law" of a kind specified, together with an Act of a State or Territory "that applies to employment generally" and has a main purpose of either regulating workplace relations; providing for the determination of the terms and conditions of employment; providing for the making and enforcement of agreements determining the terms and conditions of employment; providing for rights and remedies connected with termination of employment or prohibiting conduct that relates to whether a person is a member of an industrial association. It will be necessary to make further reference to the provisions excluding State and Territory laws when dealing with the arguments on that topic.

34 Section 117 provides that a Full Bench of the AIRC has the power to make an order restraining a State industrial authority from dealing with a matter which is the subject of a proceeding before the AIRC. If such an order is made, the new Act provides that the State industrial authority must cease dealing with the matter and any order the State industrial authority makes in contravention of the restraint is invalid to the extent of the contravention.

35 Between 14 December 2005 and 27 March 2006, the new Act included Pt VIAAA, which sought to render of no effect an obligation contained in any State law, State award, State authority order or Territory law requiring a "relevant employer" with fewer than 15 employees to pay redundancy pay. In the case of a State law or award or authority order "relevant employer" meant a constitutional corporation. In the case of a Territory law, it meant any employer. Although the provision was repealed on 27 March 2006, it could have affected persons before its repeal, and its validity was challenged.

36 It is necessary now to refer to certain Schedules. That which was the subject of most argument is Sched 1, headed "Registration and Accountability of Organisations". Much of the substantive content of this Schedule was in the previous Act, but under the previous Act the constitutional basis for the regulation of organisations of employers and employees was s 51(xxxv)[3]. The basis has now changed, even though the scheme of regulation remains, in large part, substantially the same.

37 Schedule 1 provides for the registration and regulation of organisations of employees and employers. It is unnecessary for present purposes to go into the detail of the regulation. The provisions relating to registration are central to the scheme. The associations which may apply for registration under the new Act are those which are "federally registrable". An association of employers is federally registrable either if it is a constitutional corporation or if the majority of its members are "federal system employers". Federal system employers include constitutional corporations, employers in relation to "public sector employment", employers in Victoria, or employers in relation to an enterprise that operates principally from or within a Territory, or is engaged principally in interstate trade or commerce. Federally registrable employee associations are those which are constitutional corporations or which have as a majority of their members "federal system employees". Federal system employees are persons employed by constitutional corporations, or employed in public sector employment, or employed in Victoria, or in certain kinds of enterprise including those which operate principally from or within a Territory or are engaged principally in interstate trade and commerce.

38 Federally registrable enterprise associations include constitutional corporations and associations the majority of whose members are federal system

---

3 *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309.

employees. An association may apply to the AIRC for registration. If the application is successful, the association becomes an "organisation", which is deemed to be a body corporate.

39 Item 4 of Sched 4 to the Amending Act was included among the transitional provisions, and dealt with the operation of pre-reform awards.

40 Schedule 6 to the new Act provides transitional arrangements for certain employers and employees bound by federal awards. It is based upon the power given by s 51(xxxv). It provides in effect that employers who do not fall within s 6(1), and their employees, will continue to be bound by a federal award which applied to them before the reform commencement for a transitional period of up to five years, as a transitional award. During that period the AIRC can vary transitional awards but is prohibited from making new awards. There are limits on the content of transitional awards.

41 Schedule 8 preserves for a time the terms and conditions of employment of those employees within the meaning of s 5(1) who, but for the commencement of the reforms, would have been bound by, or whose employment would have been subject to, a State employment agreement, a State award or a State or Territory industrial law. Its object also is to encourage the making of workplace agreements under the new Act during that time. It creates a new federal instrument called a "notional agreement preserving State awards" containing the terms of the original State award or State or Territory industrial law. The pay rates, casual loading provisions, classification and coverage provisions in pre-reform wage instruments are converted to a preserved APCS pursuant to Div 2 of Pt 7. The notional agreement ceases to operate three years from the date of the reform commencement, or otherwise ceases to operate in relation to an employee if a workplace agreement comes into operation in relation to the employee, or if the employee becomes bound by an award. A term of a notional agreement that deals with a matter for which provision is made by the Pay and Conditions Standard is not enforceable. State employment agreements are converted into Preserved State agreements taken to have come into operation on the reform commencement. The new Act provides that industrial action must not be taken until after the date on which the agreement would have expired, or the end of three years, whichever is the sooner. The Pay and Conditions Standard does not apply to those covered by a Preserved State agreement. State industrial authorities are prohibited from exercising any function in respect of the converted instruments.

42 There are general, and specific, regulation-making powers, the terms of which will be mentioned when considering challenges to those powers and to regulations.

43 The State of Victoria joined in most of the challenges made by the other States. In one important respect, however, the application of the new Act to Victoria is different, and is covered by Pt 21. Reference has already been made to the Referral Act, and the exceptions to which it was subject.

44 Part 21 establishes a regime particular to Victoria. In its amended statement of claim, and its written submissions in chief, Victoria challenged s 898 of the new Act, which is in Div 13 of Pt 21, and deals with the exclusion of Victorian laws, on the ground that it purported to express an intention to exclude Victorian laws on matters which were excluded from the referral of powers under the Referral Act, and also on the ground that it purported to exclude Victorian laws which pertain to the essential functions of government. The Commonwealth, in its written submissions, advanced certain arguments relating to the construction of the Acts and stated certain intentions as to the making of regulations. In its written submissions in reply, Victoria stated that, in the light of those "submissions and concessions", Victoria did not persist with its challenge to s 898.

3 The principal issue: Constitution, s 51(xx)

45 In the Explanatory Memorandum circulated when the Workplace Relations Amendment (Work Choices) Bill 2005 was introduced, the first of the major changes to be implemented by the Bill was said to be to "simplify the complexity inherent in the existence of six workplace relation jurisdictions in Australia by creating a national workplace relations system based on the corporations power that will apply to a majority of Australia's employers and employees". The Explanatory Memorandum, citing a report of the Australian Bureau of Statistics[4], said that "[u]se of the corporations power, together with other heads of power such as the Territories power and powers referred by Victoria, to expand the federal system would mean that up to 85 per cent of Australian employees would be covered by the federal system". Large and medium sized businesses in Australia are almost invariably incorporated. The figure of 85 per cent was accompanied by an assertion that 49 per cent of small businesses employing staff are currently incorporated.

---

4 Australian Bureau of Statistics, *Employee Earnings and Hours*, May 2004 (Cat No 6306.0).

46 In its submissions, the Commonwealth was concerned to make the point that reliance on the corporations power to support legislation relating to industrial relations matters and terms and conditions of employment in 2005 was not novel. At least since 1993, the Parliament has included provisions enacted in reliance on s 51(xx) in its industrial relations legislation. In *Victoria v The Commonwealth* (*Industrial Relations Act Case*)[5], Victoria, Western Australia and South Australia challenged a substantial number of the provisions of the previous Act, but they conceded that s 51(xx) empowered the Parliament to make laws governing the industrial rights and obligations of constitutional corporations. They conceded that s 51(xx) supported Div 4 of Pt VIB of the previous Act. Part VIB was substantially similar to Pt 8 of the new Act, which is now said to be invalid. New South Wales, which intervened in the case, adopted the submissions of the Commonwealth. These concessions do not preclude the States from advancing the arguments made in the present case, but they draw attention to the fact that reliance on the corporations power to sustain parts of the new Act is not unprecedented. It is the extent of the reliance that is new, but if the argument for the States in this case is correct, then it applied also to that earlier legislation. In the *Industrial Relations Act Case*, Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ said[6]:

> "It is not in issue that the Parliament may validly legislate as to the industrial rights and obligations of persons employed by constitutional corporations as defined in s 4(1) of the Act. Clearly, the constitutional powers which authorise laws in that regard also authorise laws defining those rights and obligations by reference to a specified happening or event. And they authorise laws specifying that they are exclusive of other rights and liabilities, whether that specification is express or implied." (footnotes omitted)

47 *Electrolux Home Products Pty Ltd v Australian Workers' Union*[7] concerned Pt VIB of the previous Act and, in particular, Divs 2 and 8 of that Part. The relevant provisions concerned "certified agreements" made between employers who were constitutional corporations and unions or made directly between such employers and their employees. The constitutional underpinning

---

5 (1996) 187 CLR 416.

6 (1996) 187 CLR 416 at 540.

7 (2004) 221 CLR 309.

of the legislation was noted, but not questioned[8]. McHugh J said[9] that "[t]he corporations power provides a broader basis upon which s 170LI may operate". The validity of Pt VIB of the previous Act was upheld in 2001, by the Full Court of the Federal Court, in *Quickenden v O'Connor*[10].

48 In 1909, in *Huddart, Parker & Co Pty Ltd v Moorehead*[11], this Court dealt with a challenge to the validity of certain provisions of the *Australian Industries Preservation Act* 1906 (Cth), which prohibited corporations of the kind referred to in s 51(xx) from engaging in certain forms of anti-competitive behaviour. In substance the power which the Parliament then exercised, or purported to exercise, was no different from the power that sustains much of the *Trade Practices Act* 1974 (Cth). The Court was divided in opinion. The majority, strongly influenced by the now discredited doctrine of reserved State powers, held that s 51(xx) was to be read down because of the provisions of s 51(i), which empowers the Parliament to make laws with respect to trade and commerce with other countries, and among the States. The impugned legislation covered anti-competitive activity (by constitutional corporations) in intra-State trade. Plainly, it was a law with respect to trade and commerce, but not only with respect to trade and commerce of the kind described in s 51(i). The question was whether it also was a law with respect to corporations of the kind described in s 51(xx). Griffith CJ, who was in the majority, said[12]:

> "It is common ground that [the relevant sections of the *Australian Industries Preservation Act*], as framed, extend to matters relating to domestic trade within a State, and the question is whether the power to make laws with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' extends to the governance and control of such corporations when lawfully engaged in domestic trade within the State. If it does, no limit can be assigned to the exercise of the power. The Commonwealth Parliament can make any laws

---

8 (2004) 221 CLR 309 at 344 [75] per McHugh J, 361 [133] per Gummow, Hayne and Heydon JJ, 387 [216] per Kirby J.

9 (2004) 221 CLR 309 at 344 [75].

10 (2001) 109 FCR 243.

11 (1909) 8 CLR 330.

12 (1909) 8 CLR 330 at 348.

> it thinks fit with regard to the operation of the corporation, for example, may prescribe what officers and servants it shall employ, what shall be the hours and conditions of labour, what remuneration shall be paid to them, and may thus, in the case of such corporations, exercise complete control of the domestic trade carried on by them."

49 By "domestic trade", Griffith CJ meant "domestic trade within the State", that is, trade other than trade of the kind referred to in s 51(i). He treated, as part of such trade, contracts made between constitutional corporations and their employees. He read down s 51(xx) by reference to the limitations inherent in s 51(i). The foundation of the reasoning of the majority in *Huddart Parker* was undermined by *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers' Case*")[13] in 1920, but the decision was not formally overruled until 1971, when *Strickland v Rocla Concrete Pipes Ltd* ("the *Concrete Pipes Case*")[14] held that *Huddart Parker* was wrongly decided. Since then, the corporations power has provided the constitutional basis for legislation prohibiting anti-competitive conduct by constitutional corporations, including conduct in what Griffith CJ called "domestic trade", notwithstanding the limitations upon the power of the Parliament to pass laws with respect to such trade contained within s 51(i).

50 No party to these proceedings questioned the authority of the *Engineers' Case*, or the *Concrete Pipes Case*, or the validity of the *Trade Practices Act* in its application to the domestic (intra-State) trade of constitutional corporations. Necessarily, however, the plaintiffs experienced difficulty in accommodating their submissions to those developments. If s 51(xx) is not affected by the limitations inherent in s 51(i), why is it affected by the limitations inherent in s 51(xxxv)? If, in the exercise of its powers under s 51(xx), the Commonwealth Parliament can regulate the terms and conditions on which constitutional corporations may deal with their customers, or their suppliers of goods or services, why can it not, in the exercise of the same powers, regulate the terms and conditions on which constitutional corporations may deal with employees, or with prospective employees? If, as Griffith CJ recognised, a corporation's dealings with its employees are part of its trading activities, how can it be that the Parliament has power to prohibit constitutional corporations from engaging in some forms of business activities (such as anti-competitive behaviour) but not

---

13 (1920) 28 CLR 129.

14 (1971) 124 CLR 468.

others (such as engaging in certain industrial practices)? Why is not use of the corporations power to regulate aspects of intra-State trade just as much an incursion into State legislative power as use of the corporations power to regulate aspects of industrial relations?

51 The answers to these questions must be found in the accepted principles of constitutional interpretation established in the previous decisions of this Court. Close and detailed attention must be given to the previous decisions of the Court in which s 51(xx) has been considered. Moreover, effect must be given to some basic principles of constitutional interpretation that were not challenged in this litigation. In particular, it is necessary to give effect to the well-established proposition that a law may be characterised as a law with respect to more than one of the subject-matters set out in s 51. To describe a law as "really", "truly" or "properly" characterised as a law with respect to one subject-matter, rather than another, bespeaks fundamental constitutional error. That error is compounded if the conclusion which is reached about the one "real" or "true" or "proper" character of a law proceeds from a premise which assumes, rather than demonstrates, a particular division of governmental or legislative power, or if it proceeds from the mischaracterisation of the subject-matter of s 51(xxxv) as "industrial relations". Resort to undefined concepts of "industrial affairs", "industrial relations", and "industrial matters" (all of which have somewhat different meanings) should not be permitted to obscure the fact that s 51(xxxv) uses none of those expressions; it speaks of "industrial disputes".

52 To say, as appears accepted on all hands in this litigation, that the Constitution is to be read as a whole and as the one coherent document does not necessarily advance the argument on either side of the record. It merely occasions further inquiry with respect to the particular issue to be determined. Early in the history of the Court, Griffith CJ stressed that the foundation of the Commonwealth of Australia involved much more than "the establishment of a sort of municipal union" resembling "the union of parishes for the administration of the Poor Laws, say in the Isle of Wight"; it involved a federation of national character exercising the most ample power[15].

---

15 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR (Pt 2) 1087 at 1108.

53 The arguments of the plaintiffs[16] included a submission that the power conferred by s 51(xx) was restricted to a power to regulate the dealings of constitutional corporations with persons external to the corporation, but not with employees (or, apparently, prospective employees). It was also submitted that s 51(xx) should be read down, or restricted in its operation, by reference to the presence in s 51 of par (xxxv). That paragraph confers on the Parliament the power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". Just as Griffith CJ in *Huddart Parker* read down s 51(xx) by reference to the terms of s 51(i), so the plaintiffs invited the Court to read down the general scope of s 51(xx) by reference to the terms of s 51(xxxv). Alternatively, it was argued that, even if the presence of s 51(xxxv) did not affect the general ambit of s 51(xx), at least it operated to restrict the capacity of the Parliament to enact a law that can be characterised as a law with respect to the prevention and settlement of industrial disputes. It will be necessary to amplify these and other challenges to the Commonwealth's reliance on the corporations power in due course.

54 Underlying all these arguments there was a theme, much discussed in the authorities on the corporations power, that there is a need to confine its operation because of its potential effect upon the (concurrent) legislative authority of the States. The Constitution distinguishes in s 107 and s 109 between legislative powers exclusively vested in the Parliament of the Commonwealth and inconsistency between federal and State laws made in exercise of concurrent powers. Section 107 does not vest exclusive powers in the State legislatures. It will be necessary also to return to that topic[17]. It is immediately useful to bear in mind what Windeyer J said in *Victoria v The Commonwealth* ("the *Payroll Tax Case*")[18]:

> "The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so. They were

---

16 For some purposes it is not necessary to distinguish between the plaintiffs or to deal separately with the interveners' submissions; it suffices to speak generally of "the plaintiffs".

17 Particularly at [192].

18 (1971) 122 CLR 353 at 395-396.

> self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the federal government, has waxed; and that of the States has waned. In law that is a result of the paramount position of the Commonwealth Parliament in matters of concurrent power. And this legal supremacy has been reinforced in fact by financial dominance. That the Commonwealth would, as time went on, enter progressively, directly or indirectly, into fields that had formerly been occupied by the States, was from an early date seen as likely to occur. This was greatly aided after the decision in the *Engineers' Case*, which diverted the flow of constitutional law into new channels." (footnote omitted)

These were the observations of a distinguished legal historian. References to the "federal balance" carry a misleading implication of static equilibrium, an equilibrium that is disturbed by changes in constitutional doctrine such as occurred in the *Engineers' Case*, and changes in circumstances as a result of the First World War. The error in implications of that kind has long been recognised. So much is evident from Alfred Deakin's Second Reading Speech on the Judiciary Bill in 1902[19] and his comparison between the difficulty of amending the Constitution by referendum, and this Court's differing but continuing role in determining the meaning and operation of the Constitution.

55 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[20]. (Plainly, a foreign corporation is a corporation formed outside the limits of the Commonwealth.) No party or intervener called in question what

---

19 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10967-10968.

20 See [58] and [185].

was said about trading and financial corporations in *R v Federal Court of Australia; Ex parte WA National Football League*[21], *Actors and Announcers Equity Association v Fontana Films Pty Ltd*[22], *State Superannuation Board v Trade Practices Commission*[23] or *Fencott v Muller*[24].

4 Other issues

56 The other principal issues between the parties may be identified as follows. Section 6(1) of the new Act, in pars (e) and (f), invokes the power conferred by s 122 of the Constitution (the territories power). There is a question whether the territories power supports the operation given to the new Act in connection with Territories by the definitions of employee and employer. As has been noted above, Sched 6 of the new Act continues reliance on the conciliation and arbitration power. There is a question whether that power enables the Commonwealth to maintain in force a limited conciliation and arbitration system, or to legislate with respect to the dismantling of the previous industrial relations system. There is a question whether s 16(1) and s 16(4) of the new Act validly exclude State and Territory laws in so far as they apply to employees and employers as defined in ss 5 and 6. There is a question whether s 117 of the new Act validly empowers the AIRC to make orders which restrict the actions of State industrial authorities. As was noted above, there are questions as to the validity of various provisions empowering the making of regulations.

PART II – SECTION 51(xx)

1 The plaintiffs' principal arguments

57 The plaintiffs' submissions about s 51(xx) were directed principally to identifying what were said to be relevant limits to the power. There were three principal strands to the submissions. First, it was submitted that s 51(xx) permits the making of a law with respect to only the *external* relationships of constitutional corporations, not their internal relationships, and that the relationship between a constitutional corporation and its employees should be classified as "internal". Secondly, both in amplification of and as an alternative

---

21 (1979) 143 CLR 190.

22 (1982) 150 CLR 169.

23 (1982) 150 CLR 282.

24 (1983) 152 CLR 570.

to the first submission, it was submitted that it is *insufficient* for a law to be characterised as a law with respect to constitutional corporations that the law confers rights or imposes obligations upon them. If a positive test is to be adopted, the preferred test was said to be a distinctive character test – that the nature of the corporation is significant as an element in the nature or character of the laws. Thirdly, as indicated earlier, it was submitted that s 51(xx) is to be read down, or confined in its operation, by reference to s 51(xxxv), with the consequence that the Parliament has no power to legislate with respect to the relationship between a constitutional corporation and its employees except pursuant to s 51(xxxv).

58 All of the plaintiffs' submissions about the validity of the Amending Act took as their premise that there are constitutional corporations (whether foreign corporations, or trading or financial corporations formed within the limits of the Commonwealth) which would be the subject of, or affected by, the various norms of behaviour for which the Amending Act provides. There was, therefore, no occasion to debate in argument, and there is no occasion now to consider, what kinds of corporation fall within the constitutional expression "trading or financial corporations formed within the limits of the Commonwealth". Any debate about those questions must await a case in which they properly arise.

59 Constitutional corporations are juristic persons recognised by the law as separate from their corporators. Such juristic persons are able to act only through human actors. The Amending Act deals with the relationship between those juristic persons which are constitutional corporations and one particular class of actors through whom those corporations may act – the corporation's employees. The Amending Act also deals with the relationship between certain other kinds of employer (including the Commonwealth, certain Territory employers, and certain persons engaged in interstate or international trade or commerce) and their employees. But it is the provisions which regulate the relationships between constitutional corporations and their employees to which attention must be given in considering the plaintiffs' challenges to the sufficiency of s 51(xx) as support for the Amending Act.

60 Once it is recognised that the Amending Act prescribes norms which regulate or affect the relationship between constitutional corporations and a class of those through whom those corporations may act, it may be seen that the plaintiffs' submissions require consideration of what is meant by a law "with respect to" the subject-matter of constitutional corporations, rather than identification of the metes and bounds of the subject-matter of the relevant head of power. That is, when it is said by the plaintiffs that s 51(xx) permits the making of a law with respect to only the external relationships of constitutional

corporations, the contention is one that seeks to identify what is meant by a law "with respect to" the specified kinds of corporation, and seeks to limit such laws to laws with respect to external relationships. And the alternative submissions about what is not, and what is, sufficient to characterise a law as a law with respect to constitutional corporations have the same focus.

2 The Commonwealth's principal arguments

61 The Commonwealth submitted that a law "directed specifically to constitutional corporations", in the sense that the law creates, alters or impairs the rights, powers, liabilities, duties or privileges of such a corporation, is supported by s 51(xx). This the Commonwealth described as "a 'direct' connection". The Commonwealth further submitted that previous decisions of this Court showed that other, less direct, forms of connection between a law and constitutional corporations are not so "insubstantial, tenuous or distant"[25] as to deny its characterisation as a law with respect to that subject-matter. Four forms of connection were said to be supported by authority:

(a) a law relating to the conduct (in the relevant capacity) of those who control, work for, or hold shares or office in constitutional corporations[26];

(b) a law relating to the business functions, activities or relationships of constitutional corporations[27];

(c) a law protecting a constitutional corporation from conduct that is carried out with intent to, and the likely effect of which would be to, cause loss or

---

25 *Melbourne Corporation* (1947) 74 CLR 31 at 79; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 369 per McHugh J; *Leask v The Commonwealth* (1996) 187 CLR 579 at 601-602 per Dawson J, 621 per Gummow J.

26 *Re Dingjan* (1995) 183 CLR 323 at 369 per McHugh J.

27 *Re Dingjan* (1995) 183 CLR 323 at 364 per Gaudron J (with whose reasons Mason CJ and Deane J agreed), 369-370 per McHugh J. See also *Quickenden v O'Connor* (2001) 109 FCR 243 at 257-258 [38]-[40] per Black CJ and French J, 274-275 [115] per Carr J.

damage to the business of[28], or interfere with the trading activities of[29], a constitutional corporation; and

(d) a law which otherwise, in its practical operation, "materially affect[s]" or has "some beneficial or detrimental effect on" a constitutional corporation[30].

In addition to these connections, said to be taken from the decided cases and said not to set the boundaries to what would be a sufficient connection, the Commonwealth submitted that there was a sufficient connection between certain provisions of the Amending Act and s 51(xx) on any of three further bases. First, provisions relating to conduct carried out or proposed to be carried out with intent to cause loss or damage to a constitutional corporation; secondly, provisions relating to conduct where there is a real, not merely remote, prospect that the conduct will have a material effect on a constitutional corporation; and, thirdly, provisions relating to conduct that is carried out or proposed to be carried out with intent to benefit a constitutional corporation, were all said to be within power.

62 In its submissions, the Commonwealth used shorthand descriptions (such as "the 'intention to damage' connection") for each of the forms of connection it identified. The adoption of such descriptions was a convenient means of presenting both written and oral argument. It is not proposed, however, to use them in these reasons, lest their use distract attention in this case, or subsequently, from the questions that must be decided by inviting consideration of the adequacy or applicability of the shorthand.

63 The Commonwealth submitted that many of the impugned provisions of the Amending Act were directed specifically to constitutional corporations (in the sense identified in the Commonwealth's submissions) and for that reason

---

28 *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 183 per Gibbs CJ, 195 per Stephen J, 208 per Mason J, 212 per Murphy J, 219 per Brennan J.

29 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 557 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

30 *Re Dingjan* (1995) 183 CLR 323 at 340 per Brennan J, 365 per Gaudron J, 370 per McHugh J.

were laws with respect to that subject-matter. The Commonwealth further submitted that other impugned provisions were to be supported in one or more of the ways identified as providing a sufficient connection between a law and s 51(xx).

3 A distinction between "external" and "internal" relationships

64 The first of the three principal submissions made by the plaintiffs about s 51(xx) (seeking to distinguish between "external" relationships and "other" or "internal" relationships) was put in a number of different ways. The plaintiffs, rightly, recognised the difficulties and dangers in attempting to state comprehensively the scope of the power. Nonetheless, they submitted that the "essential scope and focus of the corporations power" could be gathered from the Convention Debates, the early text writers, what has been said in the cases, including, in particular, *New South Wales v The Commonwealth* (*The Incorporation Case*)[31], and general principles of constitutional construction. It was said that the mischief to which the power was addressed was:

> "a concern about enabling proper regulation of artificial corporate entities of particular types, especially insofar as they operated in jurisdictions other than the ones in which they have been created, along with *a concern about the need to regulate their interaction with the public in the conduct of their business activities*, particularly in light of the economic strength and usual limited liability characteristic of such bodies corporate." (emphasis added)

These relevant ideas, it was said, could be encapsulated in different ways, but to much the same effect, and the plaintiffs pointed to a number of statements made in the cases which it was said did that. They submitted:

> "Following Isaacs J it can be said that the power is directed to regulating '*the conduct of the corporations in their transactions with or as affecting the public*', that is, '*the conduct of the corporations in relation to outside persons*'.[32] Alternatively, it may be said that the power is directed to authorise the regulation of matters peculiar to constitutional corporations,

---

31 (1990) 169 CLR 482.

32 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 395, 396 (original emphasis).

> namely matters going to peculiarly corporate characteristics along with the engagement of foreign, trading and financial corporations in trading or financial (broadly business) activities. That is essentially a way of saying that 'the nature of the corporation to which the laws relate must be significant as an element in the nature or character of the laws',[33] or 'the fact that a law binds constitutional corporations does not make it law upon the subject of constitutional corporations unless the personality of the persons bound is a significant element of the law itself',[34] or that the law must discriminate by reference to the relevant character of the corporations in question.[35]"

65 In dealing with these submissions it will be convenient first to say something more about this Court's decision in *Huddart Parker*, next to look at some matters of nineteenth century history, including the Convention Debates and some aspects of the drafting history of s 51(xx), then to deal with an argument based on some failed referendum proposals, and finally to consider the course of this Court's decisions, about s 51(xx), after *Huddart Parker*.

66 The examination of those matters will reveal that a distinction of the kind relied on by the plaintiffs, between the external relationships of a constitutional corporation and its internal relationships, does not assist the resolution of the issues presented in these matters. It is a distinction rooted in choice of law rules which cannot, and should not, be transposed into the radically different area of determining the ambit of a constitutional head of legislative power. It is a distinction which finds no support in the Convention Debates or drafting history of s 51(xx). It is a distinction of doubtful stability but, if it were to be adopted, there seems every reason to treat relationships with employees as a matter external to the corporation.

67 In so far as the distinction between external and internal relationships is proffered as a means of limiting what the plaintiffs assert would otherwise be too broad a reach for s 51(xx), it is necessary to consider whether the assertion assumes the answer to the question presented. And in any event it is necessary to examine carefully the context in which such assertions have been made. In that regard, it is essential to recognise the fundamental and far-reaching legal, social,

---

33 *Fontana Films* (1982) 150 CLR 169 at 182 per Gibbs CJ.

34 *Re Dingjan* (1995) 183 CLR 323 at 349 per Dawson J.

35 *Re Dingjan* (1995) 183 CLR 323 at 337 per Brennan J.

and economic changes in the place now occupied by the corporation, compared with the place it occupied when the Constitution was drafted and adopted, and when s 51(xx) was first considered in *Huddart Parker*.

4 *Huddart Parker*

68 There are at least two reasons why it is important to examine what was said about s 51(xx) in *Huddart Parker*. First, the decision is important for what it reveals concerning assertions made about what the framers of the Constitution intended. Secondly, as noted earlier, the dissenting reasons of Isaacs J were the acknowledged source of one of the principal strands of the plaintiffs' arguments about the construction and effect of s 51(xx).

69 *Huddart Parker* was argued in October 1908 and March 1909, little more than five years after the Court first sat in October 1903. The membership of the Court had been increased in 1906, with the appointments of Isaacs and Higgins JJ, but all five members of the Court had been leading participants in the Constitutional Conventions. All are properly seen as among the framers of the Constitution although, of course, each played a different part in that work.

70 *Huddart Parker* concerned the validity of three provisions of the *Australian Industries Preservation Act* 1906 (Cth) – ss 5, 8 and 15B. Sections 5 and 8 were held to be invalid; s 15B was held to be valid. Sections 5 and 8 created offences. Section 5 prohibited "[a]ny foreign corporation, or trading or financial corporation formed within the Commonwealth" from making any contract or engaging in any combination:

> "(a) with intent to restrain trade or commerce within the Commonwealth to the detriment of the public, or
>
> (b) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth".

Section 8 was directed to the same persons, and prohibited such corporations monopolizing, or attempting to monopolize, or combining or conspiring to monopolize, any part of the trade or commerce within the Commonwealth, with intent to control the supply or price of any goods or services. Section 15B[36] gave

---

36 Introduced into the principal Act by the *Australian Industries Preservation Act* 1907 (Cth), s 4.

power to the Comptroller-General of Customs to require persons believed to be capable of giving information in relation to an alleged offence against Pt II of the *Australian Industries Preservation Act* to answer questions and produce documents in relation to the alleged offence.

71 All members of the Court agreed that s 15B was valid. Four Justices (Griffith CJ, Barton, O'Connor and Higgins JJ) held ss 5 and 8 to be invalid; Isaacs J disagreed. The five members of the Court gave separate reasons for judgment. The headnote writer for the Commonwealth Law Reports rightly records[37] that four separate views of s 51(xx) are to be identified in the reasons.

72 All members of the Court concluded that s 51(xx) does not give power to the Parliament to make a law providing for the creation of trading or financial corporations[38]. This was an important first step in the reasons of all members of the Court and its taking was prompted by the way in which argument had been presented. As O'Connor J noted[39], counsel for the respondent, supporting the validity of the impugned provisions, had initially submitted[40] that s 51(xx) gave the Parliament "authority to create corporations and to make laws with respect to everything which has relation to the powers and scope of corporations". The real question, so the argument proceeded[41], was whether the impugned provisions "are in fact legislation dealing with corporations or legislation dealing with some other subject and applying it to corporations". Section 51(xx) was said to extend "to regulating the internal management and restraining the external affairs of corporations [and] to enabling Parliament to forbid corporations doing certain things"[42].

73 The respondent in *Huddart Parker* also advanced an alternative, less expansive, contention, that assumed that the power of creating all of the kinds of

---

37 (1909) 8 CLR 330 at 331-332.

38 (1909) 8 CLR 330 at 348-349 per Griffith CJ, 362 per Barton J, 369 per O'Connor J, 394 per Isaacs J, 412 per Higgins J.

39 (1909) 8 CLR 330 at 368-369.

40 (1909) 8 CLR 330 at 339.

41 (1909) 8 CLR 330 at 339.

42 (1909) 8 CLR 330 at 339.

corporation with which s 51(xx) deals rested either in the States (in the case of trading or financial corporations formed within the limits of the Commonwealth) or in a foreign jurisdiction (in the case of foreign corporations). But the respondent's broader contention, that the Parliament has power to regulate what constitutional corporations can or cannot do within the Commonwealth, because it has power to create trading or financial corporations, informed much of what was said by the Justices in their reasons in *Huddart Parker*. In particular, it seems plain that it was this argument that prompted consideration, by some members of the Court[43], of what Westlake had written in 1905[44], on the subjects of the law which regulated an artificial person, like a corporation, in matters "concerning only itself or the relations of its members, if any, to it and to one another" as distinct from the law which governed its entry into relations, in another country, with "outside parties".

74 Significance was attached by Griffith CJ[45], by O'Connor J[46] and by Isaacs J[47], to a distinction of the kind drawn by Westlake, as assisting the task of characterising the laws in question in *Huddart Parker*. Of course it is important to recognise that the opinions of Griffith CJ and Barton and O'Connor JJ, three of the four Justices who held ss 5 and 8 of the *Australian Industries Preservation Act* invalid, were much influenced by the then accepted doctrine of the Court that legislative powers not given to the Parliament were reserved to the States. In particular, as O'Connor J said[48], the construction of s 51(xx) was approached on the basis that the grant of power to the Parliament must be "so construed as to be consistent as far as possible with the exclusive control over its internal trade and commerce vested in the State". Nonetheless, observing the importance of the reserved powers doctrine to the reasoning of these members of the majority in *Huddart Parker* does not explain all aspects of the differences in opinion

---

43 (1909) 8 CLR 330 at 353 per Griffith CJ, 370-371 per O'Connor J, 395 per Isaacs J.

44 *A Treatise on Private International Law*, 4th ed (1905) at 358-359. See also Dicey, *A Digest of the Law of England with reference to The Conflict of Laws*, (1896) at 485-486.

45 (1909) 8 CLR 330 at 353.

46 (1909) 8 CLR 330 at 370-371.

47 (1909) 8 CLR 330 at 394-395.

48 (1909) 8 CLR 330 at 370.

expressed in that case about the ambit of s 51(xx). In particular, it does not explain the place taken by the distinction drawn by Westlake between the law regulating a corporation or the relations of its members to it and to one another, and the law governing the corporation's entry into relations with outside parties.

75 Griffith CJ pointed out[49] that there is a distinction between "acts which are *ultra vires* of a corporation and acts which, though otherwise within the powers of a corporation, are prohibited by positive law". Griffith CJ accepted that a law denying capacity to a corporation to enter into certain kinds of contract may fall within Commonwealth legislative power. "But the conditions governing the validity of a contract relating to any subject matter rests with the legislature having control of that subject matter, which, in the case of domestic trade, is the State legislature."[50] It was on this basis that Griffith CJ concluded[51] that:

> "I think that they [the words of s 51(xx)] ought not to be construed as authorizing the Commonwealth to invade the field of State law as to domestic trade, the carrying on of which is within the capacity of trading and financial corporations formed under the laws of the State. In other words, I think that pl. xx. empowers the Commonwealth to prohibit a trading or financial corporation formed within the Commonwealth from entering into any field of operation, but does not empower the Commonwealth to control the operations of a corporation which lawfully enters upon a field of operation, the control of which is exclusively reserved to the States."

76 That analysis may be compared with that undertaken by O'Connor J. In the course of argument he had said[52] that "[t]he idea of sec. 51 (xx.) ... is that what is generally known as the law as to companies should be put on a general footing all over Australia". But in his reasons O'Connor J expressed a narrower view.

---

49 (1909) 8 CLR 330 at 353.

50 (1909) 8 CLR 330 at 353.

51 (1909) 8 CLR 330 at 354.

52 (1909) 8 CLR 330 at 334.

77 Like the other members of the Court, O'Connor J took[53] as a premise the proposition that s 51(xx) was restricted to making laws with respect to corporations actually in being. From this it followed[54], in the view of O'Connor J, that the field of legislative power marked out for the Parliament extended "no further than the regulation of the conditions on which corporations of the class described shall be recognized, and permitted to carry on business throughout the Commonwealth". That power was not to be seen as unlimited lest it "encroach on the power of the State over its own internal trade"[55]. The limitation on the power was seen[56], by O'Connor J, as identifiable from the necessity, in the interests of Australian trade and commerce, for there to be federal power to grant the right to a foreign corporation, or a corporation which owed its existence to the laws of any Australian State, to carry on business in every part of Australia. Thus, it followed, in the opinion of O'Connor J[57], that:

> "In the light of the circumstances it may fairly be taken that the framers of the Constitution intended by the sub-section under consideration to confer on the Parliament of the Commonwealth just that power which was wanting in the legislative bodies then existing in Australia – the power of making a uniform law for regulating the conditions under which foreign corporations, and trading or financial corporations created under the laws of any State, would be recognized as legal entities throughout Australia. As part of that power there would be necessarily implied the authority to impose on those corporations all such conditions on admission to recognition as would be appropriate or plainly adapted to the object of the sub-section and not forbidden by the Constitution."

The general nature of the power to make laws imposing conditions upon recognition of those corporations was described[58] by O'Connor J as being "those laws and the conditions embodied in them [that] have relation only to the

---

53 (1909) 8 CLR 330 at 371.

54 (1909) 8 CLR 330 at 371.

55 (1909) 8 CLR 330 at 372.

56 (1909) 8 CLR 330 at 372.

57 (1909) 8 CLR 330 at 373.

58 (1909) 8 CLR 330 at 373.

circumstances under which the corporation will be granted recognition as a legal entity in Australia". The central focus of the power was seen by O'Connor J as falling upon the *status* of the corporation.

78 This distinction between matters of status or internal regulation on the one hand, and relations with outsiders on the other, underpinned much of the dissenting opinion of Isaacs J. But whereas Griffith CJ and O'Connor J had identified s 51(xx) as confined (in the case of Griffith CJ) to controlling the capacity of a corporation to enter a field of operations, as distinct from controlling the corporation's operations in that field, or (in the case of O'Connor J) to regulating the recognition of constitutional corporations throughout Australia, Isaacs J saw the distinction as requiring the opposite allocation of powers between federal and State legislatures. Isaacs J concluded[59] that questions of status and corporate powers were beyond federal legislative power and "left to the States". Rather[60]:

> "The power [given by s 51(xx)] does not look behind the charter, or concern itself with purely internal management, or mere personal preparation to act; it views the beings upon which it is to operate in their relations to outsiders, or, in other words, in the actual exercise of their corporate powers, and entrusts to *the Commonwealth Parliament the regulation of the conduct of the corporations in their transactions with or as affecting the public*." (emphasis in original)

79 These views of Isaacs J, upon which the plaintiffs in the present matters placed such store, and to which it will be necessary to return in some detail, may be contrasted with those of Barton J and of Higgins J.

80 Barton J said[61] that he did not dissent from the reasons of Griffith CJ, but Barton J rested his opinion upon the doctrine of reserved powers. He said[62] that the relevant question was:

---

59 (1909) 8 CLR 330 at 395.

60 (1909) 8 CLR 330 at 395.

61 (1909) 8 CLR 330 at 366.

62 (1909) 8 CLR 330 at 363.

> "Taking then sub-sec. (xx.) to authorize the dealing with both classes of corporations on the same footing – that is, the footing that neither class is a creature of federal legislation – does the sub-section, so read, constitute an exception to the otherwise exclusive reservation to the States of the power to deal by legislation with matters within the field of their internal or domestic trade?"

Barton J concluded[63] that there being no express exception to be found in s 51(xx), from the reservation to the States of power over internal trade and commerce, ss 5 and 8, in so far as they dealt with the domestic trade of the States, were[64] "in no wise incidental or ancillary to the execution of sec. 51 (xx.) of the Constitution, and that the invasion of that sphere is prohibited by the Constitution".

81 Higgins J held[65] that the federal Parliament "can regulate corporations as to status, capacity, *and the conditions on which business is permitted*. But it is for the State Parliament to regulate what contracts or combinations a corporation may make in the course of the permitted business." Thus, just as a distinction was to be drawn between legislation determining the status of a person (for example, as alien or subject) and legislation determining the rights and liabilities attached to the status thus ascertained[66], the power in s 51(xx) was understood by Higgins J[67] "as a power to legislate with respect to corporations as corporations". But this understanding of s 51(xx) did not confine that power to legislating with respect to matters of status or questions of corporate powers. Higgins J considered[68] that it extended to "the conditions under which they [constitutional corporations] shall be permitted to carry on business" including, for example[69], matters of capital requirements, filing of returns, auditing, and deposit of

---

63 (1909) 8 CLR 330 at 363-364.

64 (1909) 8 CLR 330 at 366.

65 (1909) 8 CLR 330 at 414 (emphasis added).

66 (1909) 8 CLR 330 at 414.

67 (1909) 8 CLR 330 at 416.

68 (1909) 8 CLR 330 at 412.

69 (1909) 8 CLR 330 at 412-413.

securities. But while Higgins J concluded[70] that the federal Parliament could "regulate the terms of admission into a field and of remaining therein, ... it cannot make a law imposing a penalty for picking a turnip" in the field. This, as Higgins J acknowledged[71], was a fine distinction. It was to be given effect by seeking out "the true nature and character of the legislation in the particular instance under discussion ... in order to ascertain the class of subject to which it really belongs"[72]. But the search was for a singular "nature and character"; it was assumed that a law can have no more than one character. (That a law can be one with respect to more than one head of power is now well established[73].)

82 This examination of *Huddart Parker* reveals several matters of present relevance. First, no one view of the meaning of s 51(xx) commanded the assent of even a majority of the Court. These differences of opinion deny that there was then any settled understanding, accepted by these framers of the Constitution, of what meaning or effect was to be given to s 51(xx). What *was* accepted, by at least the three founding members of the Court, were certain principles of constitutional construction, and in particular those principles which underpinned the reserved powers doctrine. Chief among those principles were first, the need to consider the Constitution "as a whole, and so as to give effect, as far as possible, to all its provisions"[74] and second, the drawing of a negative implication from the grant of a positive power, like s 51(i) and its grant of power with respect to trade and commerce with other countries, and among the States[75]. (More than faint echoes of these propositions were to be heard in the present matters in the plaintiffs' submissions concerning the relationship between s 51(xx) and s 51(xxxv).)

---

70 (1909) 8 CLR 330 at 414.

71 (1909) 8 CLR 330 at 414.

72 (1909) 8 CLR 330 at 410, quoting *Russell v The Queen* (1882) 7 App Cas 829 at 839-840.

73 See, for example, *Fontana Films* (1982) 150 CLR 169 at 192-194 per Stephen J.

74 *R v Barger* (1908) 6 CLR 41 at 72, quoted in *Huddart Parker* (1909) 8 CLR 330 at 350 per Griffith CJ.

75 *Attorney-General for NSW v Brewery Employés Union of NSW* ("the *Union Label Case*") (1908) 6 CLR 469 at 502-503, quoted in *Huddart Parker* (1909) 8 CLR 330 at 350-351 per Griffith CJ.

83 These principles informed the reasoning of Griffith CJ, Barton and O'Connor JJ in *Huddart Parker*. And because these principles underpinned the then accepted doctrine of the Court, they find some reflection in the reasoning of both Isaacs J and Higgins J. But both Isaacs J and Higgins J had expressed their opposition to the reserved powers doctrine in *R v Barger*[76] and in *Attorney-General for NSW v Brewery Employés Union of NSW* ("the *Union Label Case*")[77]. As Higgins J said in *Huddart Parker*[78], it is a mistake to treat the internal trade of a State as forbidden to the federal Parliament "until the utmost limits of all the powers conferred on that Parliament by sec. 51 have been ascertained". And as Isaacs J pointed out[79], s 107 of the Constitution, relied on as working the reservation of domestic trade and commerce to the States[80], reserves to the parliaments of the States only those powers not exclusively vested in the federal Parliament or *withdrawn* from the parliaments of the States. The relevant question presented by s 107 thus is what legislative power the Constitution grants to the federal Parliament, not what the Constitution prohibits or reserves.

84 To give effect to the reserved powers doctrine, any uncertainty or ambiguity in the federal power was resolved, as O'Connor J put it[81], by giving "full operation to the power conferred" but not so as to make it "inconsistent with those portions of the Constitution which leave to the State exclusive power to regulate its own internal trade". And the alternative view of the ambit of the power given by s 51(xx) posited by Griffith CJ, that "no limit can be assigned to the exercise of the power"[82], was rejected on that basis.

85 The second matter of present relevance to notice about what was said in *Huddart Parker* is, as noted earlier, the use that was made of a distinction

---

76 (1908) 6 CLR 41 at 84 per Isaacs J, 113 per Higgins J.

77 (1908) 6 CLR 469 at 584-585 per Isaacs J, 601 per Higgins J.

78 (1909) 8 CLR 330 at 415.

79 (1909) 8 CLR 330 at 391.

80 For example, (1909) 8 CLR 330 at 361 per Barton J.

81 (1909) 8 CLR 330 at 372.

82 (1909) 8 CLR 330 at 348.

between laws determining or affecting the status of an artificial person or its powers and laws affecting its activities. In particular, it is necessary to say more about the reasons of Isaacs J.

86 Isaacs J identified two relevant limitations on the power conferred by s 51(xx). First, only some kinds of corporation fell within the power; secondly, the corporations that "come within the legislative reach of the Commonwealth must be corporations already existing"[83]. Although, as explained earlier, it is not necessary to consider what are "trading or financial corporations formed within the limits of the Commonwealth", it is interesting to observe that Isaacs J regarded "a purely manufacturing company"[84] and "those domestic corporations, for instance, which are constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes, and possibly others more nearly approximating a character of trading"[85] as falling outside the class of trading or financial corporations. The basis for excluding mining and manufacturing corporations from the class of trading or financial corporations was not explained.

87 Because "[t]he creation of corporations and their consequent investiture with powers and capacities was left entirely to the States"[86] it was, in the view of Isaacs J[87], "absurd" to restrict s 51(xx) to power over internal company regulation. It was absurd because, if the States had the power of incorporation, that power, "effectively exercised, could go far to nullify"[88] any power over internal company regulation. Rather, because the corporations the subject of the power were legal persons created according to the law of a State or a foreign country, they are[89]:

---

83 (1909) 8 CLR 330 at 393.

84 (1909) 8 CLR 330 at 393.

85 (1909) 8 CLR 330 at 393.

86 (1909) 8 CLR 330 at 394.

87 (1909) 8 CLR 330 at 394.

88 (1909) 8 CLR 330 at 394.

89 (1909) 8 CLR 330 at 395.

> "beings, which are found and remain in actual existence, possessing a fixed identity, a defined ambit of potentiality, having certain capacities and faculties unalterable by the Commonwealth, beings ready to act within their sphere of capabilities in relation to the people of the Commonwealth".

It followed, so Isaacs J held[90], that "[n]ecessarily you cannot legislate for such corporations *except* with respect to some *extraneous* circumstances or events, whether trade, or finance, or contracts, &c" (emphasis added).

88 This distinction, between legislation affecting the status or powers of the corporation and legislation with respect to extraneous circumstances or events, is central to the opinion of Isaacs J. On its face, it is a distinction of the kind drawn by Westlake[91] – between matters "concerning only itself or the relations of its members, if any, to it and to one another" and matters concerning its relations with outside parties. But Isaacs J drew the line between the two kinds of law at a different point. He classed[92] as matters falling only within the competence of the legislature responsible for creation of a corporation all matters of "internal administration" necessary to produce "a corporation as a completely equipped body ready to exercise its faculties and capacities". Questions of employment terms and conditions and questions about qualifications of directors were[93] "purely internal management and equipment".

89 At once it can be seen that, by dealing thus with questions of employment, Isaacs J gave a very particular meaning to events and circumstances that were *not* external to a corporation. It was a meaning which would evidently present great difficulty in distinguishing between what is external or "extraneous" to a corporation and what is not. Especially would that be so if, as Isaacs J thought[94] to have been "practically conceded" in *Huddart Parker* (and is now well

---

90 (1909) 8 CLR 330 at 395.

91 Westlake, *A Treatise on Private International Law*, 4th ed (1905) at 358-359. See, further, the discussion by Dixon J in *Mills v Mills* (1938) 60 CLR 150 at 181-182.

92 (1909) 8 CLR 330 at 396.

93 (1909) 8 CLR 330 at 396.

94 (1909) 8 CLR 330 at 402.

established in respect of other powers[95]), s 51(xx) would support a law forbidding a foreign company doing any business whatever in Australia, or permitting entry to the field of trade only on conditions.

90 In any event, there seems little reason to assign relationships between the corporation and its employees to the class of "internal" relationships. If, as Isaacs J suggested[96], the touchstone is whether the corporation is "a completely equipped body ready to exercise its faculties and capacities", that seems to embrace the initial employment of employees but not any subsequent solicitation for, or engagement of, employees. Moreover, the inherent instability of the distinction can be illustrated further by considering three ways in which a corporation could raise capital – by borrowing from a bank or raising debt finance from the public, or by issuing shares (either by private placement or by public issue). There seems little reason to distinguish between the three. Yet it seems that borrowing from a bank would be an "external" matter and issuing shares to existing shareholders would be an "internal" matter. But where would an issue of unsecured notes to the public or a public offering of shares sit in this taxonomy?

91 A distinction between "internal" and "external" matters relating to a corporation, whether made at the point chosen by Isaacs J or made at some other point, is a distinction that may have utility in the context of choice of law. That was its origin. Its utility in that context is that it may inform consideration of what law is to be chosen as the law governing particular questions relating to a particular form of juristic person. In particular, it may assist the formulation of choice of law rules to distinguish (as Anglo-Australian choice of law rules have, and still do[97]) between questions of status and power on the one hand, and questions concerning the regulation of particular aspects of the conduct of that juristic person on the other.

---

95 See, for example, *Herald and Weekly Times Ltd v The Commonwealth* (1966) 115 CLR 418; *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1.

96 (1909) 8 CLR 330 at 396.

97 *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd* (1947) 74 CLR 375; *Risdon Iron and Locomotive Works v Furness* [1906] 1 KB 49; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 972; Hohfeld, "The Individual Liability of Stockholders and the Conflict of Laws", (1909) 9 *Columbia Law Review* 492.

92 But using a distinction like the one just mentioned for the radically different task of identifying whether a particular law is within or outside a constitutional head of legislative power invites attention to some underlying assumptions that its use entails.

93 The references made in *Huddart Parker* to the power of incorporating trading or financial corporations resting with the States, and the power of incorporating a foreign corporation resting with the relevant foreign country, were understood in that case as bringing with them all of the consequences that flow from a choice of law rule. In particular, the conclusion that s 51(xx) conferred no power to make laws providing for the incorporation of companies was seen as invoking principles of the kind discussed and applied in *Bateman v Service*[98]. In that case the Privy Council, on appeal from the Supreme Court of Western Australia, held that the Joint Stock Companies Ordinance 1858 (WA) did not apply to foreign companies or companies incorporated out of Western Australia (in that case Victoria) so as to require registration of the company under the Ordinance if the liability of the corporators for contracts made in Western Australia was to be limited. The Privy Council took the relevant principle to be a principle of comity, stated by Story[99] as being that:

> "In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests."

It followed, so the Privy Council held in *Bateman v Service*[100], that "[i]t is not to be presumed that there was an intention [in the Western Australian Ordinance], *contrary to the comity of nations*, to prevent a foreign incorporated company carrying on business at all in the colony" (emphasis added). Accordingly, s 4 of the Western Australian Ordinance, providing that each partner was to be severally liable for the whole debts of the partnership, if more than 10 persons carried on in partnership any trade or business having gain for its object without being registered as a company under the Ordinance or otherwise incorporated, was construed as not embracing a corporation formed in Victoria.

---

98 (1881) 6 App Cas 386.

99 *Commentaries on the Conflict of Laws*, 2nd ed (1841), §38.

100 (1881) 6 App Cas 386 at 391.

94 Notions of comity do not have any useful place in considering the questions about ambit of legislative power that arise in the present matters. Comity assumes the legislative competence of each of the jurisdictions concerned and would have one jurisdiction give effect to rules whose content is prescribed by the law of the other jurisdiction. But in a federation, the extent of the legislative power of the several integers of the federation is the very question that must be examined. It is not a question whose answer may be assumed, or resolved by appeal to notions of comity. Moreover, relying on notions of comity is apt to invoke presuppositions about allocation of legislative power between the integers of the federation that are not easily distinguished from a reserved powers doctrine. So, for example, the analysis made by Isaacs J of the consequences of s 51(xx) not authorising a law providing for incorporation depended, in important respects, upon his identifying the consequences for federal legislative power that were thought necessary to preserve the relevant State power. As Isaacs J said[101]:

> "Creation and continued existence of a corporation connote full and unalterable capacity; and that necessarily implies internal administration, which, besides, presents as a substantive subject *every reason for retention in the same hands as being a subordinate power to that of creation*, and none for transference alone to a national legislature". (emphasis added)

To draw the line between what is internal and what is external, as Griffith CJ did[102], between matters of formation and corporate powers and objects on the one hand, and the corporation's operations on the other, necessarily reflects a conclusion about the content of federal legislative power which stems not from the terms in which the power is granted, but from a priori assumptions about division of power.

95 Adopting a distinction which is derived from choice of law rules and distinguishes between matters internal and external to a corporation approaches the question in a way that distracts attention from the issues that must be considered. Those issues focus upon the text of s 51(xx) and the ambit of the power it confers on the federal Parliament, not upon such matters as whether, for example, a corporation's dealings with persons the corporation hopes will become its unsecured note-holders are "internal" or "external" dealings.

---

101 (1909) 8 CLR 330 at 396.

102 (1909) 8 CLR 330 at 349, 353.

5 Relevant nineteenth century developments

96 The plaintiffs submitted that support for their contentions about s 51(xx) was provided by its drafting history and by what was said in the course of the Convention Debates. It will be necessary to examine both of these subjects. Before doing so, however, it is important to say something about the legal context within which those events occurred.

97 It is necessary to notice only the bare outline of the many British enactments dealing with companies and corporations enacted between the repeal in 1825 by Statute 6 Geo 4 c 91 of the *Bubble Act*[103], and the passing of *The Companies Act* 1862 (UK) ("the 1862 UK Act")[104]. (The word "company" was used in the nineteenth century to refer to a group of individuals associated together for a particular purpose or purposes. The word "corporation" was used to describe a juristic person distinct from its corporators. It is convenient to maintain this distinction when dealing with the nineteenth century legislation.)

98 In 1826 the first British legislation was enacted[105] by which a company could acquire any of the privileges of a corporation, or the power of suing and being sued by a public officer, without making special application to the Crown (for incorporation by Royal Charter) or to Parliament (for incorporation by private Act). The 1826 Act applied only to joint stock banking companies. The *Trading Companies Act* of 1834[106] empowered the Crown to confer by letters patent all the privileges of incorporation, except limited liability, without granting a charter. In 1844 the *Joint Stock Companies Act*[107] required all companies (with some exceptions) to obtain a certificate of incorporation. (In the

---

103 6 Geo 1 c 18.

104 The history is discussed more fully in Gower, *The Principles of Modern Company Law*, 2nd ed (1957) at 39-50. See also Buckley, *The Law and Practice under the Companies Acts 1862 to 1890*, 6th ed (1891) at 1-5; Lindley, *A Treatise on the Law of Companies*, 6th ed (1902), vol 1 at 2-7; Manson, *The Law of Trading and Other Companies*, (1892) at 1-7.

105 *The Country Bankers Act* 1826 (UK) (7 Geo 4 c 46).

106 4 & 5 Will 4 c 94.

107 7 & 8 Vict c 110.

same year the legislature retraced[108] its steps with respect to banking companies, repealed the 1826 Act, and required banking companies formed after May 1844 to apply to the Crown for incorporation.)

99 In 1855 *The Limited Liability Act* 1855 (UK) enabled companies registered under the 1844 Act (other than insurance companies) to obtain a certificate of incorporation with limited liability. But neither the 1844 Act nor the 1855 Act provided for dissolution and winding-up of companies. These subjects were dealt with separately, in 1844[109], in 1846 with respect to certain railway companies[110], in 1848[111], in 1849[112] and in 1850, again with respect to certain railway companies[113].

100 In 1856 and 1857 attempts were made[114] to consolidate the relevant legislation. These Acts were repealed by the 1862 UK Act. In the same year, 1862, legislation was passed relating to industrial and provident societies[115] which placed those bodies on much the same footing as joint stock companies. The enactment of the 1862 UK Act marked a watershed in the development of modern corporations law.

101 Section 4 of the 1862 UK Act provided that "[n]o Company, Association, or Partnership" consisting of more than a stated number of persons was to be formed, after the commencement of the Act, for certain purposes, unless it was

---

108 7 & 8 Vict c 113.

109 7 & 8 Vict c 111.

110 9 & 10 Vict c 28.

111 *The Joint Stock Companies Winding-up Act* 1848 (UK).

112 *The Joint Stock Companies Winding-up Amendment Act* 1849 (UK).

113 *The Abandonment of Railways Act* 1850 (UK).

114 *The Joint Stock Companies Act* 1856 (UK) and *The Joint Stock Companies Act* 1857 (UK).

115 *The Industrial and Provident Societies Act* 1862 (UK) subsequently repealed by *The Industrial and Provident Societies Act* 1876 (UK) which, in turn, was replaced by the *Industrial and Provident Societies Act* 1893 (UK).

registered as a company under the Act, was a company formed in pursuance of another Act or of letters patent, or was a company engaged in working mines within and subject to the jurisdiction of the Stannaries. Two kinds of purpose were identified in s 4 of the 1862 UK Act – first, the purpose of carrying on the business of banking and, secondly, the purpose of carrying on any other business that had for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof. Ten persons might form a company, association or partnership for the purpose of carrying on the business of banking without being incorporated; twenty was the limit imposed in respect of companies of persons formed to carry on any other business having for its object the acquisition of gain by the company or its members.

102 Some light was cast upon what was meant by a "Company ... formed ... for the Purpose of carrying on any other Business that has for its Object the Acquisition of Gain by the Company ... or by the individual Members thereof", by s 21 of the 1862 UK Act. That section, so far as now relevant, provided:

> "No Company formed for the Purpose of promoting Art, Science, Religion, Charity, or any other like Object, not involving the Acquisition of Gain by the Company or by the individual Members thereof, shall, without the Sanction of the Board of Trade, hold more than Two Acres of Land".

As Jessel MR was later to point out[116], the 1862 UK Act thus sought to distinguish between "commercial undertakings" and "what we may call literary or charitable associations".

103 Some Australian colonies had passed legislation relating to companies before the 1862 UK Act was enacted[117]. But the 1862 UK Act was taken as the model for equivalent legislation in the colonies of Queensland in 1863[118],

---

116 *In re Arthur Average Association for British, Foreign, and Colonial Ships; Ex parte Hargrove & Co* (1875) LR 10 Ch App 542 at 548.

117 See, for example, New South Wales legislation predating the separation of Victoria and Queensland, dealing with banking and other companies (6 Vict No 2), and joint stock companies (11 Vict No 19 and 11 Vict No 56), and Victorian legislation dealing with limited liability (17 Vict No 5 and 24 Vict No 109), and the *Mining Association Act* 1858 (Vic).

118 *The Companies Act* 1863 (Q).

Victoria in 1864[119] and South Australia in 1864[120]. Other colonies followed more slowly: Tasmania in 1869[121], New South Wales in 1874[122] and Western Australia in 1893[123]. The Queensland Act contained a provision equivalent to s 21 of the 1862 UK Act; the Victorian Act did not.

104 Section 21 of the 1862 UK Act (and the equivalent provision in *The Companies Act* 1863 (Q)) was directed to companies, as distinct from corporations, formed for certain purposes not involving the acquisition of gain by the company or its members. Neither the 1862 UK Act, nor any of the Acts of the Australian colonies derived from that Act, prohibited the association of any number of persons for pursuit of non-profit purposes. The prohibitions contained in the 1862 UK Act and its derivatives, on which those Acts turned, were prohibitions directed against the pursuit of commercial ventures by associations of more than certain numbers of persons without incorporation.

105 The 1862 UK Act and its derivatives provided for the incorporation of any group of seven or more persons "associated for any lawful Purpose"[124] as a company limited by shares or by guarantee. Towards the end of the nineteenth century provision was made, in some Acts, for some non-profit associations to be incorporated as limited liability corporations but dispensed from the obligation to include the word "limited" in their name[125].

---

119 *The Companies Statute* 1864 (Vic), the long title of which was "An Act for the Incorporation Regulation and Winding-up of Trading Companies and other Associations".

120 *The Companies Act* 1864 (SA).

121 *The Companies Act* 1869 (Tas).

122 *Companies Act* 1874 (NSW).

123 *The Companies Act* 1893 (WA).

124 1862 UK Act, s 6.

125 See, for example, *Literary Associations Incorporation Act* 1883 (Vic); *Companies Act* 1890 (Vic), s 181.

106 Some non-profit ventures in the Australian colonies like universities[126], museums[127] or zoological societies[128] were incorporated pursuant to statute. Otherwise, in most Australian colonies, and later in the States, incorporation of a non-profit association with limited liability was possible only under the relevant companies legislation. In South Australia, however, *The Associations Incorporation Act* 1858 (SA) provided a simple and cheap method for incorporation of an association established for what the preamble to that Act described as "the promotion of religion, education, and benevolent and useful objects". This innovative legislation was ultimately replicated in other Australian States and Territories but in most cases[129] that was not done until the latter half of the twentieth century[130].

107 Between 1862 and the first of the Constitutional Conventions – the National Australasian Convention held in Sydney in 1891 – there were many statutory and other developments, in England, in the law of companies and corporations. There was a deal of litigation about what companies could or should be registered. That litigation canvassed what was meant by "business"

---

126 See, for example, *An Act to incorporate and endow the University of Sydney* (14 Vict No 31) and *An Act to incorporate and endow the University of Melbourne* (16 Vict No 34).

127 See, for example, *An Act to incorporate and endow the Australian Museum* (17 Vict No 2).

128 See, for example, *The Zoological and Acclimatisation Society Incorporation Act* 1884 (Vic).

129 But see *The Religious Educational and Charitable Institutions Act* 1861 (Q); *Associations Incorporation Act* 1895 (WA).

130 Associations Incorporation Ordinance 1953 (ACT); Associations Incorporation Ordinance 1963 (NT); *Associations Incorporation Act* 1964 (Tas); *Associations Incorporation Act* 1981 (Vic); *Associations Incorporation Act* 1981 (Q); *Associations Incorporation Act* 1984 (NSW).

and "trade"[131] and what was meant by "gain"[132]. Questions were agitated about the registration of investment trust companies[133], land societies[134], loan societies[135] and foreign corporations[136]. And the legislature was no less active. The Parliament at Westminster enacted *Companies Acts* in 1867, 1877, 1879, 1880 and 1883. It enacted *The Companies Seals Act* 1864, the *Companies (Colonial Registers) Act* 1883, the *Companies (Memorandum of Association) Act* 1890, the *Companies (Winding up) Act* 1890, the *Directors Liability Act* 1890, *The Joint Stock Companies Arrangement Act* 1870, *Life Assurance Companies Acts* in 1870, 1871 and 1872 and the *Preferential Payments in Bankruptcy Act* 1888.

108 But the corporation had not yet emerged as the chief means through which individuals conducted business ventures. That was a development that was to follow the decision, in November 1896, in *Salomon v Salomon & Co*[137].

109 In the Australian colonies there was both litigation and legislation about corporations. As noted earlier, some of the litigation[138] focused upon whether a company incorporated in one colony was obliged to register in another colony in which it did business if it were to obtain the benefit of limited liability. Other

---

131 *Smith v Anderson* (1880) 15 Ch D 247 at 258-259 held that farming and banking are both businesses though neither is strictly a "trade".

132 *In re Arthur Average Association for British, Foreign, and Colonial Ships; Ex parte Hargrove & Co* (1875) LR 10 Ch App 542; *In re Padstow Total Loss and Collision Assurance Association* (1882) 20 Ch D 137.

133 *Smith v Anderson* (1880) 15 Ch D 247.

134 *In re Siddall (a Person of Unsound Mind)* (1885) 29 Ch D 1.

135 *Shaw v Benson* (1883) 11 QBD 563; *In re Thomas; Ex parte Poppleton* (1884) 14 QBD 379.

136 *Bulkeley v Schutz* (1871) LR 3 PC 764.

137 [1897] AC 22.

138 *Bateman v Service* (1881) 6 App Cas 386.

litigation[139] concerned the winding-up in a colony of a corporation incorporated elsewhere.

110 Financial difficulties and scandals emerged in Australia, particularly in Victoria, in the late 1880s and continued into the 1890s. Not surprisingly, the difficulties thus revealed were later to provoke a deal of legislative response[140]. But for the moment, it is convenient to consider the position as things stood in 1891, when the first Constitutional Convention assembled.

111 The *Federal Council of Australasia Act* 1885 (Imp) had provided in s 15 that the Federal Council should:

> "have legislative authority in respect to ... (i) [s]uch of the following matters as may be referred to the Council by the legislatures of any two or more colonies, that is to say, – ... status of corporations and joint stock companies in other colonies than that in which they have been constituted".

That power was never exercised by the Federal Council. But the proposals put to the 1891 Convention included the proposal that the federal Parliament have power over "The Status in any State of Foreign Corporations, and Corporations formed in other States". The power with respect to banking adopted at the 1891 Convention was a power "To Regulate Banking, the Incorporation of Banks, and the Issue of Paper Money". Such little debate about the corporations power as there was at the 1891 Convention focused upon whether that power should be extended, like the banking power, to the registration or incorporation of companies. Sir Samuel Griffith's response[141] was:

> "What is important ... is that there should be a uniform law for the recognition of corporations. Some states might require an elaborate form, the payment of heavy fees, and certain guarantees as to the stability of members, while another state might not think it worth its while to take so much trouble, having regard to its different circumstances. I think the states may be trusted to stipulate how they will incorporate companies,

---

139 For example, *In re Oriental Bank Corporation* (1884) 10 VLR(E) 154.

140 See, for example, *Companies Act* 1896 (Vic).

141 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 3 April 1891 at 686.

> although we ought to have some general law in regard to their recognition."

As this reveals, the concern then being addressed was very narrow.

112 The suggestion that the power be extended was not agreed. As ultimately revised, the proposal made by the 1891 Convention was that the federal Parliament have power to make laws with respect to:

> "Establishing uniform laws throughout the Commonwealth concerning the following matters, that is to say:–
>
> ...
>
> (I) The Status in the Commonwealth of Foreign Corporations, and of Corporations formed in any State of the Commonwealth".

113 The proposal was one that reflected what then was seen as the problem requiring national attention – a problem about recognition of the status of artificial juristic entities created in a State or elsewhere. The issues about corporations and their regulation that had been in such legislative and litigious ferment in the immediately preceding decades of the century were not then seen as matters warranting the grant of national legislative power. To adapt what Sir Samuel Griffith said in 1891, these were, it seems, seen as matters about which the States "may be trusted".

114 By the time the Convention met again, in 1897 in Sydney, the financial scandals of the Victorian land boom had been revealed for all to see. Building societies and banks had been formed, appeared to prosper for a time, but then had collapsed leaving investors and depositors with their claims, totalling many tens of thousands of pounds, substantially unsatisfied. Prominent citizens of the colonies who had been directors or officers of these failed entities had been prosecuted and imprisoned. The reputations of many others had been ruined. All of these events would have been well known to the delegates who attended the Convention sessions in Sydney and then Adelaide in 1897, and in Melbourne in 1898.

115 In Adelaide in 1897 the reference that had been made in the 1891 drafts to the status of corporations was dropped. The corporations power was first put to debate in Adelaide in the form: "Foreign corporations and trading corporations

formed in any State or part of the Commonwealth"[142]. Mr Barton said[143] that the change had been made:

> "So that the Commonwealth may have the power to legislate, not merely with regard to the legal status of corporations acting within the Commonwealth, *but it may have power as far as it can legislate upon the general subject of these corporations, over the general subject of foreign corporations, formed in any part of a State of the Commonwealth, for the purpose of uniform legislation*." (emphasis added)

Mr Higgins asked[144] whether this would give power to exclude such corporations from trading in the Commonwealth and Mr Barton replied[145]:

> "Not, I think, to exclude them, but to regulate the mode in which they conduct their operations. It is for the purpose of uniformity."

116 Delegates returned to the subject on 17 April 1897. On this occasion debate focused upon what kinds of corporation should be specified in the power. Particular reference was made[146] to financial institutions. Mr Deakin, who had appeared as counsel in some of the notable prosecutions in Victoria that followed the corporate collapses of the early 1890s, pointed out[147] that Victoria had passed legislation placing "a strict limitation on the meaning of the word 'banks', excluding from it particular kinds of financial companies which had hitherto been

---

142 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 12 April 1897 at 439.

143 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 12 April 1897 at 439.

144 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 12 April 1897 at 439.

145 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 12 April 1897 at 439.

146 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 17 April 1897 at 793.

147 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 17 April 1897 at 793.

called banks, or treated as banks". He suggested[148] the extension of the power with respect to corporations "to include all limited companies ... [e]specially land and finance companies which caused so much litigation in the past". An amendment inserting "or financial" after the word "trading" was at once proposed and agreed[149], with next to no debate.

117 Thereafter what was to become s 51(xx) received no separate consideration in the debates at the Constitutional Conventions.

118 While there can be little doubt that, by 1897, the drafting committee, Mr Deakin, and others saw that national power was required over a wider field of law with respect to corporations than their status within the Commonwealth, the Convention Debates reveal very little about what those who framed the Constitution thought would fall within or outside the power.

119 No doubt the reference made[150] by Mr Barton to the Commonwealth being given power "as far as it can legislate upon the general subject" of corporations can be taken as suggesting some breadth to the power. But to fasten upon this one comment, made in debate, as fixing "the framers' intention" would be to place altogether too much weight upon it. Rather, the absence of any extended debate about this power does no more than show that, like so many of the legislative powers ultimately granted to the federal Parliament in s 51, the power with respect to corporations was not politically controversial at the time the Constitution was framed. But it also follows that it is impossible to distil any conclusion about what the framers intended should be the meaning or the ambit of operation of s 51(xx) from what was said in debate about the power, or from the drafting history of the provision.

120 To pursue the identification of what is said to be the framers' intention, much more often than not, is to pursue a mirage. It is a mirage because the inquiry assumes that it is both possible and useful to attempt to work out a single

---

148 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 17 April 1897 at 793.

149 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 17 April 1897 at 794.

150 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 12 April 1897 at 439.

collective view about what now is a disputed question of power, but then was not present to the minds of those who contributed to the debates. And even if a statement about the framers' intention can find some roots in what was said in the course of the Convention Debates, care must be taken lest, like the reserved powers doctrine, the assertion assumes the answer to the very question being investigated: is the law in issue within federal legislative power? For the answer to that question is not to be found in attempting to attribute some collective subjective intention to all or any of those who participated in the Convention Debates. And when it is said that a particular construction of the constitutional text does, or does not, accord with the framers' intention, the statement compares competing constructions of the Constitution, both of which must be based in its text, interpreted in accordance with accepted principles.

121 In the case of s 51(xx) the statements made in the course of the Convention Debates were so few and equivocal as to provide no foundation for a conclusion about what those who spoke in debate thought would be the scope or meaning of s 51(xx). Moreover, in the case of s 51(xx), assertions about the framers' intention often leave out of account two subsequent developments of fundamental importance which cannot be assumed to have been foreseen by the framers. First, corporations law was still developing in the last decade of the nineteenth century. There can be no clearer demonstration of that than the decision in *Salomon's Case*. Only with that decision, in November 1896, did the courts fully grasp the implications of corporate personality. And its consequences for the rights of creditors and others were still being debated, and dealt with, well into the twentieth century[151]. Secondly, the place of corporations in the economic life of Australia today is radically different from the place they occupied when the framers were considering what legislative powers should be given to the federal Parliament.

122 The Explanatory Memorandum for the Amending Act asserted[152] that "[f]orty-nine per cent of small businesses employing staff are currently incorporated". There is no material before the Court in these matters which would show what would have been the equivalent proportion of incorporated small business employers in the 1890s. There is, however, every reason to think that it would have been very much smaller. For as Kahn-Freund pointed out, in

---

151 Kahn-Freund, "Some Reflections on Company Law Reform", (1944) 7 *Modern Law Review* 54.

152 Explanatory Memorandum at 9.

1944[153], it was the decision in *Salomon's Case* that encouraged the sole trader (or small group of traders) to conduct business as a limited company even where the venture was not especially risky or where no outside capital was required. Relatively recently, legislation doing away with the doctrine of ultra vires in relation to companies[154], permitting registration of single member companies[155], and doing away with certain capital requirements[156], may be seen as the continuation of development of the corporation as a vehicle for the sole trader's pursuit of commercial gain with minimum exposure to risk of personal liability. That development did not begin until *Salomon's Case* was decided.

123 None of these events could be foreseen by the framers. It is not possible to attribute to them some intention about how this legislative power operates in respect of these or other subsequent legal, economic, and social developments, without making some assumption to the effect that the framers intended that the legislative power granted to the federal Parliament should be limited, not only to facts and circumstances of the kind that existed at federation, but also to whatever kinds of legislative solution had then been devised to address the problems then revealed. But the plaintiffs, correctly, made no such explicit contention.

124 Rather, the plaintiffs confined their contentions about the framers' intention to the drawing of a conclusion from what was said in the Convention Debates, in *Huddart Parker*, and in early texts[157], that s 51(xx) was not intended by the framers to have the reach that would be necessary to support the Amending Act. Those sources do not support the conclusion asserted by the plaintiffs, namely, that s 51(xx) would support only a law with respect to the relationships between a constitutional corporation and members of the public (excluding employees and potential employees of the corporation).

---

153 "Some Reflections on Company Law Reform", (1944) 7 *Modern Law Review* 54 at 54; cf at 57-58.

154 *Companies and Securities Legislation (Miscellaneous Amendments) Act* 1985 (Cth), ss 46-49. See now *Corporations Act* 2001 (Cth), s 124.

155 *Corporations Act* 2001, s 114.

156 *Corporations Act* 2001, s 254C.

157 Especially Harrison Moore's reference to the improbability of the Constitution contemplating "the revival of a medieval system of personal laws" – Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 470.

6 Failed referendums

125 In its written submissions, Queensland submitted that "the people of Australia have repeatedly, at referendums, rejected attempts by governments of the Commonwealth to broaden the scope of the corporations power and to confer upon the Commonwealth Parliament a general industrial relations power". Queensland further submitted that "rejection by that sovereign force [the people of Australia] of proposals to add heads of power to section 51 of the Constitution is a powerful aid in construing the Constitution". Two reasons were proffered for that contention: first, that the need for alteration was predicated upon the power which it was sought to add being absent; and secondly, that the rejection "evidences the sovereign force's view that the power sought to be added both does not and ought not to exist and should not be found in the Constitution, *at least at that point in time*" (original emphasis).

126 At once it should be said that the Amending Act does not depend for validity upon the federal Parliament having "a general industrial relations power". It is necessary always to bear steadily in mind that the Amending Act is directed to the relationships between constitutional corporations and *their* employees, not industrial relations generally. As the Explanatory Memorandum for the Amending Act says, there is an expectation (or at least the hope) that regulating the relationships between constitutional corporations and their employees will "deliver a unified national system [of workplace relations] for most employers"[158] and that the changes will "move towards a national workplace relations system for the first time"[159]. But those consequences of the Amending Act (assuming that they are consequences that will come about) do not alter the need to focus upon the ambit of the corporations power.

127 In 1910[160], 1912[161] and 1926[162], proposals were put to referendum for amendment of both par (xx) and par (xxxv) of s 51. The amendments proposed

---

158 Explanatory Memorandum at 9.

159 Explanatory Memorandum at 10.

160 Constitution Alteration (Legislative Powers) Bill 1910.

161 Constitution Alteration (Corporations) Bill 1912 and Constitution Alteration (Industrial Matters) Bill 1912.

162 Constitution Alteration (Industry and Commerce) Bill 1926.

to s 51(xx) would in each case have extended the power by authorising the Parliament to make laws with respect to the "creation, dissolution, regulation, and control" of corporations. The amendment proposed to s 51(xxxv) would have extended the federal Parliament's power, in 1910, to making laws with respect to (among other things) "[l]abour and employment, including ... [t]he wages and conditions of labour and employment in any trade industry or calling"; in 1912, to making laws with respect to "[l]abour, and employment, and unemployment"; and in 1926, by omitting from s 51(xxxv) the words "extending beyond the limits of any one State".

128 The 1910 proposal about corporations was advanced by the then Acting Prime Minister and Attorney-General, Mr Hughes, in response to the decision in *Huddart Parker*. It was advanced on the basis that "[t]he National Parliament must have this power of dealing with corporations" – a power which "[w]e thought that paragraph xx. gave us"[163]. Corporations were said to be a national matter because "the distinguishing feature of modern production [was] the great and ever-increasing power, extent, and influence of combines"[164]. Although put forward in conjunction with a proposed alteration to legislative power with respect to industrial relations, the focus of the proposed alteration to the corporations power was upon what now would be called trade practices questions. The 1912 proposal about corporations was advanced (again by Mr Hughes as Attorney-General) on a generally similar basis[165].

129 By contrast, the 1926 proposal about the corporations power was not separated from the proposals about industrial matters and, at least so far as the parliamentary debates reveal, the central purpose of the amendments was to "cover industrial relations generally"[166]. In 1946[167] the proposal again focused

---

163 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 October 1910 at 4704.

164 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 October 1910 at 4704.

165 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 November 1912 at 5625-5636.

166 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 May 1926 at 2159.

167 Constitution Alteration (Industrial Employment) Bill 1946.

upon industrial relations. It was proposed to add a new par (xxxivA) to s 51, giving the Parliament legislative power with respect to "[t]erms and conditions of employment in industry, but not so as to authorize any form of industrial conscription".

130 All these proposals failed.

131 There are insuperable difficulties in arguing from the failure of a proposal for constitutional amendment to any conclusion about the Constitution's meaning. First, there is a problem of equivalence. The argument must assume that the proposal which was defeated was as confined as is the question that now falls for determination. If the proposal was wider than the immediate question for decision, it is not open to conclude that a majority of those to whom the proposal was put (whether they are described as "the people of Australia", the "sovereign force" or, as in s 128, "the electors qualified to vote for the election of members of the House of Representatives") reached any view about the ambit of the (unamended) constitutional power, or that they reached any view about that part of the proposal that appears to deal with the immediate issue. None of the proposals relied on in this matter was so confined. And the fact that the early proposals (of 1910 and 1912) were prompted by the decision in *Huddart Parker* does not confine those proposals to the questions that now fall for decision in the present matters.

132 Secondly, despite Harrison Moore's optimistic view[168] that the constitutional alteration mechanism provided by s 128 was a "less cumbrous" way for avoiding the obstacle of disagreement between the Houses of Parliament than the deadlock provisions of s 57 of the Constitution, few referendums have succeeded. It is altogether too simple to treat each of those rejections as the informed choice of electors between clearly identified constitutional alternatives. The truth of the matter is much more complex than that. For example, party politics is of no little consequence to the outcome of any referendum proposal. And much may turn upon the way in which the proposal is put and considered in the course of public debate about it. Yet it is suggested that failure of the referendum casts light on the meaning of the Constitution.

133 Finally, is the rejection of the proposal to be taken as confirming what is and always has been the meaning of the Constitution, or is it said that it works

---

168 Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 157.

some change of meaning? If it is the former, what exactly is the use that is being made of the failed proposal? If it is the latter, how is that done? The plaintiffs offered no answers to these questions.

134 Constitutional construction is not so simple a process as the argument from failed referendums would have it. If, as is so often the case, a question about the meaning and operation of the Constitution is controversial, it is for this Court to determine the answer that is to be given. Chapter III, particularly s 76(i), indicates that the determination of matters arising under or involving the interpretation of the Constitution is committed to the judicial power of the Commonwealth. The phrase "or involving its [the Constitution's] interpretation" encompasses later curial disputation concerning earlier decisions respecting the Constitution[169]. Such decisions may also be followed by the passage of a proposed law for the alteration of the text of the Constitution pursuant to s 128. But the opening words of s 128, "[t]his Constitution shall not be altered except in the following manner ...", must be read with those of Ch III to which reference is made above. The constitutional text must be treated as the one instrument of federal government.

135 The failure of successive referendums to alter s 51(xx) and s 51(xxxv) provides no assistance in the resolution of the present matters.

7 The course of authority after *Huddart Parker*

136 It will be recalled that in *Huddart Parker* all members of the Court concluded that s 51(xx) does not give the Parliament power to enact a law providing for the incorporation of trading and financial corporations. That conclusion was affirmed in *The Incorporation Case*[170]. The Court held[171] that "[t]he word 'formed' is a past participle used adjectivally, and the participial phrase 'formed within the limits of the Commonwealth' is used to describe corporations which have been or shall have been created in Australia". It

---

169 See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901), at 790.

170 (1990) 169 CLR 482.

171 (1990) 169 CLR 482 at 498 per Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ.

followed, so the joint reasons of six members of the Court continued[172], that "[t]he subject of a valid law is restricted by that phrase to corporations which have undergone or shall have undergone the process of formation in the past, present or future".

137 No party or intervener in the present matters sought to reopen *The Incorporation Case* and it was not in the interests of the plaintiffs to do so. It was not in the plaintiffs' interest to challenge *The Incorporation Case* because to do so would have challenged the premise for the reasoning of Isaacs J in *Huddart Parker* which the plaintiffs sought now to embrace. There is in these circumstances no occasion to consider further what was decided in *The Incorporation Case*.

138 Consideration of the other principal decisions of this Court concerning s 51(xx), since *Huddart Parker*, can be confined to examining first, what those cases have said about the reach of s 51(xx) and secondly, some of the caveats that have been entered in those cases about the breadth of that reach. In undertaking that task it will be important to keep two matters at the forefront of consideration. First, there is no decision of the Court which has decided the specific issues raised in the present matters. Secondly, it follows that what is said in the cases since *Huddart Parker* is to be understood against the background of the issues that fell for decision in those cases – issues different from those that must now be decided.

139 Apart from *The Incorporation Case*, it is necessary to say something about five other decisions – *Bank of NSW v The Commonwealth* ("the *Banking*

---

172 (1990) 169 CLR 482 at 498.

Case")[173], the *Concrete Pipes Case*[174], *Fontana Films*[175], *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*)[176] and *Re Dingjan; Ex parte Wagner*[177]. It is convenient to deal with them chronologically, and to do so recognising what the plaintiffs contended was to be derived from them.

140 The plaintiffs submitted that in the cases decided after *Huddart Parker* there could be found views "as to the scope of s 51(xx), or the appropriate test for characterisation of a law with respect to foreign, financial and trading corporations". Two tests were said to be thus revealed – a "distinctive character test", and an "object of command test" – the former of which was to be preferred, and the latter to be regarded as having been rejected, or at least not endorsed, in the cases. The "distinctive character test" was said to be: "the fact that the corporation is a foreign, trading or financial corporation should be significant in the way in which the law relates to it"[178] if the law is to be valid. The "object of command test" was said to be: that a constitutional corporation is "an 'object of command' [of a law], permitting or prohibiting a trading or financial corporation from engaging in conduct or forming relationships"[179]. It was not suggested that the distinction drawn between external and internal relationships by Isaacs J in *Huddart Parker* was taken up in the later cases.

141 At once it should be said that the plaintiffs' argument against the object of command test and in favour of the distinctive character test has several difficulties. It seeks to build upon some statements made in judgments of the Court which, read in their context, constitute no more than an explicit limitation upon what was being decided in the particular case. In so far as it seeks to build

---

173 (1948) 76 CLR 1.

174 (1971) 124 CLR 468.

175 (1982) 150 CLR 169.

176 (1983) 158 CLR 1.

177 (1995) 183 CLR 323.

178 cf *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 316 per Dawson J.

179 cf *Fontana Films* (1982) 150 CLR 169 at 212 per Murphy J and *Huddart Parker* (1909) 8 CLR 330 at 348 per Griffith CJ.

upon suggestions that s 51(xx) could be interpreted as having an unduly broad reach, such as would disturb a proper or intended "federal balance", it invites the closest attention to what assumptions underpin the suggestions. Finally, the assertion of a specific test for characterisation of a law as being a law with respect to constitutional corporations either runs serious risk of inverting the proper order of inquiry or posits a test that again invokes notions of federal balance.

142 The general principles to be applied in determining whether a law is with respect to a head of legislative power are well settled. It is necessary, always, to construe the constitutional text and to do that "with all the generality which the words used admit"[180]. The character of the law must then be determined by reference to the rights, powers, liabilities, duties and privileges which it creates[181]. The practical as well as the legal operation of the law must be examined[182]. If a law fairly answers the description of being a law with respect to two subject-matters, one a subject-matter within s 51 and the other not, it is valid notwithstanding there is no independent connection between the two subject-matters[183]. Finally, as remarked in *Grain Pool of Western Australia v The Commonwealth*[184], "if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice[185]".

143 The argument that the object of command test has been, or should be, rejected is an argument that focuses upon what is said *not* to establish the

---

180 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

181 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 352-353 [7], 372 [58]; *Grain Pool* (2000) 202 CLR 479 at 492 [16].

182 *Re Dingjan* (1995) 183 CLR 323 at 369; *Grain Pool* (2000) 202 CLR 479 at 492 [16].

183 *Re F; Ex parte F* (1986) 161 CLR 376 at 388; *Grain Pool* (2000) 202 CLR 479 at 492 [16].

184 (2000) 202 CLR 479 at 492 [16].

185 *Leask* (1996) 187 CLR 579 at 602.

sufficiency of connection between a law and the relevant head of power. But it does that divorced from any consideration of the legal or practical operation of the law in question. That inverts the proper order of inquiry.

144 What is described as the "distinctive character test" builds largely upon statements made in cases where the laws in question have concerned the *trading* activities of *trading* corporations. The argument that the distinctive character test has been, or should be, adopted takes what has been said about what is distinctive of a trading corporation and treats that as indicating that the adjectives "foreign", "trading", and "financial" are the considerations on which the power turns. "Trading" and "financial" are said to refer to a corporation's activities; "foreign" refers to a corporation's status or origin. Yet it is acknowledged that the power is to make laws with respect to particular juristic persons. It is what was described in argument as "a persons power" – it is not "a power with respect to a function of government, a field of activity or a class of relationships"[186].

145 Treating the character of the corporations mentioned in s 51(xx) (as foreign, trading or financial) as the consideration on which the power turns produces awkward results. Why should the federal Parliament's power with respect to Australian corporations focus upon their *activities*, but the power with respect to foreign corporations focus only upon their *status*? More fundamentally, however, examination will reveal that the "distinctive character test" is put forward by the plaintiffs, not just as a convenient description of the result of considering the sufficiency of connection between a law and the relevant head of power, but as an additional filter through which it is said the law must pass if it is to be regarded as having a sufficient connection with s 51(xx). This is a contention that, again, necessarily invokes notions of federal balance.

146 It will be necessary to return to consideration of the plaintiffs' arguments after saying something about each of the five cases mentioned earlier.

7(a) The *Banking Case*

147 It will be recalled, from what has been said earlier about the Convention Debates, that the banking power (s 51(xiii)) provides explicit power to make laws with respect to the incorporation of banks. But s 51(xiii) also limits the banking power by specifying the power as being with respect to "[b]anking, *other than*

---

186 *New South Wales v The Commonwealth* (*The Incorporation Case*) (1990) 169 CLR 482 at 497.

State banking; also State banking extending beyond the limits of the State concerned" (emphasis added).

148 The laws in question in the *Banking Case* could be characterised, in at least their major aspects, as laws with respect to foreign corporations or financial corporations, as well as laws with respect to banking, and laws with respect to the acquisition of property. Latham CJ concluded[187] that s 51(xx) should not be construed as giving "complete power to pass any law of any description in so far as it is made applicable to banking corporations". To do so would deny the qualification to the power to make laws with respect to banking provided by the words "other than State banking". The conclusion reached by Latham CJ was expressed in words of great generality. He said[188] that s 51(xiii) is to be interpreted "as a special provision which provides for the whole legislative power of the Commonwealth Parliament so far as laws with respect to banking corporations and banking are concerned". Accordingly, Latham CJ continued[189], s 51(xx) "should be regarded as not applying to corporations so far as they are engaged in banking". It is not necessary to decide whether these statements are cast in terms that are too absolute.

149 Latham CJ recorded[190] the Commonwealth's argument, in the *Banking Case*, that s 51(xx) "gave full power to make any law upon any subject so long as it was a law which applied to and controlled the conduct" of constitutional corporations. Although it is evident that Latham CJ did not favour this aspect of the Commonwealth's argument about s 51(xx), he treated the decisive point as being the relationship between s 51(xiii) and s 51(xx), and expressed no concluded view about the wider issue. It is to be noted, however, that Latham CJ considered[191] that what had been said[192] to be inconvenient consequences of construing s 51(xx) as the Commonwealth submitted it should be, were not conclusive of that wider issue.

---

187 (1948) 76 CLR 1 at 203.

188 (1948) 76 CLR 1 at 204.

189 (1948) 76 CLR 1 at 204.

190 (1948) 76 CLR 1 at 202.

191 (1948) 76 CLR 1 at 203.

192 *Huddart Parker* (1909) 8 CLR 330 at 409-410 per Higgins J.

150 On the question of the relationship between s 51(xiii) and s 51(xx), Rich and Williams JJ agreed[193] that "corporations which are banks [are to be] placed in the separate category expressly provided for by pl. (xiii.) and therefore as corporations outside the generality of the classes of corporations referred to in pl. (xx.)". But on the more general question of the proper meaning of s 51(xx), Rich and Williams JJ said[194], of s 51(xx) and of *Huddart Parker*:

> "Very conflicting views of the meaning of this placitum were there expressed. But there was agreement that the placitum does not authorize the Commonwealth Parliament to create corporations but relates to legislation with respect to corporations as existing entities. For the purposes of private international law, each of the States of Australia is regarded as a foreign country in the courts of another State, so that bodies incorporated in one State are just as much foreign corporations in another State as bodies incorporated abroad. The language of the placitum indicates an intention to give the Commonwealth Parliament power to make laws from time to time with respect to the conditions, subject to the performance of which, corporations of all kinds created beyond Australia and trading and financial corporations incorporated in Australia should be entitled to carry on business throughout Australia or in any part thereof."

Again it may be noted that, as in *Huddart Parker*, choice of law issues were introduced into the debate. For the reasons given earlier, those notions provide no relevant assistance to the examination of the ambit of the legislative power conferred by s 51(xx).

151 By contrast, Starke J said[195] of s 51(xx) that it would authorise the Commonwealth:

> "to govern and regulate the operation of these companies but would not authorize the suppression of all such corporations or the nationalization of their activities. Thus, the carrying on business in Australia by these corporations might be prohibited absolutely or except upon certain

---

193 (1948) 76 CLR 1 at 256.

194 (1948) 76 CLR 1 at 255.

195 (1948) 76 CLR 1 at 304.

conditions and the exercise of their powers in Australia might be regulated and so forth."

152 In the end, what was said in the *Banking Case* is of little direct assistance in the present matters. What was said there, about the consequences for construction of recognising that a particular law is a law with respect to banking and with respect to foreign corporations or financial corporations, would be of direct relevance in the present matters only if the Amending Act were to be characterised as a law with respect to constitutional corporations and a law with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. But that is not said to be the character of the impugned provisions of the Amending Act.

7(b) The *Concrete Pipes Case*

153 Like *Huddart Parker*, the *Concrete Pipes Case* concerned trade practices legislation. The central provision of the Act in question (s 35 of the *Trade Practices Act* 1965 (Cth)) required the registration of certain agreements – agreements under which restrictions of any of a number of kinds were accepted by one or more of the persons party to the agreement who were competitive with any of the parties to the agreement. Section 7 of the Act provided that the relevant restrictions included restrictions coming within the terms of s 35 and accepted under an agreement by a party to the agreement who is a foreign corporation, or a trading or financial corporation formed within the limits of the Commonwealth. Thus, at the risk of undue abbreviation, the impugned provisions could be described as taking the form "No person shall ..."; "This prohibition extends to constitutional corporations".

154 The Court held in the *Concrete Pipes Case* that the law was not a law with respect to constitutional corporations. That the law applied to constitutional corporations did not suffice to bring it within s 51(xx). All members of the Court in the *Concrete Pipes Case*[196] agreed that the provisions of ss 5 and 8 of the *Australian Industries Preservation Act*, held invalid in *Huddart Parker*, were laws with respect to corporations. And it was in the context of considering whether the Parliament had power to make a law "to govern and regulate the

---

196 (1971) 124 CLR 468 at 489 per Barwick CJ, 499 per McTiernan J, 511 per Menzies J, 512-513 per Windeyer J, 513 per Owen J, 515 per Walsh J, 525 per Gibbs J.

trading activities of corporations of the kind mentioned" in s 51(xx)[197] that Barwick CJ said[198] that:

> "it does not follow either as a logical proposition, or, if in this instance there be a difference, as a legal proposition, from the validity of those sections [of the *Australian Industries Preservation Act*], that any law which in the range of its command or prohibition includes foreign corporations or trading or financial corporations formed within the limits of the Commonwealth is necessarily a law with respect to the subject matter of s. 51 (xx.). Nor does it follow that any law which is addressed specifically to such corporations or some of them is such a law."

155 The plaintiffs in the present matters attached a deal of significance to this statement, and on occasions in argument came close to submitting that Barwick CJ had decided that in no case could a law be a law with respect to constitutional corporations unless more was demonstrated than that the law was addressed specifically to such corporations. But Barwick CJ stated no such negative and absolute proposition. Rather, what was said was no more than the proper marking of a limit to what was being decided in a case where the law in question was addressed to all persons, not constitutional corporations in particular. And in any event, a negative proposition of the kind described would appear to assume that a court may take a piecemeal or sequential approach to characterisation of a law: by first considering whether one aspect of the law sufficed to make it a law with respect to a particular head of power before passing on to consider the whole of "the nature of the rights, duties, powers and privileges which [the law in question] changes, regulates or abolishes"[199]. That would not be a proper approach to the task.

156 The plaintiffs also emphasised the statement by Menzies J[200] that "[a] law is not to be described as with respect to the various persons or classes of persons

---

197 (1971) 124 CLR 468 at 525 per Gibbs J.

198 (1971) 124 CLR 468 at 489-490.

199 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7 per Kitto J. See also *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 386-387 [122], 411 [202], 416 [217], 444-445 [287].

200 (1971) 124 CLR 468 at 502.

upon whom it casts obligations". They submitted that this was to be understood as rejection of the "object of command test". It is a statement that can be seen to have influenced the views expressed by Dawson J in *The Tasmanian Dam Case* and *Re Dingjan*. Further, the statement was made in the context of an argument that a law directed to all persons could be characterised as a law with respect to constitutional corporations. This was not because those bodies were the object of the law's command, but because those bodies were within the range of its command to *all* persons.

7(c) *Fontana Films*

157 By the time *Fontana Films* came to be decided, there had been controversy about what are "trading or financial corporations formed within the limits of the Commonwealth". In particular, in *R v Trade Practices Tribunal; Ex parte St George County Council*[201], the Court had held that a county council, established under the *Local Government Act* 1919 (NSW) for "local government purposes", empowered to sell electricity and sell and install electrical fittings and appliances, and pursuing *only* those activities, was not a trading corporation. In his dissenting opinion, Barwick CJ had said[202] that "a corporation whose predominant and characteristic activity is trading whether in goods or services" was a trading corporation. But this view did not then command the assent of a majority of the Court[203].

158 In *R v Federal Court of Australia; Ex parte WA National Football League*[204], *St George County Council* was distinguished. Associations incorporated under associations incorporation legislation, whose principal objects were the promotion, control and management of Australian Rules football matches, were held to be trading corporations. Mason J said[205]:

> ""Trading corporation' is not and never has been a term of art or one having a special legal meaning. Nor, as the Chief Justice pointed out [in

---

201 (1974) 130 CLR 533.

202 (1974) 130 CLR 533 at 543.

203 cf *Fencott v Muller* (1983) 152 CLR 570 at 598-599.

204 (1979) 143 CLR 190.

205 (1979) 143 CLR 190 at 233.

> *St George County Council*], was there a generally accepted definition of the expression in the nineteenth century. Essentially it is a description or label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation."

As noted earlier, the correctness of this proposition is not in issue in these matters.

159 *Fontana Films* concerned the validity of s 45D of the *Trade Practices Act* 1974 – a provision dealing with secondary boycotts. Taking account of what had been held in the *Concrete Pipes Case*, provisions of the *Trade Practices Act* 1974, other than s 45D, took a form which nowadays has become familiar. Whereas the *Trade Practices Act* 1965 considered in the *Concrete Pipes Case* took the form "No person shall ..."; "This prohibition extends to constitutional corporations", the 1974 Act generally took a form first considered and upheld in *R v Australian Industrial Court; Ex parte CLM Holdings Pty Ltd*[206].

160 Again, at the risk of undue abbreviation, the 1974 Act generally took the form of providing that, in the first instance, the Act is to have direct operation according to its terms, but also providing that, in addition to that operation, the Act should have further operation in accordance with provisions evidently intended to engage particular heads of power – interstate and international trade or commerce, foreign corporations, trading and financial corporations, territories, and so on.

161 Section 45D of the *Trade Practices Act* 1974, however, took a different form. It prohibited any person, in concert with another, from engaging in conduct that hindered or prevented the supply or acquisition of goods or services by a third person to or from a fourth person (not being an employer of the first person) where the third person is a constitutional corporation and the conduct would have specified purposes or effects. Section 45D specified those purposes and effects differently according to whether the fourth person was or was not a corporation but those purposes and effects could be described generally as the inflicting of substantial loss on, or damage to, the third person's business.

162 The command of s 45D was directed to any person; it imposed no obligation upon a corporation. The section was, however, designed to protect a

---

206 (1977) 136 CLR 235.

corporation from certain conduct which was intended and likely to cause substantial loss or damage to its business. Section 45D in its application to trading corporations was held to be a valid law with respect to corporations. Certain other applications of the provisions were held invalid.

163 Gibbs CJ pointed out[207] that, like the aliens power (s 51(xix)), the corporations power is conferred "by reference to persons". He continued[208]:

> "However, having regard to the federal nature of the Constitution, it is difficult to suppose that the powers conferred by pars. (xix) and (xx) were intended to extend to the enactment of a complete code of laws, on all subjects, applicable to the persons named in those paragraphs. ... [I]n the case of the corporations described in s. 51(xx), extraordinary consequences would result if the Parliament had power to make any kind of law on any subject affecting such corporations. ... Other difficulties in relation to s. 51(xx) are caused by the need to construe the Constitution as a whole, and thus to reconcile par. (xx) with other parts of s. 51".

Although Gibbs CJ concluded[209] that it was both unnecessary and undesirable to attempt to define the outer limits of s 51(xx), he did say[210] that:

> "The words of par. (xx) suggest that the nature of the corporation to which the laws relate must be significant as an element in the nature or character of the laws, if they are to be valid ... In other words, in the case of trading and financial corporations, laws which relate to their trading and financial activities will be within the power."

As to foreign corporations, he added[211] that "the fact that the corporation is a foreign corporation should be significant in the way in which the law relates to it".

---

207 *Fontana Films* (1982) 150 CLR 169 at 181.

208 (1982) 150 CLR 169 at 181-182.

209 (1982) 150 CLR 169 at 182.

210 (1982) 150 CLR 169 at 182.

211 (1982) 150 CLR 169 at 183.

164 In *Fontana Films*, the parties arguing against validity had sought to distinguish[212] between a law which regulates or prohibits trading activities of a corporation (which was acknowledged to be a law with respect to the corporation) and a law which strikes at the activities of others because they interfere with the activities of such a corporation. They submitted that s 45D was of the latter character, and not a law with respect to corporations. Of this distinction, Mason J said[213]:

> "When we speak of a law which regulates the trading activities of a trading corporation we mean a law which controls the subject matter by prohibiting the corporation from engaging in certain trading activities or permitting it so to do either absolutely or subject to condition. Such a law is within power because it necessarily operates directly on the subject of the power – it is a law about trading corporations. But when we speak of a law which protects the trading activities of a trading corporation our statement is not so specific. It may be understood as signifying a law which operates directly on the subject of the power. So understood the law is within power and valid. But it may be understood in a different sense so as to denote a law which, though it protects the trading activities of trading corporations, does so by a legal operation outside the subject matter of the power."

165 Because this was an important focus of argument, the reasons stated by the Court in *Fontana Films* are to be understood accordingly. In particular, the statements made by Gibbs CJ about laws relating to the trading and financial activities of trading and financial corporations being within power are to be understood as responding to the arguments advanced in that case. They are not to be read as attempting an exhaustive statement of the ambit of the power. Gibbs CJ explicitly denied[214] any intention of doing that. That said, it must be recognised that Gibbs CJ emphasised the importance of giving due weight to the words "foreign", "trading", and "financial" in considering the application of s 51(xx).

---

212 (1982) 150 CLR 169 at 172.

213 (1982) 150 CLR 169 at 205.

214 (1982) 150 CLR 169 at 182.

7(d) *The Tasmanian Dam Case*

166 Section 10(2) of the *World Heritage Properties Conservation Act* 1983 (Cth) prohibited a body corporate that is a foreign corporation, is incorporated in a Territory or, not being incorporated in a Territory, is a trading corporation formed within the limits of the Commonwealth, from doing any of a number of specified acts in certain places. Section 10(3) prohibited such corporations from doing any act (not being unlawful by virtue of s 10(2)) that damaged or destroyed any property to which the section applied. Section 10(4) provided that it was unlawful for a trading corporation to do "for the purposes of its trading activities" any of the acts specified in s 10(2) in certain places. The Court held[215] that s 10(4) was a law with respect to trading corporations.

167 It is hardly surprising that the discussion in *The Tasmanian Dam Case* of the ambit of the corporations power was moulded by the terms of the legislation under consideration and the arguments advanced in the case. In particular, because s 10(4) focused upon the trading activities of a trading corporation, it is not surprising that much of what is said in the case about s 51(xx) looked to the connection between a law having *both* those features and the power to make laws with respect to trading corporations.

168 In the present matters, the plaintiffs emphasised the conclusion[216] of Dawson J (who dissented) that s 10 of the Act there in question was "bereft of any attribute which connects it with corporations other than the fact that the command which it contains is directed to trading and foreign corporations". And in the opinion of Dawson J, the fact that the law directed its command to the object of the power given by s 51(xx) did not suffice; more must be established to show that the law was a law with respect to constitutional corporations. Dawson J concluded that the reference, in s 10(4), to activities for the trading purposes of trading corporations did not suffice: the law was "not a law in which the character of a trading corporation has any significance"[217]. Because everything that a trading company does is "for trading purposes", the activities mentioned in the Act were not confined to "trading activities".

---

215 (1983) 158 CLR 1 at 119 per Gibbs CJ, 153 per Mason J, 179-180 per Murphy J, 241 per Brennan J, 271-272 per Deane J.

216 (1983) 158 CLR 1 at 317.

217 (1983) 158 CLR 1 at 317.

169 The plaintiffs in the present matters submitted that the analysis made by Dawson J in *The Tasmanian Dam Case*, and subsequently amplified in *Re Dingjan*, embodied the distinctive character test and is the preferable approach to determining whether a law is supported by s 51(xx). It is an approach which would read the power as confined to making laws with respect to the trading activities of Australian trading corporations and the financial activities of Australian financial corporations. But that, of course, is not what s 51(xx) says.

170 It is an approach that presents a particular difficulty with foreign corporations. The character of a foreign corporation is fixed by its status, not by its activities. The power to legislate with respect to foreign corporations would be very narrow if the law must focus upon the status of the corporation. There is no immediately evident reason for there to be such disconformity between the ambit of legislative power with respect to Australian corporations and the ambit of legislative power with respect to foreign corporations.

171 South Australia sought to meet this difficulty by contending that the legislative power given with respect to foreign corporations was directed to the activities of such corporations, in Australia, that were "foreign activities" for those corporations. It was submitted that because most, if not all, of the activities undertaken in Australia by a foreign corporation would bear the character of foreign activities (when viewed from the standpoint of that corporation), a wider range of laws regulating the activities in Australia, or matters related to the activities in Australia, of foreign corporations, may be regarded as laws with respect to that subject-matter.

172 The submission should be rejected. It depends upon assessing what is "foreign" from two, opposite, points of view: a foreign corporation is one formed outside Australia, and in that sense is foreign to Australia, but a foreign activity is one occurring within Australia but foreign to the corporation because it occurs here, not overseas. There is no textual, historical or other reason to adopt that approach.

7(e) <u>*Re Dingjan*</u>

173 Section 127A(2) of the *Industrial Relations Act* 1988 (Cth) gave power to the AIRC to review a contract for services, binding on an independent contractor, on the grounds that the contract was unfair, harsh, or against the public interest. This provision applied in relation to a contract to which a constitutional corporation is a party, and to a contract relating to, or entered into for the

purposes of, the business of a constitutional corporation. But the provision also applied to a contract relating to trade or commerce to which s 51(i) of the Constitution applied, a contract so far as it affects matters that take place in or are otherwise connected with a Territory, and a contract to which the Commonwealth or a Commonwealth authority is a party. Was this a law with respect to constitutional corporations? A majority of the Court held in *Re Dingjan*[218] it was not.

174 Each member of the majority expressed the reasons for concluding that the provision was invalid in different words. There are obvious difficulties, then, in proffering any single comprehensive statement of the reasoning. It is nonetheless right to say that the majority focused upon whether a law permitting review of a contract "relating to the business" of a constitutional corporation had a more than insubstantial, tenuous or distant connection[219] with the relevant head of power. Holding that it did not, the majority concluded that it was not possible to read down or sever the provision and that, accordingly, it was wholly invalid.

175 The explanations given for why the impugned law lacked the requisite connection with the relevant head of power contained a number of elements which should be identified. Dawson J, amplifying the approach reflected in his reasons in *The Tasmanian Dam Case*, said[220] that "[i]t has long been recognised that a law is not a law with respect to foreign corporations or trading or financial corporations within the meaning of s 51(xx) of the Constitution *merely because its provisions are addressed to constitutional corporations*" (emphasis added). Because s 51(xx) is a power about persons, Dawson J said[221] that "a *different approach* is required in determining whether a law falls within its terms" (emphasis added). Before a law may be said to be with respect to constitutional corporations "the way in which the law operates upon them must be such that they impart their character to the law ... [T]he fact that it is a trading or financial corporation should be significant in the way in which the law relates to it."[222]

---

218 (1995) 183 CLR 323 at 339 per Brennan J, 347 per Dawson J, 354 per Toohey J, 371 per McHugh J.

219 *Melbourne Corporation* (1947) 74 CLR 31 at 79 per Dixon J.

220 (1995) 183 CLR 323 at 344.

221 (1995) 183 CLR 323 at 345.

222 (1995) 183 CLR 323 at 346.

176 Brennan J, though saying he saw no error in the approach taken by Gibbs CJ in *Fontana Films*[223] and by Dawson J in *The Tasmanian Dam Case*[224], sought to give that approach further content, at least for the case where a law "applies to constitutional corporations and to other persons indifferently"[225], by postulating[226] a "test of discriminatory operation" – "a law [is] with respect to constitutional corporations ... by reason of the differential effect on constitutional corporations which it produces".

177 The dissenting members of the Court in *Re Dingjan*, Mason CJ, Deane and Gaudron JJ, took a view of the reach of s 51(xx) wider than that of the majority. Particular reference need now be made only to the reasons of Gaudron J (with which Deane J agreed). Her Honour's reasoning proceeded by the following steps[227]. First, the business activities of corporations formed within Australia signify whether they are trading or financial corporations, and the main purpose of the power to legislate with respect to foreign corporations must be directed to their business activities in Australia. Second, it follows that the power conferred by s 51(xx) extends "at the very least"[228] to the business functions and activities of constitutional corporations and to their business relationships. Third, once the second step is accepted, it follows that the power "also extends to the persons by and through whom they carry out those functions and activities and with whom they enter into those relationships"[229].

178 This understanding of s 51(xx) was subsequently amplified by Gaudron J in her reasons in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union*[230] where her Honour said:

---

223 (1982) 150 CLR 169 at 182.

224 (1983) 158 CLR 1 at 316.

225 (1995) 183 CLR 323 at 336.

226 (1995) 183 CLR 323 at 337.

227 (1995) 183 CLR 323 at 365.

228 (1995) 183 CLR 323 at 365.

229 (1995) 183 CLR 323 at 365.

230 (2000) 203 CLR 346 at 375 [83].

> "I have no doubt that the power conferred by s 51(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."[231]

This understanding of the power should be adopted. It follows, as Gaudron J said[232], that the legislative power conferred by s 51(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".

8 Distinctive character and discriminatory operation

179 On its face, there seems no reason to consider that the test of discriminatory operation adopted by Brennan J in *Re Dingjan* would not be satisfied by any law which singled out constitutional corporations as the object of statutory command. That is, any law taking the form "a constitutional corporation shall ..." or "shall not ..." would have an effect on constitutional corporations but none on any other person; there would be a differential effect. Yet the plaintiffs in the present matters contended that this was not what Brennan J intended by the test. Rather, they sought to treat all that had been said by Gibbs CJ in *Fontana Films* and *The Tasmanian Dam Case*, by Dawson J in

---

231 The passage appears in reasons which are dissenting, but not on s 51(xx); since the majority, unlike her Honour, found the impugned legislation to be supported by s 51(xxxv), it was not necessary for them to consider s 51(xx) (see (2000) 203 CLR 346 at 360 [29] per Gleeson CJ, 422 [231] per Gummow and Hayne JJ, 449 [302] per Callinan J). Her Honour's treatment, immediately before the passage cited, of one particular aspect of the legislation in issue in the case does not qualify the principle stated. So much is made clear by her Honour's conclusion, in the next paragraph of her reasons ((2000) 203 CLR 346 at 375 [84]), that the legislation in question operated "neither to prescribe the industrial rights and obligations of corporations and their employees nor to regulate the means by which they are to conduct their industrial relations".

232 (2000) 203 CLR 346 at 375 [83].

The Tasmanian Dam Case and later in *Re Dingjan*, and by Brennan J in *Re Dingjan* as generally equivalent statements of a distinctive character test. Thus the plaintiffs contended that to ask whether the particular character of a corporation (as foreign, trading or financial) is "significant" in the way in which a law relates to it, and to search for "discriminatory operation", inserts a different, or an additional, filter in the process of deciding whether there is a sufficient connection between the relevant head of power and the law in question.

180 The better view is that there is an important difference between the analysis made by Dawson J and that advanced by Brennan J in *Re Dingjan*. In particular, it may greatly be doubted that Brennan J intended, in *Re Dingjan*, to indicate that a law which imposes a duty or liability, or confers a right or privilege, on a constitutional corporation is not a law with respect to constitutional corporations unless more is shown. Rather, the better view is that his Honour's test of discriminatory operation was intended to apply chiefly, perhaps only, where the law applies to constitutional corporations and to other persons indifferently.

181 But if such a test is to be applied in deciding whether a law applying to all persons indifferently is a law with respect to constitutional corporations, there is no evident basis upon which a law which imposes a duty or liability, or confers a right or privilege, *only* on a constitutional corporation should not be characterised as a law with respect to constitutional corporations. And, more particularly, there is no evident basis upon which laws of the kind described by Gaudron J in *Re Dingjan*[233] and later in *Re Pacific Coal*[234] should not be characterised as laws with respect to that subject-matter. That is, laws regulating "the activities, functions, relationships and the business" of a constitutional corporation, and laws creating "rights, and privileges belonging to such a corporation, [imposing] obligations on it and, in respect to those matters, [regulating] the conduct of those through whom it acts" including its employees, and regulating "those whose conduct is or is capable of affecting its activities, functions, relationships or business" would, on this test, be properly characterised as laws with respect to constitutional corporations.

182 What the plaintiffs identify as an object of command test (which they contend should be rejected) is then seen to be indistinguishable from what is the

---

233 (1995) 183 CLR 323 at 363.

234 (2000) 203 CLR 346 at 375 [83].

logical extension of a discriminatory operation test of the kind described by Brennan J. But whether or not that is so, what is now important is that the plaintiffs in the present matters contended that a special rule should be adopted for considering whether a law is supported by s 51(xx) – a distinctive character test which was to be understood as substantially the same as a test of discriminatory operation.

9 A need to limit s 51(xx)?

183 An important element underpinning this argument, and indeed all of the plaintiffs' arguments about s 51(xx), was that it is necessary to limit the reach of the power. The step of taking "a different approach"[235] to s 51(xx) was said by Dawson J to be required because s 51(xx) is a power with respect to persons. But what necessarily underpins the proposition that a different approach is required to the task of determining whether a law is supported by s 51(xx) is an implicit assertion about federal balance and, in particular, an implicit assertion that to give the ordinary scope to the legislative power with respect to the particular persons mentioned in s 51(xx) could or would distort that balance. So much was made explicit by Gibbs CJ in *Fontana Films*[236] – "extraordinary consequences would result if the Parliament had power to make any kind of law on any subject affecting such corporations". And if there is no underlying assertion about federal balance, there could be no reason to adopt a different approach to determining the sufficiency of connection between an impugned law and the relevant head of power. The bare fact that s 51(xx) is a power to legislate with respect to particular persons rather than functions, activities or relationships, requires no such conclusion.

184 Each of the arguments advanced by the plaintiffs proffered a form of limit on the reach of s 51(xx): only "external" relationships, "something more" than object of command, "distinctive character" or "discriminatory operation". As noted earlier, because the new Act prescribes norms which regulate or affect the relationship between constitutional corporations and their employees, the limits proffered by the plaintiffs must be seen as contentions about what is meant by a law being "with respect to" constitutional corporations.

---

235 *Re Dingjan* (1995) 183 CLR 323 at 345.

236 (1982) 150 CLR 169 at 182.

185 Again, as noted earlier, it is well established that the heads of legislative power in s 51 are to be construed "with all the generality which the words used admit"[237]. But no question arises in these matters about what are constitutional corporations[238]. The existence of such bodies and the new Act's engagement with them are assumed.

186 From time to time reference will be found in the cases to powers in s 51 being "plenary". To describe s 51(xx) as a "plenary" power is at best unhelpful in the present matters and, at worst, would be misleading. It is unhelpful because neither the identity nor the characteristics of the persons who are the subject of s 51(xx) is in issue. It would be misleading if it suggested that some new and wider test was to be applied in deciding whether a law is a law with respect to those persons.

187 Reference has often been made in the cases[239] to what are said to be the possible consequences of concluding that a law whose object of command is only constitutional corporations is a valid law. In *Huddart Parker*, Higgins J spoke[240] of possibilities that he saw as distorting constitutional arrangements. Reference was made to the possibility of the federal Parliament framing a new system of libel laws applicable to newspapers owned by corporations, and to licensing Acts creating a new scheme of administration and of offences applicable only to hotels belonging to corporations.

188 In part, reference to such consequences seeks to present possible *social* consequences that it is said could flow if further legislation is enacted, and which it is said are to be seen as absurd or inconvenient, as a reason to confine the reach of the legislative power. Section 51(xx), like other powers, should not be given a meaning narrowed by an apprehension of extreme examples and distorting

---

237 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226.

238 See [55] and [58].

239 *Huddart Parker* (1909) 8 CLR 330 at 409 per Higgins J; *Bank of NSW v The Commonwealth* ("the *Banking Case*") (1948) 76 CLR 1 at 202 per Latham CJ; *Fontana Films* (1982) 150 CLR 169 at 182 per Gibbs CJ; *The Tasmanian Dam Case* (1983) 158 CLR 1 at 315 per Dawson J.

240 (1909) 8 CLR 330 at 409.

possibilities of its application to future laws[241]. While there may be room for debate about whether the particular examples proffered by Higgins J are properly to be characterised as extreme examples or distorting possibilities, what is plain is that, as Professor Zines has written[242]:

> "It is clear that any power of the Commonwealth, on the most restricted or the widest interpretation, might, if the federal Parliament were so inclined, produce results which, when viewed together with State laws, are inefficient, socially bad or downright ridiculous. ... *That does not mean that the powers concerned should be construed restrictively so as to prevent those results*. The object of the power, as an aid in its interpretation, is not to be seen as an accumulation of desirable laws." (emphasis added)

189 The plaintiffs' arguments proffering limits to the reach of s 51(xx) were not confined, however, to arguments about the social or political utility of parallel systems of laws dealing in the one case with constitutional corporations and in the other with all other persons. Rather, the arguments about consequences went further than postulating absurd or inconvenient social consequences and explicitly or implicitly invoked notions of federal balance.

190 No party sought to challenge the approach to constitutional construction that underpinned the decision in the *Engineers' Case* to reject the doctrine of implied immunities and the doctrine of reserved powers. But it is important not to overstate either the propositions about constitutional construction applied in and after the *Engineers' Case* or the consequences of their adoption.

191 The doctrine of implied immunities, or as Sir Robert Garran described it[243], "the reciprocal doctrine of non-interference", was founded in an implication.

---

241 *XYZ v Commonwealth* (2006) 80 ALJR 1036 at 1047-1048 [39]; 227 ALR 495 at 507; *Singh v The Commonwealth* (2004) 222 CLR 322 at 384 [155]; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32]; *Grain Pool* (2000) 202 CLR 479 at 492 [16]; *Egan v Willis* (1998) 195 CLR 424 at 505 [160]; *Kartinyeri* (1998) 195 CLR 337 at 380-381 [87]-[88].

242 Zines, "Characterisation of Commonwealth Laws", in Lee and Winterton (eds), *Australian Constitutional Perspectives*, (1992) 33 at 59.

243 Garran, "The Development of the Australian Constitution", (1924) 40 *Law Quarterly Review* 202 at 215.

Whether that implication was to be drawn depended greatly upon how the constitutional structure was viewed. If, as the founding members of the Court (Griffith CJ, Barton and O'Connor JJ) saw it, the Constitution created a federation of separate, co-ordinate, governments, each substantially independent of the other, supreme in its own sphere but each of which had yielded some of their powers to a central government, the implication of a reciprocal doctrine of non-interference could be described[244] as a necessary implication. But if the inquiry begins from a different starting point – the constitutional text, rather than a view of the place of the States that is formed independently of that text – a different conclusion is reached. There is then no necessity to imply a reciprocal doctrine of non-interference.

192 So, too, the doctrine of reserved powers depended upon drawing negative implications from the positive grants of legislative power to the federal Parliament, and sought to draw support for that approach from s 107 of the Constitution. As Dixon J pointed out in *Melbourne Corporation v The Commonwealth*[245], "the attempt to read s 107 as the equivalent of a specific grant or reservation of power lacked a foundation in logic". But no less fundamentally, the doctrine of reserved powers could be supported only if the Constitution was understood as *preserving* to the States some legislative power formerly held by the unfederated Colonies. Thus, like the doctrine of implied immunities, much depended upon what was taken as the starting point for the analysis.

193 As Windeyer J rightly pointed out in the *Payroll Tax Case*[246], the *Engineers' Case* is not to be seen "as the correction of antecedent errors or as the uprooting of heresy". There is no doubt that, as he continued[247], "[t]o return today to the discarded theories would indeed be an error and the adoption of a heresy". But the *Engineers' Case* was both a consequence of developments outside the law courts (not least a sense of national identity emerging during and

---

244 *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employés Association* (1906) 4 CLR 488 at 505.

245 (1947) 74 CLR 31 at 83.

246 (1971) 122 CLR 353 at 396.

247 (1971) 122 CLR 353 at 396.

after the First World War) and a cause of future developments. As Windeyer J went on to say[248]:

> "That is not surprising for the Constitution is not an ordinary statute: it is a fundamental law. In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances. This does not mean that courts have transgressed lawful boundaries: or that they may do so."

194 What was discarded in the *Engineers' Case* was an approach to constitutional construction that started in a view of the place to be accorded to the States formed independently of the text of the Constitution. The *Engineers' Case* did not establish that no implications are to be drawn from the Constitution. So much is evident from *Melbourne Corporation*[249] and from *R v Kirby; Ex parte Boilermakers' Society of Australia* ("the *Boilermakers' Case*")[250]. Nor did the *Engineers' Case* establish that no regard may be had to the general nature and structure of the constitutional framework which the Constitution erects. As was held in *Melbourne Corporation*[251]:

> "The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities."

And because the entities, whose continued existence is predicated by the Constitution, are polities, they are to continue as separate bodies politic each having legislative, executive and judicial functions. But this last observation does not identify the content of any of those functions. It does not say what those legislative functions are to be.

---

248 (1971) 122 CLR 353 at 396-397.

249 (1947) 74 CLR 31.

250 (1956) 94 CLR 254.

251 (1947) 74 CLR 31 at 82. See also *Austin v The Commonwealth* (2003) 215 CLR 185.

195 In the present matters, the appeals made to notions of federal balance, no matter whether the appeal was explicit or only implicit, were propositions about a "balance" of legislative power between the Commonwealth and the States. Two points must be made about those propositions. First, as Dixon J said[252] in *Melbourne Corporation*:

> "The position of the federal government is necessarily stronger than that of the States. The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation. Then supremacy is given to the legislative powers of the Commonwealth."

Secondly, again as Dixon J pointed out[253] in *Melbourne Corporation*, the framers "appear ... to have conceived the States as bodies politic *whose existence and nature are independent of the powers allocated to them*" (emphasis added). Thus when it is said that there is a point at which the legislative powers of the federal Parliament and the legislative powers of the States are to be divided lest the federal balance be disturbed, how is that point to be identified? It cannot be identified from any of the considerations mentioned thus far in these reasons, and no other basis for its identification was advanced in argument.

196 Whether a basis for choosing a point of balance is identified or not, the fundamental question which lies behind the plaintiffs' submissions is: what exactly is the content of the proposition that a particular construction of s 51(xx) would, or would not, impermissibly alter the federal balance? It is a proposition that stops well short of asserting that the favoured construction must be adopted lest the States could no longer operate as separate governments exercising independent functions. Instead it is advanced by proposing particular limitations to the connection which must be established to demonstrate that a law is a law with respect to constitutional corporations and is advanced in that form on the basis that the result is said to be evidently desirable, even necessary. It may be suggested that the proposition should be criticised as being more a political proposition than a legal proposition. But "[t]he Constitution is a political instrument. It deals with government and governmental powers."[254] To state that the proposition is political rather than legal may, therefore, have a specious

---

252 (1947) 74 CLR 31 at 82-83.

253 (1947) 74 CLR 31 at 82.

254 *Melbourne Corporation* (1947) 74 CLR 31 at 82.

plausibility but really be meaningless[255] and the suggested criticism would be ill-founded. But to be valuable, the proposition, that a particular construction of s 51(xx) would or would not impermissibly alter the federal balance, must have content, and the plaintiffs made no attempt to define that content.

10 General conclusions

197 It is convenient to summarise at this point the conclusions that follow from the preceding discussion of the arguments about s 51(xx), before dealing with the arguments advanced by the parties concerning the relationship between s 51(xxxv) and s 51(xx). The distinction between external and internal relationships of corporations proffered by the plaintiffs as a limit to the legislative power conferred by s 51(xx) should be rejected as an inappropriate and unhelpful distinction. As explained earlier, transposing a distinction originating in choice of law rules into the present context is inappropriate. The distinction finds no reflection in the Convention Debates or the drafting history of s 51(xx) and, in any event, is unstable. Adopting it would distract attention from the tasks of construing the constitutional text, identifying the legal and practical operation of the impugned law, and then assessing the sufficiency of the connection between the impugned law and the head of power.

198 In so far as the plaintiffs contended that a test of distinctive character or discriminatory operation is to be adopted it is enough to say that, as these reasons will explain, the impugned provisions of the Amending Act which depend upon s 51(xx) either single out constitutional corporations as the object of statutory command (and in that sense have a discriminatory operation) or, like the legislation considered in *Fontana Films*, are directed to protecting constitutional corporations from conduct intended and likely to cause loss or damage to the corporation. In so far as the plaintiffs' contentions required tests of distinctive character or discriminatory operation to be understood as inserting a new or different filter into the process of characterisation those contentions should be rejected. A law which prescribes norms regulating the relationship between constitutional corporations and their employees, or affecting constitutional corporations in the manner considered and upheld in *Fontana Films* or, as Gaudron J said in *Re Pacific Coal*[256], "laws prescribing the industrial rights and obligations of [constitutional] corporations and their employees and the means by

---

255 cf *Melbourne Corporation* (1947) 74 CLR 31 at 82.

256 (2000) 203 CLR 346 at 375 [83].

which they are to conduct their industrial relations" are laws with respect to constitutional corporations.

PART III – THE RELATIONSHIP BETWEEN s 51(xxxv) AND s 51(xx)

1 The parties' submissions

199 The submissions by which the various plaintiffs sought to elaborate the arguments respecting the relationship between s 51(xxxv) and s 51(xx) of the Constitution differed in emphasis and perhaps also in character. The Australian Workers' Union ("the AWU") identified the key provisions of the new Act as giving to the Act the character of a law with respect to industrial relations generally. The AWU (and New South Wales) relied upon s 51(xxxv) as providing a powerful reason, even without a substantive limitation being drawn from s 51(xxxv), favouring a narrow construction of s 51(xx) so as to deny its use to provide for industrial relations.

200 In the course of oral argument, the AWU submitted that s 51(xxxv) indicated at least prima facie the extent of federal legislative power to deal with industrial regulation and industrial matters. The qualification was that the nature of other powers, specifically s 51(i) and s 51(vi), but not s 51(xx), might compel a different conclusion. Laws with respect to interstate and foreign commerce, and defence might encompass industrial matters. But, such instances apart, unless the nature of any one of the other powers in s 51 so suggested, the power should not be read as extending to "similar matters" to those dealt with in s 51(xxxv). The result was said to be that the selection in s 51(xxxv) of one method of preventing and settling industrial disputes and the limitation of that paragraph to disputes extending beyond the limits of any one State indicated that other powers, particularly s 51(xx), should not be construed so as to support laws without those limitations. The AWU submitted that there is nothing in s 51(xx) which suggests it should be treated as dealing with the subject of employment. (This submission by the AWU went beyond the consequences for Pts 7, 8, 9 and 13 of the new Act; it went also to the central definition of "employer" in s 6(1)(a), which speaks of "a constitutional corporation".)

201 In the course of their treatment of the exhaustive operation of Ch III of the Constitution in the *Boilermakers' Case*[257], Dixon CJ, McTiernan, Fullagar and Kitto JJ remarked that[258]:

---

257 (1956) 94 CLR 254.

258 (1956) 94 CLR 254 at 270.

"affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise"[259].

202 The submissions by the AWU implicitly relied upon a negative implication of the kind identified in the *Boilermakers' Case*. However, it will always be necessary first to identify the particular "order or form of things" upon which the negative implication may then operate.

203 It is here that several difficulties with the submissions of the AWU appear. First, the text of s 51(xxxv) (as the Commonwealth stressed and Victoria recognised) is concerned with a narrower subject-matter than industrial matters or relations and their regulation. Legislation may prescribe, independently of any mechanism for the resolution of disputes, a wide range of matters which may fairly be regarded as affecting the mutual relations of employers and employees who from time to time are engaged in an industry[260]. Part 7 of the Act, which prescribes what are identified in s 171 as "key minimum entitlements of employment", is a law of this description. Why should the heads of power, particularly s 51(xx), which are relied upon by the Commonwealth as supporting a law such as Pt 7, be construed as not doing so for the reason that s 51(xxxv) identifies particular means for the prevention and settlement of certain industrial disputes? The other heads of power should not be so construed.

204 Secondly, it is contrary to established principle, in the case of a law which may bear several characters, one of which attracts a particular head of legislative power, to ask, as a requirement of validity, whether there is anything in that head of power which suggests it may be used to deal with those other matters. It will be convenient to return to this point later in these reasons.

205 The third point arising from the AWU's submissions concerns reliance by the AWU upon the settled body of authority which construes what the AWU

---

259 See also *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; *R v Wallis* (1949) 78 CLR 529 at 550; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50.

260 cf *McKernan v Fraser* (1931) 46 CLR 343 at 374.

identified as the guarantee of just terms provided by s 51 of the Constitution. In *Attorney-General (Cth) v Schmidt*, Dixon CJ remarked[261]:

> "It is hardly necessary to say that when you have, as you do in par (xxxi), *an express power, subject to a safeguard, restriction or qualification*, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification." (emphasis added)

These remarks were cited in the joint judgment of the whole Court in *Bourke v State Bank of New South Wales*[262], a decision to which it will be necessary to return.

206 The AWU referred in particular to the qualification, recently applied in *Theophanous v Commonwealth*[263], that the requirement of just terms does not reach laws made under heads of power where "just terms" is an inconsistent or incongruous notion. It is sufficient, at this stage, to remark that there is nothing incongruous or inconsistent with a grant of power to legislate with respect to trading corporations formed within the limits of the Commonwealth for the power to be exercised to regulate the terms and conditions of the employment of persons by such corporations, with or without providing also for the means of resolving or preventing disputes on those subjects.

207 Victoria took its preferred stand on the footing that, as a matter of substantive limitation, the Parliament of the Commonwealth lacks the power to enact a law with respect to trading corporations formed within the limits of the Commonwealth which also has the character of a law with respect to conciliation and arbitration for the prevention and settlement of industrial disputes within the limits of any one State. The substantive limitation upon the entry of federal law into the sphere of industrial relations is said to be that any industrial dispute so regulated must extend beyond the limits of any one State and the mechanism adopted must be conciliation and arbitration.

---

261 (1961) 105 CLR 361 at 371-372.

262 (1990) 170 CLR 276 at 285-286.

263 (2006) 80 ALJR 886; 226 ALR 602.

208 None of the various submissions by the plaintiffs should be accepted. Their rejection is favoured by a consideration of the text and structure of the Constitution and by the course of authority in this Court since at least the demise of the reserved powers doctrine in 1920. That outcome is supported also by recourse to the provenance of s 51(xxxv) to identify the contemporary meaning in 1900 of the language used in that paragraph and the subject to which that language was directed[264]. The plaintiffs made no argument that their submissions were to be supported by the facts that the *Conciliation and Arbitration Act* 1904 (Cth) was cast in the terms it was, or that much litigation in this Court concerning the operation of the 1904 Act centred upon s 51(xxxv). Those considerations were rightly seen as wholly irrelevant to the task at hand.

2 Text, structure and authority

209 Perusal of the Convention Debates together with general historical knowledge of the period in which the Constitution took shape shows that in Australia, as elsewhere, there was concern with both the public disorder and the economic hardship which attended the strikes and lock-outs used by "capital" and "labour" in their disputes. This was the era of the London dock strike of 1889, the Homestead and Pullman strikes of 1892 and 1894 in the United States, the maritime strike of 1890 in Australia and New Zealand and the great shearers strike of 1891 in Australia.

210 The Report of the Royal Commission on Strikes which was established following the maritime strike and reported to the New South Wales Governor in 1891 ("the NSW Royal Commission") described industrial strife as "the great social problem of the age"[265]. The Report also identified the employment of

---

264 See *Cole v Whitfield* (1988) 165 CLR 360 at 385; *Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Vic) Ltd* (1989) 166 CLR 311 at 329-330.

265 Paragraph III of the Report. The President of the Royal Commission was Dr Garran MLC, father of Sir Robert Garran: Garran, *Prosper the Commonwealth*, (1958) at 55-59. References to the considerable body of literature upon the subject were collected in Reeves, *State Experiments in Australia and New Zealand*, vol 2, (1902) at 69. Reeves was the Minister for Labour in New Zealand and leading proponent of reforms in that country; with Kingston, he shares the credit for the compulsory scheme of conciliation and arbitration: Mitchell, "State Systems of

(Footnote continues on next page)

non-unionists as "rapidly becoming the chief ground of contention between employers and employed"[266]. The existence of jurisdiction under the New Zealand legislation to direct in an award preferential engagement of union members was to be the issue in *Taylor & Oakley v Mr Justice Edwards*[267]. In the United Kingdom, the dispute giving rise to *Quinn v Leathem*[268] arose from the engagement of non-union labour.

211 There is a theme running through the evidence of the 55 witnesses (including Sir Samuel Griffith, Mr Barton and Mr Kingston) who gave evidence to the NSW Royal Commission that the cruelty and brutality they saw in accounts of industrial disputation in other countries should not become the norm in Australia. Something had to be done. In his evidence, Justice Windeyer emphasised that the consequences of industrial strife were so significant for the public as a whole as to create a right, and perhaps a duty, on the part of government to intervene, not only to enforce public safety by available legal means, but to devise means to prevent disputation "going to extremes"[269].

212 With that background in mind, it was to be expected that a new instrument of government such as the Constitution would encompass these matters, and do so at several levels. One arm of the defence power conferred by s 51(vi) is "the control of the forces to execute and maintain the laws of the Commonwealth"; on the application of the Executive Government of a State, the Commonwealth should protect the State "against domestic violence" (s 119)[270]. In their work[271], Quick and Garran discussed the concept of "domestic violence" in s 119 with detailed reference to the decision of the Supreme Court of the United States in

---

Conciliation and Arbitration: The Legal Origins of the Australasian Model", in Macintyre and Mitchell (eds), *Foundations of Arbitration*, (1989) 74 at 93-96.

266 Paragraph V.

267 (1900) 18 NZLR 876.

268 [1901] AC 495; cf *McKernan v Fraser* (1931) 46 CLR 343.

269 *Royal Commission on Strikes – Précis of Evidence*, (1891) at 157 (answer to question 6453).

270 See *Re Aird; Ex parte Alpert* (2004) 220 CLR 308 at 327-328 [61].

271 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 964-965.

In re Debs[272] which supported the intervention of the federal government in the Pullman Strike to break the strike by force.

213 At another level, and in s 51(xxxv) in direct terms, the Constitution provided legislative means to achieve the second objective which Justice Windeyer had identified, namely, to prevent industrial disputation going to extremes.

214 Industrial relations intimately concerns terms and conditions of employment and the state of the workplace. Changes therein might alleviate industrial disputation without the laws making these changes also being laws providing for the settlement of industrial disputes. As remarked earlier in these reasons, Pt 7 of the new Act, dealing with minimum conditions, is a law of this description. The powers conferred by s 51(i) and s 98 of the Constitution were relied on, for example, to support the enactment of the *Seamen's Compensation Act* 1911 (Cth)[273]. The same may be said of the posts and telegraphs power, as is illustrated by the federal compensation legislation considered in *Telstra Corporation Ltd v Worthing*[274].

215 Section 51(xxxv) speaks of the use of particular means to prevent and settle industrial disputes of a certain geographical character. Why, as Victoria particularly would have it, should the text of the Constitution be so read as to pre-empt the exercise of other heads of legislative power to deal with industrial disputations to which s 51(xxxv) could not apply?

216 To answer that question it is necessary first to deal with some general and settled propositions respecting the scope of the various heads of legislative power and their interrelation.

217 These propositions demonstrate that in the course of interpretation of the Constitution much has changed since 1908 when Higgins J identified "[t]he

---

272 158 US 564 at 582 (1895).

273 *Australian Steamships Ltd v Malcolm* (1914) 19 CLR 298; cf *Owners of SS Kalibia v Wilson* (1910) 11 CLR 689, respecting the invalidity of the *Seamen's Compensation Act* 1909 (Cth).

274 (1999) 197 CLR 61.

doctrine of unconstitutionality in legislation [as] really a branch of the law as to powers" and referred to the text of *Farwell on Powers*[275] on that subject[276].

218 First, as to motive. In *Huddart Parker Ltd v The Commonwealth*[277], Dixon J emphasised that once legislative power over a subject-matter is established it is irrelevant to inquire into the motives for its exercise. In the same case Evatt J said[278]:

> "Given the appropriate subject matter, the Commonwealth Parliament may prohibit as well as it may restrict; it may remove restrictions, alter restrictions or add restrictions; it may encourage or discourage; it may facilitate or obstruct. The phraseology is political, and question-begging terms necessarily abound."

Isaacs J had spoken to the same effect in *The State of New South Wales v The Commonwealth*; *The Commonwealth v The State of New South Wales* ("the *Wheat Case*")[279].

219 There is a further general proposition that "a law with respect to a subject-matter within Commonwealth power does not cease to be valid because it affects a subject outside power or can be characterized as a law with respect to a subject-matter outside power"[280]. That proposition, however, does not apply when, as it was put in *Bourke v State Bank of New South Wales*[281], "the second subject-matter with respect to which the law can be characterized is not only outside power *but is the subject of a positive prohibition or restriction*" (emphasis added). That positive prohibition or restriction may merely confine the ambit of the particular head of legislative power within which it is found, or it

---

275 Farwell and Sheldon, *A Concise Treatise on Powers,* 2nd ed (1893) at 298.

276 *Jumbunna Coal Mine* (1908) 6 CLR 309 at 316-317.

277 (1931) 44 CLR 492 at 515. See also *Murphyores* (1976) 136 CLR 1 at 6, 8, 9, 11, 19-23.

278 (1931) 44 CLR 492 at 526.

279 (1915) 20 CLR 54 at 98.

280 *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 285.

281 (1990) 170 CLR 276 at 285.

may be of general application. If the latter, then the other paragraphs in s 51 are to be construed as subject to the limitation.

220 In *Bourke* itself, it was held that the phrase in s 51(xiii) "other than State banking" imposes a restriction upon federal legislative power generally, rather than a restriction only upon the ambit of s 51(xiii). Other examples of positive prohibitions or restrictions are found in the paragraphs of s 51 dealing with taxation (s 51(ii)) – "but so as not to discriminate between States or parts of States"; bounties (s 51(iii)) – "but so that such bounties shall be uniform throughout the Commonwealth"; insurance (s 51(xiv)) – "other than State insurance"; and medical and dental services (s 51(xxiiiA)) – "but not so as to authorize any form of civil conscription"[282].

221 Paragraph (xxxv) is to be read as a whole; it does not contain any element which answers the description in *Bourke* of a positive prohibition or restriction upon what otherwise would be the ambit of the power conferred by that paragraph. Accordingly, there does not arise the further question addressed in *Bourke*, namely, whether other paragraphs of s 51, in particular par (xx), are to be construed subject to a positive prohibition or restriction found elsewhere, and, in particular, in s 51(xxxv).

222 The phrase "conciliation and arbitration" identifies a species of process or procedure embarked upon or engaged in with the objectives introduced by the word "for", namely, the prevention and settlement of certain industrial disputes, those "extending beyond the limits of any one State". The AWU submits that the latter words are "functionally equivalent" to the imposition of a direct limit on the powers of the Parliament of the Commonwealth "to deal with industrial matters". But the constitutional text (and, as will appear, its origins to be seen in the Convention Debates) treats the characteristic of interstate industrial disputation as the object of the application of processes and procedures of conciliation and arbitration. The text of par (xxxv), like that of par (i), expresses a compound conception; the paragraph contains within it, and not as an exception or reservation upon what otherwise would be its scope, the element of interstate disputation.

---

282 See, as to s 51(xxiiiA), *British Medical Association v The Commonwealth* (1949) 79 CLR 201.

3 The course of authority

223 The course of authority in this Court denies to par (xxxv) a negative implication of exclusivity which would deny the validity of laws with respect to other heads of power which also had the character of laws regulating industrial relations in a fashion other than as required by par (xxxv).

224 In *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc*[283], the Court upheld the validity of laws pertaining to the relationship between employers and maritime employees, so far as they were supported by s 51(i) of the Constitution. In this way, the prescience of Dr Quick in 1898 was further vindicated[284]. At the third session of the Convention at Melbourne and during the debate upon what became par (xxxv), he had said[285]:

> "Even in the Constitution as drawn there is a provision giving the Federal Parliament jurisdiction in the case of navigation and shipping, and this would apply to labour disputes in connexion with navigation and shipping."

The immediate reference was to what became s 98 of the Constitution which states that the power of the Parliament to make laws with respect to trade and commerce (namely the power in s 51(i)[286]) extends to navigation and shipping.

225 To the point made by Dr Quick may be added the consideration that s 101 of the Constitution provides for an Inter-State Commission, modelled, in part, on the body which had been established in the United States as the Interstate Commerce Commission. Speaking with no foreboding of the fate that in 1915 awaited the Australian body when the *Wheat Case* was decided[287], Quick and Garran wrote[288]:

---

283 (2003) 214 CLR 397.

284 See, earlier, *Huddart Parker Ltd v The Commonwealth* (1931) 44 CLR 492.

285 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 27 January 1898 at 182.

286 *Morgan v The Commonwealth* (1947) 74 CLR 421 at 454-455.

287 (1915) 20 CLR 54.

288 *The Annotated Constitution of the Australian Commonwealth*, (1901) at 901.

> "The extent of the power of the Parliament to make laws with respect to trade and commerce has already been discussed (sec. 51-i.); and the Parliament itself is the sole judge of the extent to which it is necessary to vest in the Inter-State Commission the power of adjudicating upon and administering such laws. Practically the whole administration of the law upon this vast subject, and a great part of the judicial work in connection therewith, could be entrusted to the Commission."

226 Victoria did not seek to reopen *CSL* but submitted that it was to be distinguished. This was said to be because (a) par (i) of s 51 contains, by reason of the phrase "among the States", essentially the same geographical limit as par (xxxv); and (b) this made it "unlikely" that there arose from par (xxxv) "essentially the same limit" when par (i) was relied on to support laws regulating "industrial relations" of those engaged in interstate or overseas trade or commerce. But the presence of a common geographical limit, if that be accepted, is beside the point. As already remarked, each head of power expresses a compound and distinct concept; that a law with respect to par (i) of s 51 also bears upon industrial relations does not deny to the law that character, whether or not it might fall outside par (xxxv).

227 Reference also should be made to *Pidoto v Victoria*[289]. The decision in that case necessarily denied the proposition that the defence power is limited by par (xxxv). Whether all that was said on the subject by Latham CJ necessarily represents the views of the other members of the majority (Rich, McTiernan and Williams JJ) need not be pursued here. This is because the reasoning of Latham CJ is compelling and should be followed. Latham CJ rejected the submission (in substance, repeated in the present litigation) that par (xxxv) implies a negative. He understood that to mean[290]:

> "not only that the Commonwealth Parliament shall have power to legislate in relation to the industrial disputes there defined and in the manner there prescribed, but also that the Commonwealth Parliament shall not have power to deal with any other industrial matter or with any industrial dispute in any other manner".

---

289 (1943) 68 CLR 87.

290 (1943) 68 CLR 87 at 101.

Latham CJ continued[291]:

> "Section 51 (xxxv.) is a positive provision conferring a specific power. The particular terms in which this power is conferred are not, in my opinion, so expressed as to be capable of being so construed as to impose a limitation upon other powers positively conferred. Further, if s. 51 (xxxv.) were construed so as to prevent the Parliament from dealing with industrial matters except under that specific provision, similar reasoning would lead to the conclusion that the Commonwealth Parliament could not (under *any* legislative power) provide for the use of conciliation and arbitration in relation to any other matter than inter-State industrial disputes. It must, I think, be conceded, for example, that the Commonwealth Parliament can, in legislating with respect to the public service of the Commonwealth (Constitution, s. 52 (ii.)), provide for conciliation and arbitration in relation to matters such as wages, conditions and hours, whether or not any dispute about those matters is industrial, and whether or not it extends beyond the limits of any one State." (original emphasis)

228 The terms in which his Honour expressed his conclusion deny the reservation urged by the AWU that this turned upon the special nature of the defence power in war-time. More recently, in *Re Pacific Coal*[292], Gleeson CJ approved what had been decided in *Pidoto* in a passage which now also should be accepted and followed. The Chief Justice said[293]:

> "It has often been pointed out that s 51(xxxv) does not empower the Parliament to legislate directly to regulate conditions of employment[294]. An attempt was made in argument to develop that proposition by adding to it what was described as '[t]he principle that Parliament cannot do indirectly what it cannot do directly'. Two points need to be made about that. First, it is one thing to say that the nature of the power is such that it deals with instituting and maintaining a system of

---

291 (1943) 68 CLR 87 at 101.

292 (2000) 203 CLR 346.

293 (2000) 203 CLR 346 at 359-360 [29].

294 For example, *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association* (1920) 28 CLR 209 at 218 per Knox CJ.

> conciliation and arbitration, and that it is only through such a system that conditions of employment may be regulated under s 51(xxxv); it is another thing to find some negative implication amounting to a prohibition against the Parliament enacting any law which has the effect of altering conditions of employment. That there is no such negative implication, and no such prohibition, must follow from the acceptance that, where Parliament can rely upon some other power conferred by s 51, it can legislate in relation to conditions of employment. Such an implication was rejected, for example, in *Pidoto v Victoria*[295]. In the present case, an attempt was made to rely, if necessary, upon the power conferred by s 51(xx). It is unnecessary to deal with that attempt but if, in a given case, legislation were validly enacted pursuant to that power, then it would not be affected by any negative implication or prohibition of the kind mentioned. Secondly, there is no principle that Parliament can never do indirectly what it cannot do directly. Whether or not Parliament can do something indirectly, which it cannot do directly, may depend upon why it cannot do it directly. In law, as in life, there are many examples of things that can be done indirectly, although not directly. The true principle is that 'it is not permissible to do indirectly what is prohibited directly'[296]. If there were a constitutional prohibition of the kind earlier considered, then it could not be circumvented by an attempt to do indirectly that which is prohibited directly. There is, however, no such prohibition."

229 What has been said in cases concerned with pars (i) and (vi) of s 51 of the Constitution is true of the broadcasting and telegraph power conferred by par (v). The *Telecommunications Act* 1975 (Cth) empowered the Conciliation and Arbitration Commission to prevent or settle "industrial disputes" in respect of the Australian Telecommunications Commission Service. But, given the head of legislative power engaged, the term "industrial disputes" was properly defined without reference to considerations which would have been required by par (xxxv)[297].

---

295 (1943) 68 CLR 87.

296 *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 at 522 per Mason CJ, Gaudron and McHugh JJ.

297 See *R v Staples; Ex parte Australian Telecommunications Commission* (1980) 143 CLR 614 at 627.

4 The provenance of s 51(xxxv)

230 Something more now should be said respecting the setting in which par (xxxv) was included in the draft of the Constitution and the significance as then understood of the terms in which it was expressed. This does not support any proposition to the effect that what was seen in the 1890s as an authority for legislative experimentation of a particular kind under the Constitution was to be the sole method open to the Parliament of the Commonwealth for legislating for industrial regulation.

231 Section 51(xxxv) took its final form upon the motion of Mr Higgins presented in Committee at Melbourne on 25 January 1898 and passed on 27 January[298]. Those unsuccessfully opposing Mr Higgins stressed the indeterminacy of the requirement that the disputes extend beyond the limits of any one State. Nor was any particular method prescribed for the processes of conciliation and arbitration. It was said that voluntary systems used in some colonies had failed[299]. Mr Higgins declared[300]:

> "I do not ask the committee to say that arbitration shall be compulsory, or even that any steps shall be taken to secure the settlement of industrial disputes; I simply wish to give the Federal Parliament power to legislate on the subject. Whatever honorable members may think, the experience of New Zealand shows that this matter is at least within the pale of practical politics."

---

298 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne) at 180, 215 respectively.

299 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 27 January 1898 at 193-195, 200-201. The *Trade Disputes Conciliation and Arbitration Act* 1892 (NSW) was introduced after the Report of the NSW Royal Commission as a voluntary system and, after its repeal and eventual replacement by the *Industrial Arbitration Act* 1901 (NSW), was described by Mr Reeves as "an amiable and nicely-drafted measure", sponsored by Mr Barton, which was treated by employers with contempt, and had been "a not inexpensive piece of waste paper": Reeves, *State Experiments in Australia and New Zealand*, vol 2, (1902) at 99.

300 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 25 January 1898 at 180.

The reference to New Zealand legislation was to *The Industrial Conciliation and Arbitration Act* 1894 (NZ) ("the NZ Act"). This had been sponsored by Mr Reeves and had introduced a compulsory system with features resembling those of a Bill which had been proposed unsuccessfully in South Australia by Mr Kingston in 1890[301]. The Kingston Bill had provided for the registration of unions and associations of unions, who would thereby have become bound by the Act, for the making and registration of industrial agreements, for Boards of Conciliation, in some instances for compulsory conciliation, and for the enforcement of awards and agreements. Part IX forbad strikes and lock-outs on account of any industrial dispute for the settlement of which the Bill provided. It was Mr Kingston who was to draft the Bill for the *Conciliation and Arbitration Act* 1904 (Cth) ("the 1904 Act") before his abrupt resignation from the Ministry[302]; and the influence of his efforts in 1890 upon the scheme of the 1904 Act is apparent.

232 The importance of Mr Kingston as the prominent advocate of a compulsory system with the characteristics of the 1904 Act should not, in retrospect, obscure other contemporary considerations. The enactment of a law such as the 1904 Act had not been a given. Several of the delegates at Melbourne, particularly Mr O'Connor[303], had stressed the "experimental" nature of legislation which would be supported by s 51(xxxv).

233 Later, and with the benefit of hindsight, O'Connor J was to state in *Whybrow's Case*[304]:

> "[W]hen we have regard to the use of the word 'arbitration' in connection with the settlement of industrial disputes, it becomes still plainer that at the time when the Constitution was being framed by the Convention there was in Australia and New Zealand a well recognized use of the word as

---

301 Kingston's Bill is reproduced as Conciliation Appendix H(c) to the Report of the NSW Royal Commission.

302 La Nauze, *Alfred Deakin*, (1965), vol 1 at 296-301.

303 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 27 January 1898 at 199-200.

304 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 44.

> describing permanent public arbitral tribunals for settlement of industrial disputes, constituted not by choice of the parties, but by public authority."

Matters had not been so simple as they later were to appear.

234 The ordinary usage of the terms "conciliation" and "arbitration" at the time of the adoption of the Constitution appears from the title "Arbitration and Conciliation in Labour Disputes" in vol 25 of the *Encyclopaedia Britannica* published in 1902[305]. The terms were used to describe "*a group of methods* of settling disputes between employers and work-people or among two or more sets of work-people, of which the common feature is the intervention of some outside party not directly affected by the dispute"[306] (emphasis added). The title continued:

> "If the parties agree beforehand to abide by the award of the third party, the mode of settlement is described as 'arbitration'. If there be no such agreement, but the offices of the mediator are used to promote an amicable arrangement between the parties themselves, the process is described as 'conciliation'. The third party may be one or more disinterested individuals, or a joint-board representative of the parties or of other bodies or persons."

Labour arbitration was said to differ from commercial arbitration governed by the *Arbitration Act* 1889 (UK) in several respects. The former often related to the terms on which future contracts were to be made rather than purely to the rights and liabilities under existing contracts; the enforcement of awards by legal penalties was hampered by the unsettled questions respecting the legal personality of trade unions[307] and the need to bind present and future members.

235 Arbitration and conciliation as practised in the United Kingdom, whether by bodies established for particular trades or in particular areas which operated outside any statutory structure, or under the procedures of the *Conciliation Act*

---

305 Volume 25 was one of the New Volumes, constituting, with vols 1-24 of the Ninth Edition, the Tenth Edition.

306 at 550.

307 Before *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426.

1896 (UK)[308], was voluntary, both as regards the initiation and conduct of negotiations and the performance of any agreement which resulted[309]. Classic nineteenth century liberalism did not favour the state participation which was an important part of the Kingston model[310].

236 Beside the voluntary system adopted in the United Kingdom there operated the law of torts which was used by the employer to obtain an award of damages in *Quinn v Leathem*[311]. That in turn led to the form of union immunity conferred by the *Trade Disputes Act* 1906 (UK). The divergence between the systems adopted in Australia and the United Kingdom for dealing with industrial relations was later described by Evatt J in *McKernan v Fraser*[312]. The point of present importance is that none of this was pre-ordained, or excluded, by the structure of government set up by the Constitution.

237 The reference by Dr Quick in the Convention Debates to the settlement of maritime disputes has been noted earlier in these reasons. Mr Isaacs noted that the power in s 51(i) to regulate interstate trade and commerce would enable the Parliament "to prevent any obstruction of that inter-state trade and commerce"[313]. Indeed after the passage of the *Interstate Commerce Act* 1887 (US)[314] and the *Sherman Act* 1890 (US)[315], which were supported by the Commerce Clause[316], the United States federal courts had intervened by injunction in labour

---

308 Repealed by the *Employment Protection Act* 1975 (UK).

309 See, generally, Kahn-Freund, *Labour and the Law*, (1972) at 97-101.

310 See Sinclair, *Willliam Pember Reeves: New Zealand Fabian,* (1965) at 110-111.

311 [1901] AC 495.

312 (1931) 46 CLR 343 at 373-390.

313 *Official Record of the Debates of the Australasian Federal Convention,* (Melbourne), 27 January 1898 at 189.

314 24 Stat 379.

315 26 Stat 209.

316 The Constitution of the United States of America, Art I, s 8, cl 3.

disputes[317]. *In re Debs*, a cause célèbre of the mid-1890s[318] which arose out of the Pullman Strike, had reached the Supreme Court as a contempt case[319].

238 It was against this background that in *Re Pacific Coal* Gummow and Hayne JJ remarked[320]:

> "The importance of arbitrated or conciliated awards in Australia has been at the expense of some features of other systems of industrial relations. Collective bargaining has a different place in Australia, and takes a very different form, from the bargaining that has taken place in the United States, the United Kingdom, or Germany[321]. The enforcement of arrangements struck between organisations of employees and employers or groups of employers has not depended solely on industrial action as it sometimes has in the United Kingdom[322]. Nor has there been the resort to enforcement in the ordinary courts of collectively negotiated contracts that has been seen in the United States[323]. More importantly, there has seldom been the need to focus, at least until recently, upon the terms and

---

317 See Frankfurter and Greene, "The Use of the Injunction in American Labor Controversies", (1928) 44 *Law Quarterly Review* 164 at 168-171.

318 See Fiss, "Troubled Beginnings of the Modern State, 1888-1910", *History of the Supreme Court of the United States*, vol 8 at 53-74.

319 158 US 564 (1895).

320 (2000) 203 CLR 346 at 404-405 [183].

321 Davies and Freedland, *Kahn-Freund's Labour and the Law*, 3rd ed (1983) at 178-180.

322 *Ford Motor Co Ltd v Amalgamated Union of Engineering and Foundry Workers* [1969] 2 QB 303; Great Britain, *Report of the Royal Commission on Trade Unions and Employers' Associations*, (1968) Cmnd 3623.

323 For example, *Schlesinger v Quinto* 192 NYS 564 (1922); affd 194 NYS 401 (1922). See also Rice, "Collective Labor Agreements in American Law", (1931) 44 *Harvard Law Review* 572; Witmer, "Collective Labor Agreements in the Courts", (1938) 48 *Yale Law Journal* 195; Lenhoff, "The Present Status of Collective Contracts in the American Legal System", (1941) 39 *Michigan Law Review* 1109.

conditions of an individual's contract of employment. Identifying the relevant award and its terms has been much more important[324]."

PART IV – PARTICULAR CONCLUSIONS

1 Particular provisions and s 51(xx)

239 Much of the new Act turns (including many of the provisions whose validity the plaintiffs challenge) on the definition of employer set out in s 6 of the new Act. The employers identified in par (a) of the definition of employer in s 6(1) are constitutional corporations. The definition of employee in s 5(1) depends upon the identification of an employer (as defined).

240 The plaintiffs (in some cases, some of the plaintiffs) challenged the validity of Pts 7, 8, 9 and 10, Divs 1 and 2 of Pt 12, Pt 23 and Sched 8 of the new Act and item 4 of Sched 4 to the Amending Act, in so far as those provisions apply to employers as defined in par (a) of the definition appearing in s 6(1), on the ground that those provisions are not supported by s 51(xx).

241 Some plaintiffs made a separate point about the operation of Pt XVII[325] between 14 December 2005 and 27 March 2006 in so far as that Part then applied to employers and employees as then defined in s 550. But as those plaintiffs noted, there is no material difference between the presently relevant aspects of the definitions in what was s 550 and the definitions in ss 6(1) and 5(1). It is therefore not necessary to deal separately with the validity of Pt XVII in its operation during the period from December 2005 to March 2006.

242 Some of the plaintiffs challenged the validity of what was Pt VIAAA of the new Act (in so far as it purported to apply from 14 December 2005 to 27 March 2006 to employers who were constitutional corporations).

243 The plaintiffs (or again in some cases, some of the plaintiffs) challenged the validity of ss 365 and 366, ss 637(1) and (4) and 643(1)(a), Div 5 of Pt 15 in so far as it purports to apply through a number of provisions of s 755 and Pt 16 in so far as it purports to apply through a number of provisions of ss 783 and 785, on the ground that those provisions are not supported by s 51(xx).

---

324 But see *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.

325 Part XVII became Pt 23 on 27 March 2006, when the principal amendments to the Act took effect.

244 It is convenient to deal first with the challenges to Pts 7, 8, 9 and 10, Divs 1 and 2 of Pt 12, Pt 23 and Sched 8 of the new Act, item 4 of Sched 4 to the Amending Act, and what was Pt VIAAA of the new Act in so far as those provisions apply to constitutional corporations and their employees.

1(a) Part 7

245 Part 7 of the new Act provides for "key minimum entitlements of employment"[326] – the Pay and Conditions Standard. Part 7 obliges an "employer" (and thus a constitutional corporation) to provide employees with not less than the specified entitlements of employment. That obligation is elaborated and qualified in certain respects (as, for example, by provisions[327] that allow for determinations of issues about whether the "outcome" for an employee under a workplace agreement or a contract of employment is or is not more favourable than the prescribed minimum standard). Other provisions of the Part[328] provide mechanisms by which the content of minimum standards is to be adjusted. But the central operation of Pt 7 can be summarised as being that an employer, as defined in s 6(1) (and thus a constitutional corporation), shall provide its employees with not less than the prescribed minimum entitlements: those provided by the Pay and Conditions Standard.

246 In so far as the provisions of Pt 7, which give it that central operation, apply to employers as described in par (a) of the definition in s 6(1), they single out constitutional corporations as the object of the statutory command. In that sense they have a discriminatory operation. It is constitutional corporations that must provide their employees with not less than the prescribed minimum entitlements. These are laws with respect to constitutional corporations. Other provisions of Pt 7 elaborating or qualifying the obligations created elsewhere in the Part, or providing mechanisms for the alteration of the particular content of minimum standards, are incidental to that central operation and are also laws with respect to constitutional corporations. The challenge to the validity of Pt 7,

---

326 s 171(1).

327 s 172.

328 For example, Div 2 of Pt 7 (ss 176-222) which relates to the fixing of Federal Minimum Wages.

in so far as it applies to employers as described in par (a) of the definition in s 6(1), fails.

1(b) Parts 8 and 10, Divs 1 and 2 of Pt 12 and Pt 23

247 The same analysis is to be made of Pts 8 and 10, Divs 1 and 2 of Pt 12, and Pt 23 of the Act. Each of these Parts relates to the terms and conditions of employment to be provided by constitutional corporations to their employees. Part 8 deals with workplace agreements, Pt 10 with awards, Pt 12 with minimum entitlements of employees and Pt 23 with school-based apprentices and trainees.

248 Part 8 identifies various types of workplace agreements which will regulate terms and conditions of employment (ss 326-331), obliges an employer to lodge certain kinds of workplace agreement with the Employment Advocate (ss 342-346), prescribes what steps an employer must take before lodging such an agreement (ss 336-341), and prescribes when a workplace agreement comes into operation and ceases to be in operation (s 347) and who is bound by it (s 351). The Part prescribes what content workplace agreements must have (ss 352-355) and what content they must not have (ss 356-366). The Part prescribes how a workplace agreement may be varied (ss 367-380), how it may be terminated (ss 381-398) and the consequences of termination (s 399). As noted earlier, Pt 8 provides remedies (ss 403-414) for contravention of certain of its provisions.

249 Part 8, in so far as it applies to employers as described in par (a) of the definition in s 6(1), like Pt 7, prescribes norms with which a constitutional corporation, making or proposing to make certain agreements with its present or its prospective employees, must comply. Those provisions of Pt 8 have a discriminatory operation; they are provisions that are directed at constitutional corporations. They are laws with respect to constitutional corporations. So too, those other provisions of Pt 8 which elaborate or qualify those obligations, or provide mechanisms for their implementation or enforcement, are incidental to the prescription of the norms with which constitutional corporations must comply in making workplace agreements with employees.

250 Part 10 of the new Act deals with awards and a general description of its operation is set out in the introductory section of these reasons. It provides for the terms that may be included in awards (ss 513, 520-524), for terms that are taken to be included in each award (s 514), and for matters that are not to be included in awards (ss 515-519). Part 10 preserves certain pre-existing award entitlements (ss 527-533), provides for what it calls "Award rationalisation and award simplification" (ss 534-551), provides for variation and revocation of

awards (ss 552-556), and provides for variation of the parties to an award (ss 557-566). Part 10 raises no different question about s 51(xx) from those presented by and answered in respect of Pts 7 and 8.

251 Like Pt 7, Divs 1 and 2 of Pt 12 provide for certain minimum entitlements of employees, including in respect of meal breaks (Div 1 – ss 607-610) and public holidays (Div 2 – ss 611-619), and elaborate and qualify those entitlements. Part 23 obliges constitutional corporations (and other persons falling within the definition of an "employer" in s 6) to afford school-based apprentices and trainees any additional conditions to which a full-time apprentice or trainee, doing the same kind of work in the same location and for the same employer, would be entitled. The norms created by Divs 1 and 2 of Pt 12 and by Pt 23 (qualified as they are in certain respects) present no different question about s 51(xx) from those dealt with in relation to Pt 7.

252 The plaintiffs' challenges to Pts 8 and 10, Divs 1 and 2 of Pt 12 and Pt 23, in so far as they apply to constitutional corporations, fail.

1(c) Part 9

253 Part 9 of the new Act deals with industrial action. The Part focuses primarily upon the conduct of employees, or organisations of employees, which is directed at an employer as defined in s 6(1). But the Part also includes some provisions which forbid employers (as defined), and thus constitutional corporations, from engaging in certain conduct[329].

254 "[I]ndustrial action" is defined in s 420 as any action of four kinds (which encompass bans, limitations, strikes and lock-outs) but does not include authorised or agreed action, or action by an employee based on a reasonable concern by the employee about the employee's health or safety. As Western Australia (and other plaintiffs) pleaded, "[t]he concept of industrial action is not defined for the purposes of the Act so as to require significant damage or detriment to the trading or financial activities, or to the interests, of constitutional corporations".

255 As noted earlier, Pt 9 makes provision in s 435 (and related provisions) for what is "protected action". Section 496(1) obliges the AIRC to make an order

---

329 For example, s 448 forbids an employer dismissing an employee for engaging in what the Act defines, in s 435, as "protected action".

that industrial action "stop, not occur and not be organised", "[i]f it appears to the Commission that industrial action by an employee or employees, or by an employer, that is not, or would not be, protected action ... is happening; or ... is threatened, impending or probable; or ... is being organised". The AIRC may make an order under s 496(1) on its own initiative or on the application of any person who is affected (whether directly or indirectly) or who is likely to be affected (again, whether directly or indirectly) by the industrial action, or of an organisation of which such a person is a member[330].

256 Section 496(1) deals only with industrial action by employers and employees as defined in s 6(1) with s 5(1) and, as noted earlier, it contains no reference (whether directly in s 496(1) or through the definition of industrial action) to any requirement that the industrial action be of a kind that would cause loss or damage to the business of a constitutional corporation. That may be contrasted with the provisions of s 496(2). That provides:

> "(2) If it appears to the Commission that industrial action by a non-federal system employee or non-federal system employees, or by a non-federal system employer;
>
> (a) is:
>
> (i) happening; or
>
> (ii) threatened, impending or probable; or
>
> (iii) being organised; and
>
> (b) will, or would, be likely to have the effect of causing substantial loss or damage to the business of a constitutional corporation;
>
> the Commission must make an order that the relevant industrial action stop, not occur and not be organised."

A "non-federal system employee" and a "non-federal system employer" are persons not covered by the definitions in ss 5 and 6 respectively but who otherwise fall within the ordinary meaning of "employee" and "employer"[331].

---

330 s 496(4).

331 s 496(3).

257 The provisions of s 496(2) dealing with industrial action by non-federal system employees and non-federal system employers are of a kind not materially different from the provisions whose validity was considered and upheld in *Fontana Films*. The plaintiffs did not contend to the contrary and did not submit that s 496(2) was not a law with respect to constitutional corporations. Rather, the plaintiffs submitted that because the Part (in so far as it applies to employers and employees as defined in s 6(1)(a) with s 5(1)) does *not* confine the industrial action with which it deals to action which will, or would, be likely to have the effect of causing substantial loss or damage to the business of a constitutional corporation, it is not a law supported by s 51(xx). Both the fact that any person who is or is likely to be affected by the action may apply for an order under s 496(1), and the breadth of the concept of industrial action, were said to "militate against the view that s 496 is a law with respect to s 51(xx) corporations".

258 To the extent to which Pt 9 prescribes norms governing what industrial action constitutional corporations may take *against* their employees, it is valid for the same reasons that other provisions of the new Act prescribing what a constitutional corporation may or may not do in relations with their employees are valid. And in so far as Pt 9 prescribes norms governing what industrial action the employees of constitutional corporations may take against their employer, it is properly characterised as a law with respect to constitutional corporations; the norms it creates give constitutional corporations rights or immunities. If, as was held in *Fontana Films*, and as the plaintiffs accept, a law forbidding any person from engaging in certain conduct, in trade or commerce, that will, or would, be likely to have substantially adverse effects on a constitutional corporation is a law with respect to constitutional corporations, then a law which regulates the relationship between constitutional corporations and their employees is no less of that character. It is only if what has earlier been referred to as "a new or different filter" is inserted into the process of characterisation that the need to demonstrate actual or likely damage to a constitutional corporation would take on significance. For the reasons given earlier, that contention should be rejected.

259 The AWU made a discrete point about s 497 of the new Act, a provision concerned with what the Act calls "pattern bargaining" – a course of conduct involving the seeking of common wages or conditions of employment under two or more proposed collective agreements, where the course of conduct extends beyond a single business[332]. Section 497 permits the Federal Court or the Federal

---

332 s 421(1).

Magistrates Court[333] to grant an injunction in respect of industrial action if that action is or would be for the purpose of supporting or advancing claims made by a negotiating party to a proposed collective agreement, and that party is engaged in pattern bargaining.

260 The AWU submitted that the absence of any requirement that the proscribed conduct have any effect on a constitutional corporation was a significant consideration in deciding whether the provision was supported by s 51(xx). *Fontana Films* shows that a law which is predicated upon demonstrating that damage will or would be likely to be sustained by a constitutional corporation may be a law with respect to constitutional corporations. But it does not follow that a law is a law with respect to constitutional corporations *only* if it is to protect such corporations from damage. Section 497, in its operation with respect to constitutional corporations, is a law with respect to that subject-matter.

261 The AWU further submitted that the provisions of Div 9 of Pt 9 (ss 507-509) concerning the payment of wages in relation to periods of industrial action were invalid. This submission should be rejected. These provisions of the new Act fix particular aspects of the rights and obligations of constitutional corporations concerning payments to their employees in relation to periods of industrial action. They are provisions of the same constitutional character as other provisions of the new Act regulating terms and conditions of employment.

262 The plaintiffs' contentions that Pt 9 of the new Act is invalid, in so far as it applies to employers which are constitutional corporations, and their employees, should be rejected.

1(d) Item 4 of Sched 4 to the Amending Act and Sched 8 to the new Act

263 It is convenient to deal next with the challenges made to item 4 of Sched 4 to the Amending Act and Sched 8 to the new Act. These provisions deal with industrial instruments that were in operation when the new provisions introduced by the Amending Act came into force. Item 4 of Sched 4 to the Amending Act was one of the transitional, application and saving provisions made in the Amending Act. It dealt with the operation of awards, within the meaning of s 4(1) of the previous Act, which were awards in force at the time the Amending Act commenced operation. It provided that the original award was to be taken to

---

333 s 419.

be replaced by an instrument in the same terms and that the new instrument binds (among others) each employer and each employee bound by the original award.

264 Schedule 8 to the new Act deals with a different transitional question – what the heading to the Schedule describes as "Transitional treatment of State employment agreements and State awards". But it follows a generally similar path to that followed by item 4 of Sched 4 to the Amending Act with respect to existing federal awards. As noted in the introductory section of these reasons, a new industrial instrument, called a "notional agreement preserving State awards", is created by the new Act.

265 The central thrust of the argument against the validity of these provisions was[334] that:

> "The invocation of the power of the Commonwealth under s 51(xx) as a support for [the] law is merely incidental and is not substantially or relevantly connected with any notable feature which attaches to corporations, and which would allow for the characterisation of [the law] as being a law 'with respect to' corporations, as opposed to being a law with respect to the creation and maintenance of an industrial relations regulatory system, which happens to use corporations as one of the designated categories of employer to whom these laws are expressed to apply."

266 The submission should not be accepted. First, in speaking of "opposing" characterisations of the impugned provisions, the submission might be understood as embracing the long-discarded view that a law may have only a single character. But secondly, and no less importantly, the submission proceeds from the premise that a law is not a law with respect to constitutional corporations unless it not only has a discriminatory operation (in the sense of singling out constitutional corporations as the object of command) but also is "substantially or relevantly connected with" some other "notable feature" which attaches to constitutional corporations. For the reasons given earlier, that seeks to insert a new and additional filter into the process of characterisation and that proposition should not be accepted.

267 The essential operation of the provisions under immediate consideration is that the employment relationship between certain constitutional corporations and

---

334 Australian Workers' Union submissions, par 218.

their employees shall be regulated according to certain terms and conditions whose content is to be found in identified forms of instrument and whose content may be adjusted in the ways prescribed by the new Act. That is a law with respect to constitutional corporations.

268 The challenges to the provisions of item 4 of Sched 4 to the Amending Act, and to Sched 8 to the new Act, in so far as they apply to constitutional corporations, should be rejected.

1(e) Part VIAAA

269 Part VIAAA was inserted into the Act by item 5 of Sched 3A to the Amending Act. It commenced on the day on which the Amending Act received the Royal Assent (14 December 2005)[335]. It was repealed by item 71 of Sched 1 to the Amending Act which commenced[336] on its proclamation on 27 March 2006. Part VIAAA provided that certain small businesses (so far as now relevant, constitutional corporations employing fewer than 15 employees) were not to be bound by requirements deriving from a State law, a State award, or an order of a State industrial authority to pay redundancy pay. (The Part had further operation in respect of the Territories but that operation is considered separately at a later point in these reasons.) Although Pt VIAAA has been repealed, it was in operation for some months and the validity of that operation is not now shown to be moot.

270 In its operation with respect to constitutional corporations, Pt VIAAA provided that such persons were not bound to make certain kinds of payment to their employees. For the reasons already given in relation to other impugned provisions of the new Act, Pt VIAAA was a law with respect to constitutional corporations.

271 Consideration of the challenge to the remaining provisions alleged not to be supported by s 51(xx) (ss 365, 366, 637(1) and (4), 643(1)(a) and certain operations of Div 5 of Pt 15 and of Pt 16) requires more elaborate examination of the particular provisions in issue.

---

335 Amending Act, s 2.

336 Amending Act, s 2.

1(f) Sections 365 and 366

272 Sections 365 and 366 provide:

"**365 Seeking to include prohibited content in an agreement**

(1) A person contravenes this subsection if:

(a) the person seeks to include a term:

(i) in a workplace agreement in the course of negotiations for the agreement; or

(ii) in a variation to a workplace agreement in the course of negotiations for the variation; and

(b) that term contains prohibited content; and

(c) the person is reckless as to whether the term contains prohibited content.

(2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

366 Misrepresentations about prohibited content

(1) A person contravenes this subsection if:

(a) the person makes a misrepresentation in relation to a workplace agreement (or a variation to a workplace agreement) that a particular term does not contain prohibited content; and

(b) the person is reckless as to whether the term contains prohibited content.

(2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement."

273 It was submitted that neither section required that the person to whom the prohibition was directed be a party or proposed party to a workplace agreement or a proposed agreement[337]. Moreover, the submission contended, the provisions of s 366(1) "are even more abstract", in as much as the conduct enjoined does not have to be in the course of, or in relation to, negotiations for a workplace agreement or a variation to it.

274 It is critically important, however, to recognise that both provisions relate to existing or proposed workplace agreements. By definition a workplace agreement is an agreement to which an employer, as defined in s 6(1), is a party (or in the case of a multiple-business agreement, one or more such employers is a party[338]). For present purposes, then, ss 365 and 366 have operation in relation to existing or proposed workplace agreements with constitutional corporations.

275 A law which forbids any person from making a misrepresentation in relation to an existing or proposed workplace agreement, that a particular term does not contain prohibited content, is connected with the subject-matter of s 51(xx) – constitutional corporations. It is connected in a way that is not "insubstantial, tenuous or distant"[339]. The connection is not insubstantial, tenuous or distant because the provisions now impugned form an integral part of a set of provisions directed to forbidding employers and employees from making or seeking to make workplace agreements with prohibited content. Section 365 prevents any person from seeking the inclusion of such a term; s 366 is evidently intended to prevent reckless misrepresentations about the effect of existing or proposed agreements. In their operation with respect to those employers which are constitutional corporations, both ss 365 and 366 are supported by s 51(xx).

1(g) Sections 637 and 643

276 Sections 637 and 643 are found in Div 4 of Pt 12 of the new Act – a division dealing with minimum entitlements of employees in relation to termination of employment. The principal object of the Division is said[340] to be

---

337 s 324(a).

338 s 331(1).

339 *Melbourne Corporation* (1947) 74 CLR 31 at 79.

340 s 635.

to establish procedures for conciliation, and subsequent procedures, remedies and sanctions, in connection with the termination or proposed termination of an employee's employment in certain circumstances. One aspect of that object[341] is "to provide for remedies appropriate to a case where, on arbitration, a termination is found to be harsh, unjust or unreasonable".

277 Subdivision B of Div 4 of Pt 12 (ss 643-658) is entitled "Application to Commission for relief in respect of termination of employment". Subdivision C (ss 659-667) concerns unlawful termination of employment by employers; subdiv D (ss 668-671) concerns Commission orders after an employer fails to consult relevant trade unions about termination. Section 637 is an application provision. The impugned sub-sections provide:

> "(1) Subdivision B applies, in so far as it relates to an application to the Commission for relief in relation to the termination of employment of an employee on the ground that that termination was harsh, unjust or unreasonable, if the employee concerned was, before the termination, an employee within the meaning of subsection 5(1).
>
> ...
>
> (4) Without prejudice to their effect apart from this subsection, Subdivisions C and D also apply in relation to the termination of employment of an employee within the meaning of subsection 5(1)."

Section 643 provides for the making of applications to the Commission to deal with terminations.

278 Very little separate argument was advanced in connection with these provisions. For the most part they were treated as standing or falling with other provisions put in issue by the plaintiffs. It is, therefore, enough to say that, for the reasons already given, the plaintiffs' contentions about these provisions should be rejected.

1(h) Division 5 of Pt 15

279 Part 15 of the new Act deals with rights to enter premises. Division 5 (ss 755-759) is concerned with "Entry for OHS purposes". An "OHS law" is

---

341 s 635(1)(c).

defined[342] as "a law of a State or Territory prescribed by the regulations" for the purposes of the definition. The particular focus of the plaintiffs' submissions was upon ss 740-742 and 756. Section 756 provides that an official of an "organisation", that is, an organisation registered pursuant to Sched 1 to the new Act, who has a right under an OHS law, must not exercise that right unless the official holds a permit under Pt 15 and exercises the right during working hours. Sections 740-742 provide for the issue of permits.

280 Regulation 15.1 of Ch 2 of the Regulations prescribes three laws for the purposes of the definition of an OHS law: *Occupational Health and Safety Act* 2000 (NSW), *Occupational Health and Safety Act* 2004 (Vic) and ss 49G and 49I-49O of the *Industrial Relations Act* 1979 (WA), to the extent that those provisions relate to a right of entry to investigate suspected breaches of certain Western Australian Acts. Section 755 of the new Act identifies "OHS entries" to which Div 5 of Pt 15 applies. That section provides:

> "(1) This Division has effect in relation to a right to enter premises under an OHS law if:
>
> (a) the premises are occupied or otherwise controlled by:
>
> (i) a constitutional corporation; or
>
> (ii) the Commonwealth; or
>
> (b) the premises are located in a Territory; or
>
> (c) the premises are, or are located in, a Commonwealth place; or
>
> (d) the right relates to requirements to be met by:
>
> (i) a constitutional corporation or the Commonwealth in its capacity as an employer; or
>
> (ii) an employee of a constitutional corporation or the Commonwealth; or

---

342 s 737.

(iii) a contractor providing services for a constitutional corporation or the Commonwealth; or

(e) the right relates to conduct engaged in, or activity undertaken or controlled, by:

(i) a constitutional corporation or the Commonwealth in its capacity as an employer; or

(ii) an employee of a constitutional corporation or the Commonwealth; or

(iii) a contractor providing services for a constitutional corporation or the Commonwealth; or

(f) the exercise of the right will have a direct effect on:

(i) a constitutional corporation or the Commonwealth in its capacity as an employer; or

(ii) an employee of a constitutional corporation or the Commonwealth; or

(iii) a contractor providing services for a constitutional corporation or the Commonwealth.

(2) In this section:

constitutional corporation includes:

(a) a Commonwealth authority; and

(b) a body corporate incorporated in a Territory."

281 The plaintiffs made a number of separate points about Div 5 of Pt 15, one about the construction of the provisions, and others about validity. It is necessary to deal first with the construction issue.

282 It was submitted that Div 5 of Pt 15 has no application to rights of entry under the New South Wales or Western Australian legislation prescribed by reg 15.1 of Ch 2 of the Regulations because those State Acts, unlike the Victorian Act, give rights of entry to certain officials of organisations registered under State law and those organisations are not and cannot be registered under

Sched 1 to the Act. (The Victorian Act gives rights of entry to officials of federally registered organisations.) The submission should be rejected.

283 For the purposes of dealing with the point, it is not necessary to consider whether it is right to say that an organisation registered under a State industrial system cannot be registered under Sched 1. It is enough to decide that, as the Commonwealth submitted, s 756 does not require that the right of entry under an OHS law be derived from the holding of office in an organisation registered under Sched 1. Section 756 forbids a person who is an official of such a federal organisation who has a right of entry, no matter what may be the criteria for granting that right under the relevant State law, from entering premises otherwise than in accordance with s 756. If a person is an official of a federal organisation, and has a right of entry under the New South Wales or Western Australian legislation (or for that matter a right of entry under the Victorian legislation), that official is bound by s 756.

284 The plaintiffs' contentions about validity focused upon a number of the operations given to Div 5 of Pt 15 by s 755. The chief contention was that s 755(1)(a)(i) should be held to be invalid on the ground that, like the law considered in *Re Dingjan*, it "does no more than make the activity of a s 51(xx) corporation the condition for regulating the conduct of an outsider". To describe the operation of s 755(1)(a)(i) in this way gives insufficient significance to the fact that the particular operation of the new Act that is in question is the regulation of a right of entry to premises, and that the premises to which the right of entry is controlled are premises "occupied or otherwise controlled by" a constitutional corporation. This is a sufficient connection with s 51(xx), whether or not the entry that is thus regulated concerns a business being conducted on the premises by that corporation. The connection lies in the controlling of entry to a constitutional corporation's premises. The law controlling entry is a law with respect to constitutional corporations.

285 Some plaintiffs further submitted that s 755(1)(d)(i), (e)(i) and (f)(i) were invalid. These provisions concern rights to enter relating to requirements to be met by a constitutional corporation as employer (s 755(1)(d)(i)), relating to conduct engaged in, or activity undertaken or controlled, by such a corporation in that capacity (s 755(1)(e)(i)), or having a direct effect on such a corporation in that capacity (s 755(1)(f)(i)). But as the Commonwealth rightly submitted, these paragraphs give the Division an operation in connection with the obligations or activities of constitutional corporations, or an operation having a direct effect on constitutional corporations as employers. The challenge to the validity of these provisions should be rejected.

286 All plaintiffs submitted that s 755(1)(d)(iii), (e)(iii) and (f)(iii) were invalid. These provisions concern contractors providing services for constitutional corporations. The plaintiffs submitted that these provisions do not require that the right of entry be exercised in relation to an activity of a contractor engaged in for the purposes of providing services to the constitutional corporation. The Commonwealth accepted that on that construction the provisions would exceed power and therefore urged that the provisions be construed as limited in their application to requirements or activities in which a contractor is engaged *in the course of* providing services to a constitutional corporation. That construction of the provisions is to be preferred. So construed, the provisions are laws with respect to constitutional corporations.

287 Finally, Western Australia submitted that s 755(1)(d)(iii), (e)(iii) and (f)(iii) are invalid in relation to contractors providing services to the Commonwealth. Those provisions in their operation with respect to the Commonwealth are to be construed in the same way as they are construed in their operation with respect to constitutional corporations. That is, they are to be construed as limited in their application to requirements or activities in which a contractor is engaged *in the course of* providing services to the Commonwealth. In that operation, these provisions are not supported by s 51(xx). If they are valid their support would be found in other legislative powers supporting the particular activities being undertaken by the Commonwealth. But those are not matters that were or could be explored in this litigation. No order should be made in these proceedings about this aspect of the legislation.

1(i) Part 16

288 The plaintiffs put their challenges to Pt 16 (ss 778-813 dealing with "Freedom of association") in different ways. Victoria sought a declaration that s 785(1) of the new Act is invalid. Western Australia, New South Wales, South Australia, Queensland, and the AWU sought narrower relief – that s 783 and s 785(1)(d), (e) and (f) are invalid. Victoria contended that Pt 16 could not be read down to apply only in respect of Victoria and supported by its referral of power.

289 Section 783 provides that Pt 16 applies to conduct by an organisation registered under Sched 1, conduct by an officer of such an organisation acting in that capacity and "conduct carried out with a purpose or intent relating to a person's membership or non-membership" of an organisation registered under Sched 1. Section 785 provides:

"(1) This Part applies to the following conduct:

(a) conduct by a constitutional corporation;

(b) conduct against a constitutional corporation;

(c) conduct that adversely affects a constitutional corporation;

(d) conduct carried out with intent to adversely affect a constitutional corporation;

(e) conduct that directly affects a person in the capacity of:

(i) an employee, or prospective employee, of a constitutional corporation; or

(ii) a contractor, or prospective contractor, of a constitutional corporation;

(f) conduct carried out with intent to directly affect a person in the capacity of:

(i) an employee, or prospective employee, of a constitutional corporation; or

(ii) a contractor, or prospective contractor, of a constitutional corporation;

(g) conduct that consists of advising, encouraging or inciting a constitutional corporation:

(i) to take, or not to take, particular action in relation to another person; or

(ii) to threaten to take, or not to take, particular action in relation to another person.

(2) In this section:

constitutional corporation includes a body corporate incorporated in a Territory."

It is convenient to leave aside from consideration, for the moment, the extension to the meaning of "constitutional corporation" provided by s 785(2) and confine attention to the operation of the relevant provisions in relation to corporations of the kinds mentioned in s 51(xx).

290 Part 16 proscribes a number of different kinds of conduct: certain conduct done with an intent to coerce (s 789), making certain kinds of false or misleading statements (s 790), organising, taking, or threatening to organise or take industrial action for particular reasons (s 791). More particular forms of conduct are dealt with by other provisions of the Part.

291 For present purposes, it is convenient to focus upon s 785 and to recognise that it provides for the application of the Part to several kinds of conduct: conduct *by* a constitutional corporation (s 785(1)(a)), conduct *against* a constitutional corporation (s 785(1)(b)), conduct that does, or is intended to, adversely affect a constitutional corporation (s 785(1)(c) and (d)) or that does, or is intended to, adversely affect a present or prospective employee or contractor of a constitutional corporation (s 785(1)(e) and (f)), and conduct that consists of advising, encouraging or inciting a constitutional corporation to do, or not do, certain things (s 785(1)(g)). The first two forms of conduct (conduct by or against a constitutional corporation) raise no separate or different issue from those considered in connection with a number of other provisions of the Act, including Pts 7, 8, 10, Divs 1 and 2 of Pt 12 and Pt 23. For the reasons given in connection with those provisions, the challenge to the validity of s 785(1)(a) and (b) fails.

292 The prohibition of forms of conduct whose ultimate purpose or effect is to cause harm to a constitutional corporation is to be supported as not materially different from legislation of the kind upheld in *Fontana Films*. And those provisions of s 785 which proscribe conduct done with the *intent* to cause harm to constitutional corporations are to be supported on the same basis.

293 It is important to notice that the provisions about conduct directly affecting or done with intent to directly affect present or prospective employees or contractors of constitutional corporations (s 785(1)(e) and (f)) describe the relevant conduct as conduct affecting a person "*in the capacity of*" employee or contractor. The reference to capacity reveals that the conduct proscribed is conduct which affects the present or prospective relationship between an employee or contractor and a constitutional corporation. That being so, s 785(1)(e) and (f) are to be supported in the same way as s 785(1)(a) and (b), and are properly characterised as laws with respect to constitutional corporations. The prohibition in s 785(1)(g), against persons advising, encouraging or inciting a constitutional corporation, is to be supported on the same basis as the law creating the principal prohibition of conduct by the constitutional corporation the incitement of which is forbidden.

294 The challenges to Pt 16 fail. It is, thus, not necessary to consider any question about the effect of Victoria's reference of power.

2 Particular provisions and s 51(xxxv)

295 Something should be said of the fate of the particular challenges to portions of the new Act which Victoria made in its submissions (which were adopted by some of the other States) as to the interrelation between pars (xxxv) and (xx) of s 51 of the Constitution.

2(a) Parts 8, 9 and 13

296 Victoria challenged Pt 8, much of Pt 9[343] and Pt 13 of the new Act on this basis. The substance of those provisions is explained earlier in these reasons. Part 8 is headed "Workplace agreements" and, significantly for present purposes, requires (s 353) such agreements to include dispute settlement procedures and specifies that in the absence of such provision the agreement must be taken to include the model dispute resolution process laid out in Pt 13. Part 9 contains detailed provisions respecting what in s 420 is defined as "industrial action". All these Parts turn for their operation to a significant degree upon the definition of "employer" and thus upon the presence of an employer which is a "constitutional corporation" (s 6(1)(a)), being a corporation to which s 51(xx) applies (s 4(1)).

297 Victoria characterised Pts 8, 9 and 13 as laws for the prevention and settlement of industrial disputes. But Victoria contended that these laws do not observe the "restrictions" in s 51(xxxv), namely, that the dispute extend beyond the limits of any one State and that the law adopt the process of conciliation and arbitration. Part 7 which provides for minimum entitlements of employment is not characterised by Victoria as a law for the prevention or settlement of industrial disputes. It is not attacked by Victoria on grounds relating to s 51(xxxv) and the "qualification" of s 51(xx) by s 51(xxxv). The validity of Pt 7 is attacked in particular by the AWU as a law with respect to industrial relations, a subject for which there is said to be no good reason to suggest that it be within the reach of a law otherwise supported by s 51(xx).

298 The various grounds upon which Victoria sought to make good its "qualification" have been considered above. As there explained, the submissions

---

343 Divs 2, 3, 4, 5, 6, 7, 8, 9 (other than s 496(2), (3)) and s 497, in so far as it purports to apply to employers and employees as defined in s 6(1)(a) with s 5(1).

in support of the "qualification" should not be accepted. The same is true of the arguments (particularly by the AWU) in the weaker form, that s 51(xxxv) invites or requires particular caution in construing s 51(xx).

2(b) Schedule 6

299 South Australia contended that Sched 6 is invalid for want of support by s 51(xxxv) of the Constitution (with particular reference to cll 1(2)(c), 8, 28(2) and 29). Section 8 of the new Act provides that Sched 6 has "effect". The Schedule operates during a "transitional period" of five years beginning with the commencement of the Schedule (cl 2(1)). It provides for what are described as transitional arrangements for certain employers bound by federal awards and their employees. During the transitional period those awards are to continue in operation as "transitional awards" and be maintained by the AIRC but within the limits specified in Sched 6. However, while the AIRC may vary a transitional award as permitted by cl 29 of the Schedule, it must not make any new awards (cl 7). A transitional award ceases to be in force at the end of the five year period if it has not earlier done so (cl 6(1)).

300 The AIRC must (cl 8(1)) perform its functions in a way that furthers the objects set out in cl 1. One of those objects is the variation of awards so that wages and other monetary entitlements are not inconsistent with wage-setting decisions of the AFPC (cl 1(2)(c)). The AIRC must also "have regard to" wage-setting decisions of the AFPC and the desirability of consistency between its decisions and those of the AIRC (cl 8(4)).

301 In preventing or settling an industrial dispute or maintaining the settlement of such a dispute, the power of the AIRC to vary a transitional award is limited in various respects by cl 29. Further, the AIRC must not vary a term about long service leave, notice of termination, jury service or superannuation (cll 22, 28(2)).

302 One of the objects of Sched 6 is to ensure that during the transitional period those bound by a transitional award may in appropriate circumstances shift to an available State system (cl 1(2)(b)). Clauses 57-60 provide for such shifts.

303 The decision in *Re Pacific Coal*[344] emphasises the errors in treating s 51(xxxv) of the Constitution as concerned with the settlement of particular

---

344 (2000) 203 CLR 346.

disputes by arbitration, rather than with the operation of a particular system of dispute resolution[345], and in attaching to the outcome of a process of arbitration a constitutional as opposed to a legislative significance[346].

304 These errors are repeated in the submissions made by South Australia to the effect that Sched 6 requires the AIRC to vary transitional awards "in such a way that they no longer represent the outcome of a process" identified in s 51(xxxv).

305 A complaint by South Australia respecting the significance to be attached by the AIRC to the wage-setting decisions of the AFPC turns, South Australia accepted in the oral submissions in reply of the Solicitor-General, upon the construction particularly of cl 8 of the Schedule. The submissions by the Commonwealth that to require the AIRC to have regard to particular matters in making a decision is not to mandate a particular outcome should be accepted.

306 In any event, the validity of Sched 6 as a whole is to be assessed by identification of the rights, duties, powers and privileges which it changes, regulates or abolishes. The following statement by Gummow and Hayne JJ in *Re Pacific Coal* is applicable to Sched 6[347]:

> "Here the rights, duties, powers and privileges which are changed, regulated or abolished are some of those which were given by the Parliament in respect of the outcome of the process of conciliation and arbitration carried on under legislation enacted pursuant to s 51(xxxv). The effect of the changes may be very large, and may even be classified by some as unjust. But neither the size of that effect, nor any qualitative description of it, means that some other rights or duties are properly identified as having been the subject of the legislative change."

307 The Parliament is not bound by s 51(xxxv) to maintain any particular system of regulation of industrial disputes. A legislative power to enter a particular field ordinarily, and as it does here, carries with it the power to

---

345 (2000) 203 CLR 346 at 360 [30].

346 (2000) 203 CLR 346 at 418-419 [225], 421-422 [230], 449-450 [303], [305].

347 (2000) 203 CLR 346 at 416 [217].

withdraw from that field[348]. That withdrawal may be staged in a manner such as that provided by Sched 6.

308 Accordingly, it is not useful to ask whether transitional awards, after the operation of Sched 6, remain appropriate and adapted for the prevention of future disputes or remain sufficiently connected with a past dispute. To enter upon these questions is not to answer the question whether Sched 6 is a law supported by s 51(xxxv). Schedule 6 is such a law because it prescribes for a specified maximum period the extent to which legislatively created consequences are to continue to attach to pre-existing awards; it qualifies and takes away the legal effect otherwise given by the legislation to those awards.

2(c) Schedule 1

309 This is headed "Registration and Accountability of Organisations". One of the stated intentions of the Parliament in enacting Sched 1 was to enhance relations within workplaces of "federal system employers" and "federal system employees" and to reduce the adverse effects of industrial disputation by requiring associations of such persons to meet the standards set out in Sched 1 in order to gain the rights and privileges accorded to associations under the new Act and Sched 1 (s 5(1), (2)). The terms "federal system employer" and "federal system employee" are defined in s 18A(2) and s 18B(2) respectively in terms which, among other heads of legislative power, fix upon employment by "a constitutional corporation".

310 Part 2 of Ch 2 of Sched 1 sets up a system of registration. Application may (not must) be made to the AIRC by bodies including "a federally registrable association of employers" and "a federally registrable association of employees" (s 18). If registration is obtained, it may be cancelled by the AIRC on its own motion if the organisation is not, or is no longer, a federally registrable association (s 30(1)(c)(v)).

311 An employers association may apply for registration if it itself is a constitutional corporation, or the majority of its members are federal system employers (s 18A(1)). An association of employees may apply if it itself is a constitutional corporation, or the majority of its members are federal system

---

348 cf *Kartinyeri* (1998) 195 CLR 337 at 358 [19]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 at 457 [29], 459 [37]-[38].

employees (s 18B(1)). These provisions are found in Div 1 of Pt 2, which is headed "Types of associations that may apply for registration".

312 Division 2 of Pt 2 is headed "Registration criteria". Where an application is made by a federally registrable association of employers or employees which satisfies the requirements of Div 1 for the making of an application, the AIRC must grant it, but "if, and only if" the relevant further criteria in s 19 are met by the applicant.

313 If the applicant be an association of employers, then throughout the six months before the application, those members who are employers – and the association will not have satisfied Div 1 unless it be a constitutional corporation or a majority of its members be federal system employers (s 18A(1)) – must have employed on a monthly average at least 50 employees (s 19(1)(c)).

314 If the applicant be an association of employees, then the association – which must have satisfied the requirement in Div 1 (s 18B(1)) that it be a constitutional corporation or have federal system employees as a majority of its members – is required by Div 2 (s 19(1)(d)) to have at least 50 members who are employees.

315 The terms "employer" and "employee", as used in s 19(1), are defined in s 6 of Sched 1 in terms which are not immediately attached to any head of federal legislative power. The new Act itself, in particular as appears in the definition of "employer" in s 6(1), is cast differently and does attract the heads of power invoked by pars (a)-(f) of that sub-section. Unions NSW, in particular, emphasised the distinction between the Act and Sched 1. There was said to be no rational basis for the differing discrimen chosen in the body of the Act and in Sched 1, where the registration system apparently is designed to assist the operation of the Act in various respects.

316 It is undoubtedly the case that registration under Sched 1 confers a range of rights, privileges and obligations under the new Act. Some of these are as follows. With leave of the AIRC, an organisation may intervene in any matter before it (s 101); organisations may be parties to collective agreements (ss 328, 329) and are bound by them whilst they are in operation (s 351); they may be bound by awards (s 543); and may make applications for curial relief provided by the new Act (eg, ss 405, 448(7), 494(8), 495(7), 496(4)).

317 But whatever the further restrictions imposed by s 19 of Sched 1 upon the obtaining of registration, an applicant must first pass the thresholds of s 18A and s 18B respectively. These are attached in the manner described to heads of

legislative power. Paragraphs (c) and (d) of s 19(1) are designed to exclude from registration organisations which do not "at least" reach a certain size in membership. There is nothing irrational in doing so, if rationality to the beholder be a touchstone of validity[349].

318 Nor is it to the point that, for example, par (d) of the definition of "employer" in s 6(1) of the new Act makes a more limited use of the commerce power in s 51(i) than does s 18A(2)(b)(ii) in the definition for Sched 1 of "federal system employer", or that pars (e) and (f) of the definition make a more limited use of the Territories power than s 18A(2)(b)(i) of Sched 1.

319 It may be, as counsel for the Commonwealth indicated, that Sched 1 was drafted with a view to it standing as a distinct statute. Whatever the situation in this respect may be, and contrary to the principal submission of those attacking its validity, Sched 1 is supported as an exercise of the power with respect to constitutional corporations.

320 Two decisions of this Court, given at opposite ends of the twentieth century, illustrate the extent of the power to register persons and organisations, and to incorporate the latter, if there be the sufficient connection with one or more paragraphs in s 51 of the Constitution.

321 *Cunliffe v The Commonwealth*[350] upheld the validity of a system requiring registration of persons giving assistance and advice to aliens seeking entry permits, visas and determination of refugee status. It made no difference for its validity that the law operated upon those providing the services in question rather than upon those to whom they were provided; the law was concerned with the protection of aliens in relation to matters affecting their status.

322 If it be accepted, as it should be for the argument on this branch of the plaintiffs' case, that it is within the corporations power for the Parliament to regulate employer-employee relationships and to set up a framework for this to be achieved, then it also is within power to authorise registered bodies to perform certain functions within that scheme of regulation. It also is within power to require, as a condition of registration, that these organisations meet requirements of efficient and democratic conduct of their affairs.

---

349 See [188].

350 (1994) 182 CLR 272.

323 The Commonwealth submitted that the heads of power in the terms relied upon in s 18A and s 18B of Sched 1, whatever the degree of overlap in a given case with s 6 of the new Act, supported the validity of the registration system provided by Sched 1. That submission should be accepted with respect to s 51(xx), the principal subject of debate, and also with respect to the other heads of power relied upon.

324 It is unnecessary to consider a broader submission by the Commonwealth. This was that, for example, a federal law for the organisation of lighthouse employees would be valid whoever were their employer, and whether the parties were under a federal or State industrial relations system or no such system.

325 Section 27 of Sched 1, the validity of which is challenged, provides for the incorporation of organisations registered under that Schedule. A provision to corresponding effect was found in s 58 of the 1904 Act. That invites attention to the earlier of the twentieth century cases mentioned above. This is *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association*[351]. In that case, validity of the registration provisions in the 1904 Act, including s 58, was upheld. Isaacs J remarked that the point had not been strenuously contested[352]. In its various manifestations, the 1904 Act retained such a provision. Section 27 of Sched 1B to the Act prior to the commencement of the Amending Act, introduced in 2002[353], was the most recent example.

326 It was suggested in submissions that the outcome in *Jumbunna* had depended upon the grounding of the 1904 Act in the particular head of power in s 51(xxxv), and that the shift of the present legislation away from s 51(xxxv) was fatal to the validity of s 27 of Sched 1. However, for many years, the Parliament has taken a broader view of the power of incorporation implicit in various heads of power. The received doctrine was stated as follows by Latham CJ in *Australian National Airways Pty Ltd v The Commonwealth* ("the *Airlines Case*")[354]:

---

351 (1908) 6 CLR 309.

352 (1908) 6 CLR 309 at 375.

353 Schedule 1B was given effect by s 4A inserted by the *Workplace Relations Amendment (Registration and Accountability of Organisations) Act* 2002 (Cth).

354 (1945) 71 CLR 29 at 58-59.

> "It is true that the Commonwealth has no general power to create corporations, but when the Commonwealth Parliament exercises a legislative power it is for the Parliament, subject to any constitutional prohibition, to determine the means of securing an object which it is legitimate under the power for the Parliament to pursue. Thus the establishment of the Commonwealth Bank was a means of giving effect to an approved policy with respect to banking. In the well-known case of *McCulloch v Maryland*[355] it was held that if Congress can exercise a power it can create a corporation to carry that power into effect: See *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association*[356], relating to the creation of corporations for the purpose of giving effect to the industrial arbitration power."

The establishment of the Commonwealth Bank was referable to the express power of incorporation of banks conferred by s 51(xiii)[357]. But the decision in the *Airlines Case* rested upon s 51(i) and s 122[358]. Long ago, Story wrote of the power of Congress that[359]:

> "a power to erect corporations may as well be implied, as any other thing, if it be an instrument or means of carrying into execution any specified

---

355 17 US 316 (1819). [The Supreme Court there upheld the incorporation in 1816 by the Congress of the Bank of the United States. By the time of the adoption of the Australian Constitution, the Supreme Court had upheld laws for the creation of corporations to construct railroads and bridges for the purpose of promoting interstate commerce: *Luxton v North River Bridge Co* 153 US 525 at 529-530 (1894).]

356 (1908) 6 CLR 309.

357 See *Heiner v Scott* (1914) 19 CLR 381 at 393, 395-396, 400, 402-403; *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 231-233.

358 See also *The Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 at 9-10; *Insurance Commissioner v Associated Dominions Assurance Society Pty Ltd* (1953) 89 CLR 78 at 87; *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 at 54-55; *Jones v The Commonwealth [No 2]* (1965) 112 CLR 206 at 218, 225-226, 236-237, 245.

359 *Commentaries on the Constitution of the United States*, (1833), vol 3, §1257.

power. The only question in any case must be, whether it be such an instrument or means, and have a natural relation to any of the acknowledged objects of government."

327 In considering Sched 1, there remains a point concerning transitional provisions. The Amending Act makes special provision for the application of Sched 1 to the new Act to organisations registered before the commencement of the new system[360]. The power conferred by par (c)(v) of s 30(1) of Sched 1 upon the AIRC on its own motion to cancel the registration of an organisation if "the organisation is not, or is no longer, a federally registrable organisation" is qualified by the Amending Act. With respect to organisations registered under the old system, the power of cancellation does not apply for the period of three years after the commencement of the new system. The Commonwealth submits that this moratorium period for the phasing out of the old system is supported by s 51(xxxv) of the Constitution. That submission should be accepted, by application of the reasoning supporting the transitional arrangements made by Sched 6.

PART V – CONSTITUTION, s 122 – TERRITORIES

328 *Section 122*. Section 122 of the Constitution provides:

"The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth ...".

329 *Relevant provisions of the new Act.* It is convenient to set out again pars (e) and (f) of the definition of "employer" in s 6(1) of the new Act:

"(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or

(f) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs, or usually employs, an individual in connection with the activity carried on in the Territory."

And s 5(1), subject to s 5(2), defines "employee" as meaning:

---

360 Item 24 of Sched 4 to the Amending Act.

> "an individual so far as he or she is employed, or usually employed, as described in the definition of ***employer*** in subsection 6(1), by an employer, except on a vocational placement".

1 Structure of the challenges

330 Victoria contended that s 122 did not support the following provisions so far as their validity rested on pars (e) and (f) of the definition of "employer" in s 6(1): Pts 7 and 8, Divs 2-5, 6 (other than s 496(2) and (3) and s 497) and 7-9 of Pt 9, Pt 10, Divs 1 and 2 of Pt 12, s 637(1) and Pt 23.

331 New South Wales, Queensland, South Australia, Western Australia and the AWU contended that s 122 did not support the following provisions so far as their validity depended on par (f) of the definition of "employer" in s 6(1): Pts 7-10, Div 1 of Pt 12, s 637(1) and (4), s 643(1)(a), Pt 23, item 4 of Sched 4 to the Amending Act, and Sched 8 to the new Act.

332 Western Australia, Queensland and the AWU contended that s 122 did not support Div 2 of Pt 12 so far as its validity depended on par (f) of the definition of "employer" in s 6(1).

333 Finally, New South Wales, Queensland, South Australia, Western Australia and the AWU contended that s 122 did not support the validity of Pt XVII so far as it purported to apply from 14 December 2005 to 27 March 2006 and depended on a definition of "employer" identical to that in par (f) of the definition in s 6(1).

2 Paragraph (e) of the definition of "employer"

334 Initially New South Wales, Victoria, South Australia, Western Australia and the AWU adopted the following written submission of Queensland:

> "By virtue of s 6(1)(e) [scil par (e) of the definition of 'employer' in s 6(1)], the law operates by reference to the relation of employee and employer where the employer is a body whose sole connexion with a Territory is that it *had been* incorporated in a territory – irrespective of whether the employees or body have any other connexion with a territory whatsoever.
>
> This nexus between the subject matter of s 122 and the law, which is a law with elaborate provisions governing employer-employee relations, terms

of employment and unions, is so distant and insignificant that s 122 can rightly be described as no more than a peg upon which the Act has been hung, by a slender loop." (emphasis added)

335 The Commonwealth responded to this submission by pointing out that the words "had been" do not appear in par (e) and that par (e) could not be construed as if it contained them. The Commonwealth contended that par (e) referred only to a body corporate, the ongoing status of which as a body corporate depended on a Territory law or a Commonwealth law made under s 122. The Commonwealth contended that there is a sufficient nexus or connection between laws made under s 122 and bodies corporate incorporated in a Territory, because the law of the place of incorporation generally determines the powers of corporations established under that law. The Commonwealth contended further that s 122 supported the relevant provisions even though they affected employees of the body corporate incorporated in the Territory who were outside the Territory[361].

336 In its written submissions in reply, Queensland did not seek to refute either the construction advanced by the Commonwealth or the contentions advanced by the Commonwealth on the basis of that construction. All other written submissions in reply were silent on the matter, and so were the oral submissions. The parties have since indicated that only Victoria maintains the original challenge.

337 That challenge must be rejected. The Commonwealth's construction of par (e) of the definition of "employer" is plainly correct. On that construction, its submissions as to the sufficiency of connection between s 122 and a law directed to bodies corporate incorporated in a Territory, which were not resisted by any other party, are also correct.

3 Paragraph (f) of the definition of "employer"

338 New South Wales, South Australia, Victoria, Western Australia and the AWU adopted the written argument of Queensland. In it two submissions were advanced.

---

361 *Lamshed v Lake* (1958) 99 CLR 132; *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607 per Mason J, 611 per Jacobs J; *AMS v AIF* (1999) 199 CLR 160 at 171 [19] per Gleeson CJ, McHugh and Gummow JJ (Hayne J agreeing at 227 [201]) and at 182 [59] n 59 per Gaudron J.

339 The first submission advanced by Queensland was that par (f) of the definition created no sufficient nexus with a Territory, because its effect was that the challenged provisions could apply to employees who conducted an activity in a Territory no matter how small a part of the employer's overall activities it was, no matter how insignificant it was, no matter whether the employer employed anyone in connection with the activity, no matter whether the employer or the employee had ever been present in the Territory, and no matter whether the employee might be engaged predominantly in activities unconnected in any way with the Territory. It was submitted that this state of affairs would produce an absurd outcome: an employee would be subject to the challenged legislation so far as an employee undertook Territory-connected activities, but subject to State laws so far as the employee's activities did not have that connection.

340 The second submission advanced by Queensland rested on the fact that in *Re Dingjan*[362] it was held that a law giving power "in relation to a contract relating to the business of a constitutional corporation" was not a law with respect to a constitutional corporation. It was said to follow that "a law with respect to the employment of employees in connexion with activities conducted by such persons in a territory" could not be a law for the government of the Territory.

341 The first of Queensland's submissions turned on a particular construction of the legislation. The better construction is that for a person or entity to be an employer, two elements have to be found. First, the person or entity has to carry on an activity in a Territory. Secondly, the person or entity has to employ, or usually employ, an individual in connection with that activity. The word "usually" excludes unpredictable, infrequent or unusual acts carried out by the employee at the employer's request. It suggests the need for attention to what the employee normally does, and that in turn suggests that attention must be given to the employee's core or routine duties – considered as a whole, not separately.

342 It is true, as the Commonwealth accepted, that in particular cases it might be difficult to assess whether the connection between the employee's duties and the employer's activities in a Territory existed. It is also true that changes in an individual's duties might cause that individual to cease to be an employee as defined in s 5(1), and later changes may cause that individual to become one again, with consequential changes in the application of the legislation to the employer. However, if a person or entity is an "employer" because an individual

---

362 (1995) 183 CLR 323.

is employed in connection with an activity carried on by the person or entity in a Territory, the employee is subject to the new Act in respect of all that employee's duties. The supposed absurdity of an employee falling under one body of law as to one part of his or her duties, and a different body of law as to another, would not arise.

343 On the better construction, the points made by Queensland can be seen to lack force. An employee engaged predominantly in activities unconnected in any way with a Territory would not be employed or usually employed in connection with the activity carried on by the employer in the Territory. If no employee were employed in connection with the activity, the employer would not be an employer in the sense defined in par (f). The fact that neither the employer nor the employee had ever been present in the Territory might point against the definition applying, but would not be fatal: an employer can carry on an activity in a Territory quite intensively through agents without ever going there, and an employee who directs the conduct of others in a Territory can be employed in connection with an employer's activity in that Territory without ever going there. The laws supported by s 122 are not limited to those applying to persons or activities in a Territory, but extend to laws applying to conduct taking place outside the Territory, for example, journeys that begin or end in a Territory[363]. Neither the insignificance of the activity carried on by the employer as compared to the employer's other activities, nor the insignificance of the activity considered by itself, are factors which can prevent the definition in par (f) from applying, and they are not factors revealing any remoteness of connection between the impugned provisions and the Territory. Nor is remoteness of connection demonstrated by the application of the challenged legislation to the employer in relation to only a small proportion of its employees rather than more of them.

344 The second submission advanced by Queensland must also be rejected. *Re Dingjan* is distinguishable. It dealt with the power conferred by s 51(xx) to make laws for the peace, order and good government of the Commonwealth with respect to a particular class of persons, namely certain types of "corporations". It did not deal with s 122, which is not a power limited to persons, but which extends to making "laws for the government of any territory". The connection established by par (f) of the definition of "employer" between the impugned provisions and a Territory is in any event closer than the connection between the legislation held invalid in *Re Dingjan* and corporations.

---

363 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 62-63 per Latham CJ, 71-72 per Rich J, 84 per Dixon J, 112 per Williams J.

345 *Conclusion.* The challenges to validity so far as they are based on a lack of support from s 122 fail.

PART VI – OTHER PARTICULAR CHALLENGES

1 Section 16 – Exclusion of State and Territory laws

346 *The section.* Section 16(1) provides:

> "(1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:
>
> (a) a State or Territory industrial law;
>
> (b) a law that applies to employment generally and deals with leave other than long service leave;
>
> (c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined in section 623);
>
> (d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;
>
> (e) a law that entitles a representative of a trade union to enter premises."

The expression "State or Territory industrial law" is defined in s 4(1) to mean:

(a) various identified State Industrial Relations Acts;

(b) State or Territory Acts applying to employment generally and having one or more of five identified purposes as its main purpose or one or more of its main purposes;

(c) an instrument of a legislative character made under an Act described in par (a) or par (b); or

(d) a law of a State or Territory prescribed by regulations made under the new Act.

347 Section 16(2) provides that s 16(1) does not apply to laws of a State or Territory falling within one of three categories. The third category comprises laws dealing with "non-excluded matters" which are described in s 16(3).

348 Section 16(4) provides:

> "This Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations for the purposes of this subsection."

And s 16(5) provides:

> "To avoid doubt, subsection (4) has effect even if the law is covered by subsection (2) (so that subsection (1) does not apply to the law). This subsection does not limit subsection (4)."

349 It is convenient also to summarise ss 17 and 18, which played a role in the arguments advanced against the validity of s 16. Section 17 provides that, subject to exceptions, an award or workplace agreement prevails over a law of a State or Territory, and a State award or a State employment agreement, to the extent of any inconsistency. Section 18 provides that ss 16 and 17 are not a complete statement of the circumstances in which the new Act and instruments made under it are intended to apply to the exclusion of, or prevail over, laws of the States or Territories or instruments made under those laws.

350 *The structure and nature of the challenges.* Western Australia advanced three challenges to s 16. First, it contended that s 16 was not supported by any head of power. Secondly, it contended that s 16 constituted "a bare attempt to limit or exclude State legislative power, including future State laws which may be excluded by regulations made under the [new] Act, rather than to comprehensively regulate a particular field of activity to the exclusion of any State law which also regulates that field of activity". Thirdly, it contended that s 16 impermissibly curtailed, or interfered with, the capacity of the States to function as governments. In these three challenges Western Australia was joined by Victoria, Queensland and the AWU. New South Wales put forward a version of the first challenge, but without advancing or adopting any argument in support of it.

351 A further challenge, which is related to Western Australia's first challenge but was put independently, was that s 16(4) was an invalid attempt to delegate to the Executive the expression of Parliament's intentions about the extent to which the new Act should apply to the exclusion of State and Territory laws. That challenge was advanced by the AWU (in argument, but without any supporting pleading) and South Australia (in its pleading but without any supporting argument).

352 Finally, Victoria advanced what was, in form, a further separate challenge: that s 16(1) and (4) are invalid because they are in their terms unrestricted as to the terms of the State laws which can be excluded in their operation. This was an element in the first challenge mounted by Western Australia, and the arguments of Western Australia were adopted by Victoria without elaboration.

353 *Preliminary question of construction: s 16(1).* Western Australia contended, as a preliminary question of construction, that s 16(1) excluded any State or Territory law to which it applied in its entirety, irrespective of whether that law applied to persons other than employers and employees as defined in ss 6(1) and 5(1) of the new Act. The steps in that reasoning were:

(a) The definitions of employer and employee in ss 6(1) and 5(1) apply unless the contrary intention appears.

(b) A contrary intention can be found in references in s 16 to State and Territory laws applying to a broader range of persons than employers and employees as defined in ss 6(1) and 5(1).

(c) In addition, it is plain (and the Commonwealth conceded) that by reason of s 5(2) and cl 2(1)(c) of Sched 2, the references to "employee" in s 16(3)(g) and "employees" in s 16(3)(m) are references to an "employee" or "employees" in the ordinary meaning of those words[364]. It is also plain

---

364 Section 16(3) relevantly provides:

> "(3) The non-excluded matters are as follows:
>
> ...
>
> (g) the observance of a public holiday, except the rate of payment of an employee for the public holiday;
>
> ...

(Footnote continues on next page)

(and the Commonwealth conceded) that by reason of s 6(2) and cl 3(1)(c) of Sched 2, the references to "employers" in s 16(3)(m) are references to "employers" in the ordinary meaning of that word. This reveals a "contrary intention" excluding the definitions in ss 5(1) and 6(1).

(d) That contrary intention is revealed not only in relation to s 16(3)(g) and (m), but also in relation to s 16(1), because it is to be presumed that the same terms should be used in the same sense in all places in which they appear in one section.

354 These submissions must be rejected for the following reasons.

355 First, so far as different constructions of s 16 are available, a construction is to be selected which, so far as the language of s 16 permits, would avoid, rather than result in, a conclusion that the section is invalid as being outside Commonwealth legislative power[365]. In s 16(1) the words "so far as they would otherwise apply in relation to an employee or employer", if construed by recourse to the definitions of "employee" and "employer" in ss 5(1) and 6(1), would (subject to the validity of other challenges) result in s 16(1) being valid, while the adoption of the ordinary meaning of "employee" and "employer" would put it in peril of being invalid. That points against the view that s 16(1) reveals any intention to exclude the application of the ss 5(1) and 6(1) definitions of "employee" and "employer".

356 Secondly, as Western Australia conceded, the Explanatory Memorandum to the Workplace Relations Amendment (Work Choices) Bill 2005 indicated that in s 16(1), the terms "employee" and "employer" were used in their defined

---

(m) regulation of any of the following:

(i) associations of employees;

(ii) associations of employers;

(iii) members of associations of employees or of associations of employers."

365 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 267 per Dixon J; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 14 per Mason CJ; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 504 [71] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

senses. Thus the Explanatory Memorandum said of the provisions which now correspond with ss 16, 5(1) and 6(1)[366]:

> "70. Proposed section [16] would ensure that the [new Act] would operate to the exclusion of present and future State and Territory industrial regimes in their application to employers and employees who would fall within the general constitutional coverage of the [new Act] (that is, employers and employees within the meaning of proposed subsections [5(1)] and [6(1)]).
>
> 71. This object would be achieved, first, by the exclusion by proposed paragraph [16(1)(a)] of a *State or Territory industrial law* in its application to constitutionally covered employers and employees." (italics in original)

This indicates that s 16(1) was not seen, in its references to "employees" and "employers", as applying to "employees" and "employers" in the general meaning of those expressions. It also indicates that s 16(1) was seen as excluding a State or Territory law only to the extent that it applied to employees and employers in the senses defined in ss 5(1) and 6(1). Western Australia responded by saying that the Explanatory Memorandum was of limited utility, because it was contradicted by the Supplementary Explanatory Memorandum to the Workplace Relations Amendment (Work Choices) Bill 2005. The contradiction was said to lie in the fact that the Supplementary Explanatory Memorandum contemplated that State laws would be excluded in their entirety, not just in relation to employees and employers as defined in ss 5(1) and 6(1)[367]. However, properly construed, the Supplementary Explanatory Memorandum does not support that view, and there is thus no contradiction.

357 Thirdly, it does not follow from the fact that "employee" and "employer", as used in s 16(3)(g) and (m), bear their ordinary meanings that those words as used in s 16(1) also bear their ordinary meanings. They bear their ordinary meanings in s 16(3)(g) and (m) because Parliament specifically listed those provisions in cll 2(1)(c) and 3(1)(c) of Sched 2. The fact that Parliament did not specifically list s 16(1) in either cl 2 or cl 3 negates any intention in s 16(1) to exclude the ss 5(1) and 6(1) definitions. The presumption of construction which

---

366 Explanatory Memorandum at 43 [70]-[71].

367 Western Australia relied here on page 4 of the Supplementary Explanatory Memorandum.

Western Australia relied on in par (d) of its argument on construction has no application in these circumstances.

358 Fourthly, it is not possible to infer from s 16(1) an intention to exclude the ss 5(1) and 6(1) definitions of "employee" and "employer" by reason of the fact that the State and Territory laws described in s 16(1) might apply to a broader range of persons than employees and employers as defined. That is because the State and Territory laws excluded are only excluded to a limited extent, namely, "so far as they would otherwise apply in relation to an employee or employer".

359 Hence s 16(1) on its true construction is limited to the exclusion of State and Territory laws so far as they would otherwise apply to an employee or employer, defined by reference to the heads of constitutional power referred to in pars (a)-(f) of the definition of "employer" in s 6(1).

360 *Preliminary question of construction: s 16(4).* Western Australia also contended, as a preliminary question of construction, that even if (contrary to its arguments just rejected) s 16(1) were confined to excluding State and Territory laws so far as they would otherwise apply in relation to employees and employers as defined in ss 5(1) and 6(1), s 16(4) was not so confined. It submitted that s 16(4), on its true construction, enabled a State law to be excluded by regulation regardless of whether it was an industrial law, and regardless of whether it operated in relation to an employee and an employer as defined in ss 5(1) and 6(1).

361 The construction advocated is unsound. First, so far as different constructions of s 16(4) are available, a construction is to be selected which would avoid, rather than result in, a conclusion that the sub-section was invalid as being outside Commonwealth legislative power. If s 16(4) bore the construction alleged by Western Australia, it might well be invalid. If it is construed harmoniously with s 16(1), then (subject to other arguments) it is not. Secondly, s 16(4) must be construed in context. The general context is that the new Act deals with the rights and obligations of "employees" and "employers" – generally, but not always, in the sense defined in ss 5(1) and 6(1). The particular context is that s 16(1) (subject to the matters listed in s 16(2) and (3)) applies the new Act to the exclusion of certain kinds of State and Territory laws so far as they would otherwise apply to employees and employers as defined in ss 5(1) and 6(1). In these contexts, s 16(4) is to be construed as supplementing s 16(1) and as operating in the same fashion. Section 16(4) permits the making of regulations excluding certain State or Territory laws which are described in pars (a)-(e) of s 16(1) and which relate to the dealings of employees and employers as defined, even though they would otherwise fall within the

exceptions to s 16(1) set out in s 16(2). That flows from s 16(5), which makes it clear that a regulation made under s 16(4) can cause the new Act to apply to the exclusion of a State or Territory law otherwise caught by s 16(2). If s 16(4) were not to be construed harmoniously with s 16(1), it would have been pointless to have inserted into s 16(1) the limiting words "so far as they would otherwise apply in relation to an employee or employer".

362 *Is s 16 a law with respect to any head of power in s 51 of the Constitution?* Since the constructions of s 16(1) and (4) advanced by Western Australia are rejected, ss 16(1) and 16(4) are to be characterised as laws with respect to the heads of constitutional power referred to in pars (a), (e) and (f) of the definition of "employer" in s 6(1). Subject to other arguments about to be considered, those sub-sections are supported by those heads of constitutional power as fully as the other parts of the new Act which, it has been held[368], are valid on this ground.

363 Western Australia did submit that even if "employee" and "employer" were used in s 16 with the meanings defined in ss 5(1) and 6(1), s 16 could not be characterised as a law with respect to corporations. The submission must be rejected.

364 *Western Australia's arguments on whether there was a bare attempt to limit or exclude State legislative power.* It follows from the conclusion just reached that the Parliament had available to it the heads of power referred to in the definition of "employer" in s 6(1). But Western Australia submitted that in s 16 the Parliament had failed to use its power to deal with the subject-matter of the new Act. Section 16 was not a law dealing with a subject-matter assigned to the Parliament; it was a law merely aimed at preventing State legislative action. That was because it sought to exclude the operation of State laws on matters in relation to which the Commonwealth had not attempted to legislate.

365 Western Australia accepted that it is open to the Parliament to identify a field to be "covered" by federal laws in the sense that federal laws are to operate exclusively of State laws, making those State laws inconsistent with the federal laws and invalid to that extent under s 109 of the Constitution[369]. But Western

---

368 See above at [57]-[198]. It will be recollected that no challenge was made to validity so far as the new Act rests on the heads of constitutional power referred to in pars (b)-(d) of the definition of "employer" in s 6(1).

369 Section 109 provides:

(Footnote continues on next page)

Australia contended that the Commonwealth had attempted, in a sense, to manufacture inconsistency for the purposes of s 109 of the Constitution in attempting to take the "covering the field" test beyond what s 109 permits.

366 Western Australia submitted that in contrast to s 17, s 16 was not expressed in terms requiring there to be an inconsistency between the new Act and a State law. Both ss 17 and 18 would be unnecessary if s 16 were a genuine attempt to identify the extent to which the new Act was intended to operate exclusively, and they reveal that s 16 is concerned with the operation of State laws, not with preserving the operation of particular provisions of the new Act which might be inconsistent with State laws.

367 Western Australia also contended that in numerous respects s 16 attempts to invalidate State laws despite having failed to enact any corresponding federal law. Western Australia said, for example, that s 16(1)(d) provides that the new Act is intended to apply to the exclusion of a State or Territory law providing for the variation or setting aside of rights and obligations arising under a contract of, or arrangement for, employment that a court or tribunal finds to be unfair. The only provisions in the new Act dealing with unfair contracts are ss 832-834, and they only deal with contracts binding on independent contractors, not employees. Hence s 16(1)(d) applies to the exclusion of Pt 9 of Ch 2 of the *Industrial Relations Act* 1996 (NSW), dealing with unfair contracts of employment. The State law is excluded, but no federal law applies. Western Australia contended that there were various other examples of this. One was said to relate to s 16(1)(e) which, read with s 16(3)(c), indicates an intention to apply the new Act to the exclusion of State laws dealing with the exercise of rights by a representative of any trade union to enter premises for any purpose other than occupational health and safety; yet the new Act only deals with the exercise of rights of entry pursuant to Divs 4, 5 and 6 of Pt 15 by officials of organisations registered under the new Act for certain purposes. Attention was drawn to the fact that "trade union" is defined in s 4(1) to include organisations of employees whether or not registered under the new Act. Another example related to State Acts of the kind referred to in par (b) of the definition of "State or Territory industrial law" in s 4(1), so far as they deal with matters for purposes other than one of the "main purposes" specified in that part of the definition. Western Australia submitted that those State Acts are excluded by s 16(1)(a) without any

---

> "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."

substantive regulation of the subject in the new Act itself. Other examples, developed in considerable detail, related to the making of regulations under s 16(4) in relation to discrimination legislation, matters listed in s 16(3), redundancy provisions, and the enforcement of contractual entitlements.

368 Thus Western Australia submitted that s 16, since it is aimed at preventing the exercise of State legislative power on various matters rather than preserving the operation of Commonwealth legislation on those matters, is not "a law of the Commonwealth" within the meaning of s 109, and cannot prevail over State legislation passed in exercise of its concurrent power[370]. It is true that on the construction of s 16(1) which was accepted above[371], provisions like s 16(1)(d) and (e) only apply to circumstances involving employees and employers as defined in ss 5(1) and 6(1), and hence to circumstances where, subject to the present controversy, Commonwealth power exists. But even on that construction, Western Australia contended that there was an area – relatively narrow, perhaps, but still an area – where the Commonwealth had refused to legislate positively and had used s 16 to prevent the States from doing so. That is, the Commonwealth had effectuated a bare exclusion of State law.

369 *The Commonwealth's arguments.* The Commonwealth specifically declined to contend that if a Commonwealth law simply sought to exclude State law in a field and made no provision whatever on the same subject-matter it was within power. The Commonwealth contended rather that it was open to the Commonwealth Parliament to indicate the relevant field it intended to cover to the exclusion of State law, that s 109 would then operate even though the Commonwealth had not made its own detailed provisions about every matter within that field which State law dealt with, and that it sufficed for the Commonwealth to have some provisions dealing with aspects of the field, leaving others unregulated. The Commonwealth submitted that the relevant field was to be identified, not by reference to the areas regulated by State law, but by reference to the terms of the Commonwealth law. It was concluded above that the Commonwealth has power to regulate the relationships between employees and employers as defined in ss 5(1) and 6(1) by reliance on the heads of power referred to in pars (a), (e) and (f) of the definition of "employer" in s 6(1). The

---

370 Western Australia relied on the language used in *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 628-629 [37] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

371 At [353]-[359].

Commonwealth submitted that it was open to the Parliament to identify the rights and obligations arising out of those relationships of employees and employers as a field, and to indicate an intention to cover that field (or, as here, part of it, because of the limitations to s 16(1) and the operation of s 16(2) and (3)). On the construction of s 16(1) accepted above[372], the Commonwealth chose to exclude State law only in respect of the relations of employees and employers as defined in ss 5(1) and 6(1).

370 *No bare attempt to limit or exclude State legislative power.* The Commonwealth's submissions are to be preferred. Western Australia pointed to nothing in s 109 itself or in the case law on s 109 suggesting that s 109 will not cause Commonwealth law to prevail over an inconsistent State law and render it invalid to the extent of the inconsistency unless the Commonwealth law provides some regime for regulating each particular aspect of the topics dealt with by the State law. Rather, as Dixon CJ put it in *Lamshed v Lake*[373], the distinction is between a law which lays down a positive rule and a law "seeking rather to limit State power". Section 109 may operate where the Commonwealth chooses to enact a scheme involving a more detailed form of regulation than State law provides. Equally, s 109 may operate where the Commonwealth creates a scheme involving less detailed regulation than State law provides[374]. And s 109 may operate where the Parliament has done what it has in the new Act – to provide a more detailed scheme than State law in some respects and a less detailed scheme in other respects. The Commonwealth has legislated to provide a detailed set of rules for particular agreements; it has not dealt, for example, with unfair contracts except in relation to independent contractors, but that does not preclude it from defining a field of relationships between s 5(1) employees and s 6(1) employers, and occupying parts of that field, like unfair contracts, to the exclusion of State law.

371 Section 16 of the new Act strongly resembles s 24(2) of the *Re-establishment and Employment Act* 1945 (Cth)[375]. It relevantly provided:

---

372 At [353]-[359].

373 (1958) 99 CLR 132 at 147.

374 *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 466 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

375 See also the examples given by Dixon CJ in *Lamshed v Lake* (1958) 99 CLR 132 at 147-148; *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46

(Footnote continues on next page)

> "The provisions of this Division shall apply to the exclusion of any provisions, providing for preference in any matter relating to the employment of discharged members of the Forces, of any law of a State, or of any industrial award, order, determination or agreement made or filed under or in pursuance of any such law ..."

Section 27(5)(a) provided that there was to be no preference in relation to promotion for discharged servicemen already employed by an employer. In *Wenn v Attorney-General (Vict)*[376] the defendant advanced the argument which Western Australia has advanced in this case:

> "[T]he doctrine of 'covering the field' applies only where the Commonwealth Parliament has itself made some positive provision with respect to a particular subject with which provision any State law on that subject would be inconsistent. Section 27(5)(a) excludes the application of any preference in promotion by virtue of the Federal Act. It does not make any positive provision with respect to promotions. The defendant argues that therefore the field is free for the States, the Commonwealth Parliament not having provided any law with respect to promotions, so that s. 109 of the Commonwealth Constitution cannot apply so as to render any State law inoperative."

The Court unanimously rejected that argument. Latham CJ (with whom McTiernan J agreed) said[377]:

> "Section 24(2) is a provision prescribing the area within which Federal law, as enacted in the Act, is to apply to the exclusion of State law in respect of a subject as to which the Commonwealth Parliament has full legislative power. ....

---

at 56-57 per Dixon CJ, 63-64 per Menzies J; *Agtrack (NT) Pty Ltd v Hatfield* (2005) 79 ALJR 1389 at 1400 [61] per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ; 218 ALR 677 at 691.

376 (1948) 77 CLR 84 at 109 per Latham CJ.

377 (1948) 77 CLR 84 at 111-112.

> It is ... within Federal legislative power to prevent the operation of separate and possibly varying State enactments dealing with the same subject."

Dixon J (with whom Rich J agreed) said[378]:

> "Section 24 and s. 27 ... justify the conclusion that, on the one hand, the Federal Parliament intended to define the extent to which the duty to give preference should go and to do it so as to exclude promotion, and, that on the other hand, it intended to provide in this and other respects what would be the only rule upon the subject and so would operate uniformly and without differentiation based on locality or other conditions. In this Court it is far too late to contend that s. 109 does not invalidate State law which in such a state of affairs carries the regulation of the same matter further than the Federal legislation has decided to go. This is a case where the Federal legislation undertakes a regulation or statutory determination of the very subject and then goes on to express an intention that it shall be an exhaustive declaration of the law on that particular subject."

Dixon J then said[379]:

> "To legislate upon a subject exhaustively to the intent that the areas of liberty designedly left should not be closed up is ... an exercise of legislative authority different in kind from a bare attempt to exclude State concurrent power from a subject the Federal legislature has not effectively dealt with by regulation, control or otherwise."

He said there was "a debatable area where Federal laws may be found that seem to be aimed rather at preventing State legislative action than dealing with a subject matter assigned to the Commonwealth Parliament"[380]. But he concluded that the federal Act was "well within the line".

372 The similarity of the statutory position in that case to that in the present case makes the reasoning directly applicable. *Wenn* has been cited with approval in many cases including *Botany Municipal Council v Federal Airports*

---

378 (1948) 77 CLR 84 at 119-120.

379 (1948) 77 CLR 84 at 120.

380 (1948) 77 CLR 84 at 120.

Corporation[381], *Western Australia v The Commonwealth* (*Native Title Act Case*)[382] and the *Industrial Relations Act Case*[383]. Western Australia did not contend that any of these cases should be departed from. It follows that Western Australia's second challenge to the validity of s 16 must fail.

373 *Subsidiary arguments.* The Commonwealth embarked upon a detailed refutation of some of the contentions advanced by Western Australia in relation to areas allegedly dealt with by State law but not by the new Act. It is unnecessary to decide on the merits of the competing submissions since, in view of the conclusion just reached, the controversies are irrelevant to validity. It is also undesirable to do so in the absence of factual circumstances raising a concrete dispute about them.

374 *Curtailment of, or interference with, the capacity of States to function.* Western Australia pleaded its third challenge as being that s 16 was invalid because it impermissibly curtails, or interferes with, the capacity of the States to function as governments. The conclusion that s 16 does not represent a bare attempt to limit or exclude State legislative power would make any argument in support of this challenge very difficult to maintain. No argument was in fact advanced in support of the challenge. The inference that the challenge was abandoned is supported by its omission from an agreed statement prepared after the end of the hearing by the parties setting out the issues in dispute.

375 *Is s 16(4) an invalid attempt to delegate legislative power?* The AWU submitted, and South Australia alleged in its pleading, that s 16(4) invalidly attempts to delegate the expression by Parliament of its intention as to the extent to which the new Act would apply to the exclusion of State and Territory laws. This point fails. It rested on the supposed absence of any legislative criteria by reference to which the regulation-making power was to be exercised. For the reasons given below[384], there are sufficient criteria.

---

381 (1992) 175 CLR 453 at 464-465 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

382 (1995) 183 CLR 373 at 465-468 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

383 (1996) 187 CLR 416 at 540 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

384 At [415]-[421].

376 *Lack of restriction in s 16 on the State laws which may be excluded?* Victoria pleaded that s 16(1) and (4) are invalid because "they are in their terms unrestricted as to the laws of the States which can be excluded in their operation". The allegation was not elaborated. It must be rejected for the reasons given above[385].

377 *Conclusion.* All challenges to the validity of s 16 fail.

2 Section 117 – Restraining State industrial authorities

378 *The terms of the section.* Section 117 provides:

> "(1) If it appears to a Full Bench that a State industrial authority is dealing or is about to deal with a matter that is the subject of a proceeding before the Commission under this Act or the Registration and Accountability of Organisations Schedule, the Full Bench may make an order restraining the State industrial authority from dealing with the matter.
>
> (2) The State industrial authority must, in accordance with the order, cease dealing or not deal, as the case may be, with the matter.
>
> (3) An order, award, decision or determination of a State industrial authority made in contravention of the order of a Full Bench under this section is, to the extent of the contravention, void."

"Full Bench" means "Full Bench of the Commission", that is, the AIRC (s 4(1)). The expression "State industrial authority" is defined in s 4(1) to mean:

> "(a) a board or court of conciliation or arbitration, or tribunal, body or persons, having authority under a State Act to exercise any power of conciliation or arbitration in relation to industrial disputes within the limits of the State; or
>
> (b) a special board constituted under a State Act relating to factories; or

---

385 At [355]-[361].

(c) any other State board, court, tribunal, body or official prescribed for the purposes of this definition."

The Commonwealth's contention that no prescription has been made for the purposes of par (c) of that definition was not denied.

379 Provisions similar to s 117 have appeared in federal industrial relations legislation since 1904[386].

380 *The structure and nature of the challenge.* South Australia contended that the power granted to the Full Bench by s 117 was invalid[387]. Similar contentions were made by New South Wales, Western Australia, Queensland and the AWU, each of which simply adopted the brief submissions advanced by South Australia on the issue. Those submissions may be grouped under three interlinked heads.

381 *South Australia's first contention: s 106 of the Constitution.* Section 106 of the Constitution provides:

"The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

382 South Australia submitted that the "Constitution of each State" included arrangements for the exercise of the core functions of government of the State, including arrangements for the conclusive determination of controversies arising under the valid and operational laws of the State, and arrangements for the exercise of the executive power of the State to execute and maintain its valid and operational laws.

---

386 *Conciliation and Arbitration Act* 1904 (Cth), s 20. Section 20 was amended in 1928 and 1930. From 1947 the matter was dealt with by s 31, and from 1956 by s 66. (Section 66 was enacted as s 16BB by the *Conciliation and Arbitration Act* 1956 (Cth) but the same Act renumbered the provision as s 66; the section was amended in 1972.) From 1988 it was dealt with by the *Industrial Relations Act* 1988 (Cth), s 128. From 1996 until the enactment of s 117 it was dealt with by s 128 of the *Workplace Relations Act* 1996 (Cth).

387 A challenge based on the contention that judicial power had been impermissibly vested in the AIRC was initially put, but later abandoned by South Australia and all others who mounted it.

383 South Australia contended that s 117 contravened s 106 in two ways.

384 The first way in which s 117 was said to contravene s 106 was that an order of the Full Bench restraining a State industrial authority from proceeding was a command to the authority not to apply, enforce and uphold valid and operational State laws applicable to an industrial dispute. South Australia relied on the statement of Brennan and Toohey JJ in *Re Tracey; Ex parte Ryan*[388] that provisions purporting to prohibit the exercise of the ordinary criminal jurisdiction vested in State courts by State law were invalid by reason of s 106.

385 The second way in which s 117 was said to contravene s 106 related to the impact of an order of the Full Bench on "executive tribunals". That order, it was argued, was a direct prohibition on the performance by an organ of State government of its constitutional functions.

386 *South Australia's second contention: Melbourne Corporation.* South Australia submitted that the conferral of power on the AIRC to make an order restraining a State industrial authority from dealing with a matter – that is, from administering the valid and operative laws of that State – affects the capacity of the State to "function as a government" and to "exercise constitutional functions" within the meaning of those expressions as used in *Austin v The Commonwealth*[389] in explaining the principles stated in *Melbourne Corporation*[390].

387 *South Australia's third contention: s 51(xx) is incapable of supporting a law having the consequences which s 117 has.* In oral argument, South Australia for the first time advanced a third submission – that even if s 51(xx) was capable of supporting other parts of the new Act, it could not support s 117. The effect of s 117 was to permit the Full Bench to attack the administration of valid State laws by the executive of the State. South Australia conceded that the context or subject-matter of some of the powers conferred by s 51 of the Constitution would permit those powers to be exercised in such a way as to interfere with the functions of State executives, but said that s 51(xx) was not one of them.

---

388 (1989) 166 CLR 518 at 574-575.

389 (2003) 215 CLR 185 at 259 [146] per Gaudron, Gummow and Hayne JJ.

390 (1947) 74 CLR 31.

388 *Consideration of the contentions.* There is one preliminary aspect of South Australia's submissions to be considered. It may not be a fatal obstacle but it is a difficulty. The difficulty relates to the first two arguments advanced, which, if sound, would be as good in relation to legislation not based on s 51(xx) as they are said to be in relation to legislation which is based on that paragraph. In several cases Justices of this Court have held[391], assumed[392] or said[393] that the precursors of s 117 are valid, being supported by s 51(xxxv) and (xxxix) of the Constitution. It is true that these cases are not, strictly speaking, authorities against the first two arguments advanced by South Australia, for the arguments do not appear to have been advanced in those cases or at any other stage in the last 100 years. On the other hand, the novelty of the arguments may be seen as a badge of their lack of merit. And if the fact that no-one has ever thought it worthwhile to argue that the precursors of s 117, which were supported by s 51(xxxv) and (xxxix), were invalidated by s 106 or by the doctrine in *Melbourne Corporation*[394] is an indication that the arguments to that effect lack merit, similar arguments employed against a provision to the effect of s 117, supported by s 51(xx), are likely to have no greater merit.

389 Turning to the first argument advanced by South Australia, it is necessary to note three respects in which s 117 is of limited application. First, the power only exists where the State industrial authority is dealing or about to deal with *a* matter that is the subject of the proceeding before the AIRC – that is, the same matter, not some other matter remotely connected to the matter before the Commission. Secondly, contrary to the submissions of South Australia, it is not

---

391 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Engineers &c (State) Conciliation Committee* (1926) 38 CLR 563.

392 *Western Australian Timber Workers' Industrial Union of Workers (S W Land Division) v Western Australian Sawmillers' Association* (1929) 43 CLR 185; *Australian Timber Workers' Union v Sydney and Suburban Timber Merchants' Association* (1935) 53 CLR 665 at 672 per Rich, Dixon, Evatt and McTiernan JJ.

393 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 52 per Isaacs J; *R v Moore; Ex parte NSW Public Service Professional Officers' Association* (1984) 154 CLR 1 at 15 per Deane J; at 7 Gibbs CJ said that he saw no reason to doubt validity but did not need to express any final opinion on the point; Dawson J reserved his position at 22.

394 (1947) 74 CLR 31.

the case that in its standard operation s 117 will permit orders preventing a State from enforcing one of its own valid laws, because of s 16(1)(a): if the matter in the State industrial authority involves an industrial law of that State, and if s 16(2) and (3) do not apply, the law is invalid to the extent of its inconsistency with s 16(1)(a) by reason of s 109 of the Constitution. Thirdly, when s 117 is read with pars (a) and (b) of the definition of "State industrial authority", it can be seen that it does not give power to make orders directed against courts, for example State Supreme Courts, exercising their ordinary civil and criminal jurisdiction. It is true that par (c) of the definition of "State industrial authority" gives power to prescribe a "court" for the purposes of that definition, but no prescription has been made, and the question whether s 117 is valid in its grant of power to make orders against a State Supreme Court if a State Supreme Court were ever prescribed can be left to the day when it is. Hence, s 117 at present gives no power to make orders directed at the core of State judicial systems. It follows that the reasoning of Brennan and Toohey JJ in *Re Tracey; Ex parte Ryan*[395] is not applicable to the present case, and that there is no occasion to consider the correctness of the Commonwealth's challenge to the decision.

390 South Australia's first argument raises the question of whether the constitution and operation of a board or court of conciliation or arbitration, or a tribunal, body or person, having authority under a State Act to exercise any power of conciliation or arbitration in relation to industrial disputes within the limits of that State could be described as part of the "Constitution" of the State within the meaning of s 106. The content of that term used in s 106 is not finally settled in this Court[396]. Certainly, determination of the answer to that question would call for a close examination of the laws of that State with a view to deciding which are, and which are not, part of its Constitution. The same analysis would be called for in relation to any "special board constituted under a State Act relating to factories". South Australia essayed no examination along these lines, either for the Constitution of South Australia or for the Constitution of any other State. It is not for this Court to engage in that type of analysis of its own motion in a case in which no concrete industrial dispute between litigants is before the courts "and where, as a consequence, there is no factual situation against which the relevant limits of the constitutional power can be brought into

---

395 (1989) 166 CLR 518 at 574-575. The issue to which it relates was also identified in *Truong v The Queen* (2004) 223 CLR 122 at 163 [105]-[106] per Gummow and Callinan JJ.

396 *McGinty v Western Australia* (1996) 186 CLR 140 at 259 per Gummow J.

focus"[397]. The Court ordinarily seeks to decide the issues before it in the light of detailed submissions advanced with notice to all parties, rather than by pursuing suggestions by one party for lines of research to be conducted by the Court independently after the hearing, without assistance from counsel and without notice to opponents of the party making the suggestion. It may be said, however, that normally the bodies dealing with industrial disputes or factories are specialist entities established for specific purposes and liable to change from time to time as the legislature sees fit. Even if it were to be accepted that the laws regulating State bodies of this kind may be part of the Constitution of the relevant State, it has not been demonstrated in these proceedings that that is the case in any State.

391 The same difficulty prevents acceptance of South Australia's contention that, so far as a relevant State industrial authority is an "executive tribunal", a s 117 order by a Full Bench would be a direct prohibition on the performance by an organ of the State government of its constitutional functions. It has not been shown that the "constitutional" functions referred to in South Australia's submission are part of any State's "Constitution".

392 South Australia's second argument, that based on *Melbourne Corporation*, must also be rejected. The interference which s 117 permits is relatively minor. The interest of a State in having a "State industrial authority" determine a matter in a way which is likely to lead to a conflict with the handling of that matter by a Full Bench of the AIRC is not so vital to the functioning of the State that it can be said, as South Australia asserted, that it affects the capacity of the State to "function as a government" or to "exercise constitutional functions".

393 South Australia's third argument, too, must be rejected. The argument was that s 51(xx) could not support the consequences which would flow from s 117. However, if, as Knox CJ, Isaacs, Higgins, Gavan Duffy, Powers, Rich and Starke JJ held in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Engineers &c (State) Conciliation Committee*[398], the earlier provisions to the effect of s 117 are within the power conferred by s 51(xxxv) and (xxxix) of the Constitution, and if, as held elsewhere in this judgment, s 51(xx) supports the other provisions of the new Act, one could not conclude that s 51(xx) and (xxxix) do not support s 117 unless some relevant difference between s 51(xxxv) and

---

397 *R v Moore; Ex parte NSW Public Service Professional Officers' Association* (1984) 154 CLR 1 at 22 per Dawson J.

398 (1926) 38 CLR 563.

s 51(xx) were identified. No relevant difference has been identified. Both the precursors to s 117, and s 117 itself, enable an otherwise valid federal system for the regulation of industrial relations to operate efficaciously without interference from a State body dealing with the same matter under State law. It was not explained why s 117 was not incidental to the exercise by the Parliament of its power under s 51(xx) to enact the rest of the new Act. To put the same point in a different way, the submission identified a desired conclusion, but advanced no reason why that conclusion should be drawn.

394 Hence all the challenges to s 117 fail.

3 Regulation-making powers

395 *The structure of the primary challenge.* The AWU alleged that the provisions of subdiv B of Div 7 of Pt 8 and s 436 were invalid because they turned on the expression "prohibited content", and that expression was not defined in the new Act: its content was left for specification by regulation without stipulation of any relevant criteria. In consequence, the expression of Parliament's intention with respect to subdiv B of Div 7 of Pt 8 had been completely delegated to the Executive. Although the pleadings filed by Western Australia did not support this challenge, its written submissions were apparently intended to, without elaboration of what the AWU said.

396 *The legislation.* The following provisions in subdiv B of Div 7 of Pt 8 employ the expression "prohibited content". Section 358 renders a term of a workplace agreement "void to the extent that it contains prohibited content". Section 357 prohibits an employer from recklessly lodging a workplace agreement which contains prohibited content. Section 363 obliges the Employment Advocate to vary a workplace agreement which contains prohibited content, and ss 359-362 and 364 deal with the procedures to be followed if that course is contemplated. Section 365 prohibits persons from recklessly seeking, in the course of negotiations, to include a term containing prohibited content in a workplace agreement, or in a variation to a workplace agreement. Section 366 prohibits persons from recklessly making misrepresentations that a particular term of a workplace agreement or a variation to a workplace agreement does not contain prohibited content[399].

---

399 Sections 365 and 366 are set out at [272].

397 Further, s 436 provides that engaging in industrial action in relation to a proposed collective agreement is not "protected action" if it is to support or advance claims to include "prohibited content" in the agreement.

398 Section 321 provides that "prohibited content" has "the meaning given by section 356". Section 356 provides:

> "The regulations may specify matters that are ***prohibited content*** for the purposes of this Act."

Section 846(1) provides:

> "The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters:
>
> (a) required or permitted by this Act to be prescribed; or
>
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act."

None of the particular items indicated in s 846(2) as potential subjects for regulations cast light on the power to make regulations specifying matters that are "prohibited content". Regulations of this kind have been made[400]. Their validity is not challenged, but this does not affect the question of whether s 356 itself is valid.

399 It should be said that the technique employed in s 356 is an undesirable one which ought to be discouraged. For one thing it requires the lawyers (and the many non-lawyers) who have to work with the new Act to look outside it in order to apply it: identifying what regulations are in force is a task which many inquirers have found difficult. And it creates difficulty in assessing whether particular regulations made under the legislation are intra vires. However, to make these criticisms is one thing; to conclude that there is constitutional invalidity is another.

400 *The AWU's arguments.* The AWU accepted that it was open to Parliament to authorise subordinate legislation "in wide and general terms ... under any of

---

400 Regs 8.5-8.7 of Ch 2.

the heads of its legislative power"[401]. The AWU also accepted that by reason of s 846(1) any regulations to be made specifying matters that were prohibited content could not be inconsistent with the new Act. But the AWU submitted that no provision in the Act, not even s 3[402], defining its principal object, indicated the permissible parameters of the regulations contemplated by s 356. The AWU submitted that to confer on the Governor-General a power to make regulations as broadly expressed as ss 356 and 846(1) without also stipulating matters stated in the new Act, or to be implied from it, as indicating the parameters within which those regulations could extend, was invalid for two distinct reasons. The first was that no "law" had been enacted, because, in the words of Latham CJ[403], there had been no indication of "a rule of conduct", and no "declaration as to power, right or duty". The AWU went so far as to submit that the legislation said no more than that "[p]rohibited content is whatever the Executive Government says should not be contained in a workplace agreement". The second reason advanced by the AWU was that even if a "law" had been enacted, there was, in the words of Dixon J[404], "such a width or such an uncertainty of the subject matter ... handed over" by the Parliament to the Executive that it was not a law with respect to any identifiable head of Commonwealth legislative power.

401 *Is there a "law"?* The function of the expression "prohibited content" is to indicate matters which may not be included in workplace agreements entered into by employees to which the relevant employer is necessarily a party. Among the relevant classes of "employer" set out in the definition of "employer" in s 6(1) is the class of "constitutional corporations", that is, corporations to which s 51(xx) of the Constitution applies[405]. The facility to enter workplace agreements is granted by Pt 8. Sections 326 to 331 describe six types of workplace agreement. One is an AWA between an employer and a person whose employment will be

---

401 *Plaintiff S157/2002* (2003) 211 CLR 476 at 512 [102] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

402 Section 3 is set out at [7].

403 *The Commonwealth v Grunseit* (1943) 67 CLR 58 at 82, adopted in *Plaintiff S157/2002* (2003) 211 CLR 476 at 512-513 [102] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

404 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 101.

405 See par (a), set out at [8].

subject to the agreement (s 326). The second is an employee collective agreement between an employer and persons employed in a single business, or part of a single business, of the employer, whose employment will be subject to the agreement (s 327). The third is a union collective agreement between an employer and one or more organisations of employees which meets, or meet, two specified conditions (s 328). The fourth is a union greenfields agreement between an employer and one or more organisations of employees which meets, or meet, three specified conditions (s 329). The fifth is an employer greenfields agreement relating to any business which the employer proposes to establish, or is establishing, when the agreement is made, being an agreement made before the employment of the persons who will be necessary for the normal operation of the business and whose employment will be subject to the agreement (s 330). The sixth is a multiple-business agreement which would be a collective agreement of a type mentioned in ss 327, 328, 329 or 330 but for the fact that it relates to any combination or combinations of one or more single businesses, or one or more parts of single businesses, carried on by one or more employers (s 331).

402 Sections 334 and 335 provide for employers who are constitutional corporations, and their employees, to appoint bargaining agents to act on their behalf in making, varying or terminating AWAs, making or varying employee collective agreements and varying employer greenfields agreements.

403 Section 342 creates obligations on employers to lodge certain workplace agreements with the Employment Advocate. This is to be done, in the case of AWAs, only after approval by the parties, and, in the case of employee collective agreements and union collective agreements, only after all employees have been given by the employer a reasonable opportunity to decide whether they want to approve it and a majority of them has done so.

404 Subdivision A of Div 7 of Pt 8, headed "Required content", stipulates various matters which workplace agreements must include. Subdivision B of Div 7 of Pt 8, headed "Prohibited content", stipulates, via the regulations contemplated by s 356, matters which workplace agreements must not include.

405 While neither Pt 8 nor any other provision of the new Act mandates the making of workplace agreements, as has been seen[406], according to the

---

406 See above at [19].

responsible Minister's Second Reading Speech, it is a "central objective of [the Amending Act] ... to encourage the further spread of workplace agreements"[407].

406 The advantages of various forms of workplace agreement from different points of view stem from certain consequences they have. Among those consequences are the following:

(a) Save for protected award conditions (s 354) or terms of certain awards incorporated by reference (s 355), an award has "no effect" in relation to an employee while a workplace agreement operates in relation to the employee (s 349).

(b) While persons are prohibited from applying duress to an employer or employee in connection with an AWA (s 400(5)), a person is not prohibited by that provision from requiring another person to make an AWA as a condition of engagement (s 400(6)).

(c) Only one workplace agreement can have effect at a particular time in relation to a particular employee (s 348(1)).

(d) Collective agreements (employee collective agreements, union collective agreements, union greenfields agreements, employer greenfields agreements and multiple-business agreements) have no effect in relation to an employee while an AWA operates in relation to the employee (s 348(2)). Some of the plaintiffs said, while the Commonwealth denied, that this had the effect of promoting individual bargaining over collective bargaining.

(e) On the termination of a workplace agreement, the employee covered by it does not revert to any existing workplace agreement, or to an award, except to the extent that the award contains protected award conditions (s 399).

(f) From the date when a collective agreement comes into operation until its nominal expiry date (s 352) has passed, industrial action, whether or not it relates to a matter dealt with in the agreement, must not be organised or

---

407 Second Reading Speech of the Minister for Employment and Workplace Relations and Minister Assisting the Prime Minister for the Public Service, House of Representatives, *Parliamentary Debates* (Hansard), 2 November 2005 at 17.

engaged in by an employee bound by the agreement, an organisation of employees bound by the agreement, or an officer or employee of the organisation acting in that capacity (s 494(1) and (2)). Orders and injunctions may be obtained against industrial action which is not protected action and which is happening, or is threatening, impending or probable, or is being organised (s 496).

(g) From the date when a collective agreement comes into operation until its nominal expiry date has passed, industrial action, whether or not it relates to a matter dealt with in the agreement, must not be organised or engaged in by the employer against an employee (s 494(3)).

(h) From the date when an AWA comes into operation until its nominal expiry date, the employee must not engage in industrial action in relation to the employment to which the agreement relates (s 495(1)).

(i) From the date when an AWA comes into operation until its nominal expiry date, the employer must not engage in industrial action against the employee (s 495(2)).

407 It is convenient first to deal with the AWU's submission that there was no stipulated ambit of the regulation-making power because the legislation said no more than that "[p]rohibited content is whatever the Executive Government says should not be contained in a workplace agreement". That submission must be rejected because in four respects it is erroneous.

408 The first error is that it would not be open to the Executive to say that a workplace agreement should not contain any of the matters which are required content. That is because s 846(1) requires that the regulations not be inconsistent with the new Act; it might be so even without that provision.

409 One of the matters included in required content is dispute settlement procedures, in the absence of which the agreement is taken to include the model dispute resolution process in Pt 13 (s 353). The model dispute resolution process requires the parties genuinely to attempt to resolve a dispute at the workplace level (s 695). It further provides for the alternative dispute resolution procedures of "conferencing", mediation, assisted negotiation, neutral evaluation, case appraisal, conciliation, arbitration or other determination of the rights and obligations of the parties in dispute, and other procedures or services specified in the regulations (ss 696(1) and (2) and 698). The alternative dispute resolution process is to be conducted by a person agreed between the parties, and if the parties cannot agree within a stipulated time, a party to the dispute may apply to

the AIRC to have the alternative dispute resolution process conducted by the Commission (s 696(2) and (5)). The AIRC may also be employed if the parties have been unable to resolve the dispute at the workplace level (s 699(1)).

410 Another matter which is required content is protected award conditions (s 354). Section 354(4) defines the expression "protected award conditions" to mean the terms of an award that are about, or otherwise related to, "protected allowable award matters". Section 354(4) defines that expression to mean:

> "(a) rest breaks;
>
> (b) incentive-based payments and bonuses;
>
> (c) annual leave loadings;
>
> (d) observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region, and entitlements of employees to payment in respect of those days;
>
> (e) days to be substituted for, or a procedure for substituting, days referred to in paragraph (d);
>
> (f) monetary allowances for:
>
> (i) expenses incurred in the course of employment; or
>
> (ii) responsibilities or skills that are not taken into account in rates of pay for employees; or
>
> (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;
>
> (g) loadings for working overtime or for shift work;
>
> (h) penalty rates;
>
> (i) outworker conditions;
>
> (j) any other matter specified in the regulations."

In short, if the Executive by regulation said that some aspect of the model dispute resolution process or a protected award condition were prohibited content, the regulation would be ultra vires.

411 A second error in the AWU's argument is that the specification in a regulation of matters as prohibited which had the effect of excluding the Pay and Conditions Standard or any part of it would be ultra vires, because s 173 provides that a term of a workplace agreement purporting to have that exclusionary effect is of no effect. The Pay and Conditions Standard is to be found in Divs 2-6 of Pt 7 – that is, ss 176-316 – which set out a very detailed regime relating to five minimum entitlements in relation to wages, maximum ordinary hours of work, annual leave, personal leave and parental leave.

412 A third error in the AWU's submission is that the key minimum entitlements (s 172(1)) provided by the Pay and Conditions Standard prevail over a workplace agreement to the extent to which, in a particular respect, they provide a more favourable outcome for the employee (s 172(2)). The specification in the regulation of matters as prohibited content in a manner which provided a less favourable outcome for the employee than the Pay and Conditions Standard would be ultra vires.

413 A fourth error is that the specification in the regulation of matters as prohibited content which was so wide as to undermine the possibility of making a workplace agreement capable of practical operation would be ultra vires.

414 These points are unanswerably fatal to the broad submission of the AWU as put.

415 But even if the AWU had modified its submission to accommodate the points just made by conceding that some things were prohibited and contending that no ambit was defined beyond the limit of those prohibitions, the submission would fail. Section 356 provides that the regulations *may* specify matters that are prohibited content. Regulations of that kind would be regulations "prescribing ... matters ... permitted by this Act to be prescribed", and hence would fall within s 846(1)(a). In the absence of express language precisely defining the ambit of the permitted prescription beyond the four matters just mentioned, that ambit would be identical with the ambit of the prescription contemplated by s 846(1)(b), namely that the regulations prescribe all matters "necessary or *convenient* to be prescribed for carrying out or giving effect to this Act" (emphasis added). It would be absurd if regulations could be made under s 846(1)(b) by reference to wider criteria than those applying to s 846(1)(a). In a case considering a formula to the effect of s 846(1)(b), but in language relevant

to s 846(1)(a), Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ said[408]: "The ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains." Here the character of the statute is one which, inter alia, makes provision for workplace agreements in Pt 8 and attaches significant consequences to the existence of those agreements. Their Honours continued[409]:

> "An important consideration is the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned.
>
> In an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the Governor-General to work out that policy by specific regulation, a power to make regulations may have a wide ambit. Its ambit may be very different in an Act of Parliament which deals specifically and in detail with the subject matter to which the statute is addressed."

416 While the provisions about workplace agreements in Pt 8 are in many respects detailed, the main outlines of the policy it lays down as to what workplace agreements are to contain and are not to contain is not specific or detailed. It provides for some things workplace agreements must contain, but, apart from the matters already mentioned, it does not state what they may not contain save through the use of regulations made under s 356. The new Act has laid down the main outlines of policy in relation to workplace agreements but has indicated an intention of leaving it to the Executive to work out that policy in relation to what workplace agreements may not contain by specific regulation. Section 356 thus has a wide ambit. Its ambit must be construed conformably with the scope and purposes of the new Act as a whole, and with the provisions of Pt 8 in relation to workplace agreements in particular. The extent of the power is marked out by inquiring whether any particular regulation about the prohibited content of workplace agreements can be said to have a rational connection with the regime established by the new Act for workplace agreements.

417 It follows that although the ambit of the regulation-making power so stated is imprecise, with the result that assessing whether particular regulations are ultra vires may not be easy, s 356, read with s 846(1), is a "law".

---

408 *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410.

409 *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410.

418 *Is the "law" a law with respect to any identifiable head of power?* In *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan*[410], Evatt J said that a provision in a statute conferring the power to make regulations "ordinarily ... will ... retain the character of a law with respect to the subject matter dealt with in the statute". The AWU pointed out that Evatt J's statement was predicated on the existence of "a scheme contained in the statute itself" which the regulations were to carry out. That is true, but the AWU's first challenge failed on the ground that there is a scheme here of the kind just discussed, and there is no reason not to conclude that the regulation-making power is a law with respect to the same heads of legislative power as supported the other provisions of the new Act, being those referred to in the definition of "employer" in s 6(1).

419 *Validity of other regulation-making provisions.* The AWU submitted that certain other regulation-making provisions were invalid: par (d) of the definition of "State or Territory industrial law" in s 4(1), s 16(4), cl 5 of Sched 2 and cl 55 of Sched 8 to the new Act and item 2(1) of Sched 4 to the Amending Act. Queensland and Western Australia supported the challenge to all these provisions, and Victoria supported the challenge to all but cl 55 of Sched 8.

420 The challenge was supported by brief arguments which were similar to those directed to s 356. The rejection of those arguments in relation to s 356 must mean that the challenge to the other regulation-making provisions is to be rejected, and for similar reasons.

421 *Conclusion.* The challenge to ss 356 and 846(1), to subdiv B of Div 7 of Pt 8 and to the other regulation-making provisions referred to fails.

PART VII – CONCLUSIONS AND ORDERS

422 For these reasons, the plaintiffs' several challenges to the validity of the Amending Act all fail. The Commonwealth's demurrer to the statement of claim in each action should be allowed. In each action there should be judgment for the defendant with costs.

---

410 (1931) 46 CLR 73 at 121.

423 KIRBY J. These proceedings challenge the validity of comprehensive amendments to the *Workplace Relations Act* 1996 (Cth) ("the Act") effected by the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) ("the Amending Act").

424 The central issue is whether the Amending Act, to the extent that it relies on the corporations power in s 51(xx) of the Constitution, is a valid law of the Commonwealth. The States of New South Wales, Victoria, Queensland, South Australia and Western Australia, substantially with one voice, contest the validity of the amendments. The State of Tasmania and the self-governing Territories intervened in their support. They, in turn, are supported in this challenge by a number of industrial organisations of employees ("the unions"), which mounted their own challenges to the legislation.

425 No decision of this Court has determined conclusively the central question that now falls for decision. The parties did not submit otherwise. The issue concerning the ambit of the corporations power to sustain a comprehensive federal law on industrial (or workplace) relations has been debated (and a test case anticipated) since the previous federal Government, in 1993, used the corporations power to support federal laws establishing collective agreements, known as "Enterprise Flexibility Agreements", negotiated directly between employees and employers and not with industrial organisations[411].

426 Over the years, *dicta* of members of this Court have been offered that support the view that the corporations power is broad enough to sustain general federal legislation on workplace relations with respect to the employees of constitutionally defined corporations[412]. Conflicting *obiter* were offered in *Re Dingjan; Ex parte Wagner*[413]. In that case a majority of the Justices appeared to favour a view that a federal law, so framed, would be valid so long as it was "expressed to operate on or by reference to the business functions, activities or relationships"[414] of a corporation (including workplace relations). However,

---

411 *Industrial Relations Reform Act* 1993 (Cth), s 31, inserting Pt VIB, Div 3 into the *Industrial Relations Act* 1988 (Cth). At the same time the Federal Parliament utilised the external affairs power to insert in the principal Act provisions to establish an unfair dismissal regime based on the ratification by Australia of the International Labour Organisation's Termination of Employment Convention. See *Industrial Relations Act* 1988 (Cth), Pt VIA, Div 3 (as then enacted).

412 See, eg, *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 147-153 per Mason J, 179 per Murphy J, 270 per Deane J.

413 (1995) 183 CLR 323.

414 (1995) 183 CLR 323 at 364 per Gaudron J, Deane J agreeing at 342.

some of those who expressed that opinion were in dissent in respect of the orders made in that case. Thus, by orthodox principles, their views would be disregarded in deriving any binding rule from the decision[415].

427 In more recent decisions, the constitutional point concerning the ambit of the corporations power was either conceded (so that this Court was not obliged to decide it[416]) or was expressed in individual concurring opinions, so as to fall short of establishing a clear ruling by the Court[417]. In these proceedings, for the first time, the issue has been fully argued. It must be decided. Past decisions do not decide it. However, the past is clearly of great importance in reaching a conclusion based on the constitutional text. It must be read in the usual way, with the light that is cast by legal authority, legal principle and legal policy[418].

A constitutional oddity

428 *The 1904 Act*: Before providing the answers that I would give to the questions that these proceedings present, it is worth noting what a radical change in constitutional doctrine the Commonwealth would achieve if its arguments as to the validity of the Amending Act were to succeed. For more than a century, since the passage of the *Conciliation and Arbitration Act* 1904 (Cth) ("the 1904 Act"), the substantial constitutional underpinning of the federal law on industrial disputes (later called in legislation "industrial relations"[419], and later still "workplace relations"[420]) has been provided by s 51(xxxv) of the Constitution. That paragraph of s 51 affords power to the Federal Parliament to make laws with respect to:

---

415 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417-418 [56].

416 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 539.

417 Such as *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 359-360 [29] per Gleeson CJ, 374-375 [82]-[85] per Gaudron J; cf Stewart, "Federal Labour Law and New Uses for the Corporations Power", (2001) 14 *Australian Journal of Labour Law* 145; Williams and Simpson, "The Expanding Frontiers of Commonwealth Intervention in Industrial Relations", (1997) 10 *Australian Journal of Labour Law* 222.

418 cf *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.

419 *Industrial Relations Act* 1988 (Cth).

420 *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth).

"conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

429 Although s 51(xxxv) speaks of "industrial disputes"[421], a narrow conception[422] of that term has long been rejected. The words are "given their popular meaning – what they convey to the man in the street"[423]. Even in 1908, "industrial disputes" was said to be an expression "commonly used in Australia to cover every kind of dispute between master and workman in relation to any kind of labour"[424]. Today, this meaning is even further enlarged by new understandings of the constitutional concept of "prevention", which significantly expand the scope of the power, potentially to apply to circumstances still unexplored by this Court[425]. Necessarily, "industrial disputes", so defined, now encompass all manner of "industrial affairs", "industrial relations" and "industrial matters" in Australia. Whether s 51(xxxv) is labelled as the "labour power"[426], "industrial relations power"[427], "arbitration power"[428] or, as I will refer to it, the "industrial disputes power", it must be understood in this light. This is not to say that the power is unfettered, or unlimited. However, the settled doctrine of this Court requires us to acknowledge the breadth of the federal power over industrial disputes that resides within s 51(xxxv)[429].

---

421 Joint reasons at [51].

422 See *Federated State School Teachers' Association of Australia v State of Victoria* (1929) 41 CLR 569.

423 *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 312 per Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ. See also *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 236-237 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

424 *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 366 per O'Connor J.

425 See reasons of Callinan J at [833].

426 McCallum, Pittard and Smith, *Australian Labour Law: Cases and Materials*, 2nd ed (1990) at 167.

427 Blackshield and Williams, *Australian Constitutional Law and Theory*, 4th ed (2006) at 1011.

428 Lane, *Lane's Commentary on the Australian Constitution*, 2nd ed (1997) at 334.

429 See also reasons of Callinan J at [831]-[833].

430 By the language in which s 51(xxxv) is expressed, two essential safeguards, restrictions or qualifications are imposed on the enactment of federal laws with respect to this subject matter. They are:

(1) *Interstateness*: The necessity of the presence of an actual or potential dispute extending beyond the limits of one State; and

(2) *Independent resolution*: The inability of the Parliament itself to enact laws (at least in all but exceptional cases[430]) to deal generically and directly with issues in dispute, and the requirement, instead, to provide for an independent conciliator or arbitrator to resolve the dispute between the parties by the constitutionally mandated procedures.

431 The majority considers the terms of the 1904 Act "wholly irrelevant" to the questions under consideration in these proceedings[431]. On the contrary, that Act, its history and the litigation which followed, provide the background to a constitutional context in which, for more than a century, legislators and courts in Australia assumed that any law enacted with respect to industrial disputes had to conform to the limitations imposed by s 51(xxxv)[432]. The background demonstrates how dramatically the joint reasons depart from the line of authority governing the reach of the corporations power in the constitutional field of industrial disputes.

432 *A century of decisions*: For more than a century, in hundreds of cases, the Justices of this Court have pored over each and every word of s 51(xxxv) of the Constitution. They have weighed each concept, individually and in composite, so as to decide the meaning of the stated notions in order to define the limits of the powers of the Federal Parliament. Even before the 1904 Act commenced, this Court was concerned with the scope of "industrial disputes" in the enacted jurisdiction of a State industrial tribunal[433]. However, the trickle of cases on this

---

430 It will be necessary to consider the earlier decisions made in respect of the defence power (s 51(vi) of the Constitution); the external affairs power (s 51(xxix)); and the international and interstate trade and commerce power (s 51(i)). See below at [560]-[583].

431 Joint reasons at [208].

432 See also reasons of Callinan J at [894].

433 *The Colliery Employés Federation of the Northern District, New South Wales (Industrial Union of Employés) v Brown* (1905) 3 CLR 255; cf *The Master Retailers' Association of NSW v The Shop Assistants Union of NSW* (1904) 2 CLR 94.

subject soon became a flood when the Commonwealth Court of Conciliation and Arbitration, established by the 1904 Act, arrived on the scene.

433 In 1908, in *Merchant Service Guild of Australasia v Archibald Currie & Co Pty Ltd*[434], this Court upheld a challenge to the jurisdiction of the Commonwealth Court of Conciliation and Arbitration to settle a dispute concerning employment conditions on a ship, owned by a joint stock company registered in Victoria and engaged in trade between Australia and Calcutta. The Court held that there was no jurisdiction to settle such a dispute. However, on the majority's new theory of the Constitution, there should have been no difficulty whatever in affording jurisdiction to the federal tribunal over such a dispute. Those who drew the 1904 Act, and those Justices who laboured so painstakingly over its terms, were blind to the simple truth that an easy solution existed that would permit direct federal regulation without the irksome necessity of establishing an actual or potential "dispute" or interstateness or (most irksome of all) prevention and settlement through the independent processes of conciliation and arbitration.

434 *A needless exercise?* If s 51(xx) of the Constitution now provides a legitimate source for a comprehensive federal law with respect to industrial disputes, by inference it always did. All those hard-fought decisions of this Court and the earnest presentation of cases, the advocacy and the judicial analysis and elaboration within them concerning the ambit of s 51(xxxv) of the Constitution, were (virtually without exception) a complete waste of this Court's time and energies. I say "virtually without exception" because occasional instances may exist where neither of the parties to an industrial dispute was a "constitutional corporation". But if the cases in the law reports throughout the first century of the operation of the 1904 Act, and its 1988 successor[435], are examined, it is almost impossible to find a case which does not either name a constitutional corporation as a party or a corporate industrial organisation of employees or employers as one of the litigants.

435 Indeed, the latter type of actual or potential corporations were effectively implicit in the federal legal machinery established by the 1904 Act for the very purpose of facilitating the constitutional functions of conciliation and arbitration. Because under s 51(xxxv) the laws could not "be laws simply for the prevention and settlement of such industrial disputes; they must be laws for the prevention and settlement thereof by means of conciliation and arbitration"[436], which was the

---

434 (1908) 5 CLR 737.

435 *Industrial Relations Act* 1988 (Cth).

436 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 401.

industrial relations system that the Federal Parliament established. From the earliest days of federation, compulsory conciliation and arbitration thus became a distinctive characteristic of the Australian industrial and workplace system. It was one in which "a system of arbitration … will begin to function … irrespective of the wishes of either party [disputant] … [There will be] a tribunal to which the parties … are compelled to submit"[437]. By conciliation, the system might produce an "amicable agreement". But if necessary, it would produce, by arbitration of the contested issues, a unilateral "binding award"[438] that thereafter "operates with statutory force"[439]. From these features of federal law, derived from the constitutional text, it was recognised, and for most of the twentieth century unquestioned, that "[the Federal] Parliament can do nothing of itself to preserve the atmosphere of [industrial] peace, but can only create tribunals of pacifiers"[440].

436 *The hypothesis of futility*: Given all the labour that followed in this Court, in the successive federal industrial tribunals, in the business sector, in industrial organisations avid for the assertion of jurisdiction, in the legal profession, in academic life and in Australian society, it is passing strange, if s 51(xx) existed as a constitutional *deus ex machina* to cut a swathe through so many technicalities, that a chorus of voices was not raised from the earliest days of the Commonwealth to demand the attempt. Why did generations of Justices of this Court struggle in so many cases over the jurisprudence of s 51(xxxv) of the Constitution, doing so for decades, without, in their impatience, occasionally appealing to the legislature to be rid of the needless limitations of par (xxxv) of s 51 and urging the substitution of the fructuous source of par (xx)?

437 Why were repeated attempts taken by well-advised federal governments, none of them successful, to amend the Constitution to enhance the federal legislative power with respect to terms and conditions of employment in industry, if, waiting in the wings for easy deployment, was the corporations paragraph, there to solve virtually all of the deficiencies of power and to fulfil all of the Commonwealth's law-making dreams of industrial regulation[441]?

---

437 *R v Kirby; Ex parte Boilermakers' Society of Australia* ("the *Boilermakers Case*") (1956) 94 CLR 254 at 342-343.

438 *R v Bain; Ex parte Cadbury Schweppes Australia Ltd* (1984) 159 CLR 163 at 176.

439 *Monard v H M Leggo & Co Ltd* (1923) 33 CLR 155 at 164.

440 Garran, *Prosper the Commonwealth*, (1958) at 175.

441 There were six relevant referendums: Constitution Alteration (Legislative Powers) 1910; Constitution Alteration (Industrial Matters) 1912; Constitution Alteration (Railway Disputes) 1912; Constitution Alteration (Legislative Powers) 1919; Constitution Alteration (Industry and Commerce) 1926; Constitution Alteration

(Footnote continues on next page)

438 The answer to these questions is not that the earlier Justices, or other lawyers of the Commonwealth and the well-resourced parties, lacked the intelligence, insight and imagination of those of the present generation. Their work on s 51(xxxv) is proof enough of legal imagination, demonstrated most clearly in the invention of "paper disputes" to give rise to the necessary interstateness, as Callinan J explains[442]. Nor can the answer be that the Justices focused their attention solely on the terms of the statute they had, rather than a much simpler statute that would make life easier for so many, including themselves.

439 The reported decisions on the industrial disputes power in par (xxxv) are full of judicial suggestions, arising in the disposal of proceedings, for constructive ways in which the constitutional power might be utilised more constructively and simply. Thus, from the earliest days of the Commonwealth, Isaacs J was calling attention to the importance of the "preventive jurisdiction" of the industrial tribunal which, he pointed out, "was certainly intended to be a real and substantial power of preserving the peaceful course of industry, and in its operation might prove more beneficial than the settlement of disputes after they have broken out"[443]. Opposing views on this potential for new and different federal legislation were expressed in 1976 by Barwick CJ[444] and Murphy J[445]

(Industrial Employment) 1946; cf *Industrial Relations Act Case* (1996) 198 CLR 416 at 565.

442 Reasons of Callinan J at [823]-[834]; cf *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528 at 540; *Caledonian Collieries Ltd v Australasian Coal and Shale Employees' Federation [No 1]* (1930) 42 CLR 527 at 552; *R v Dunlop Rubber Australia Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1957) 97 CLR 71 at 80-81; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Printing Industry Employees' Union* (1964) 109 CLR 544 at 551.

443 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 53. See also *Australian Boot Trade Employés' Federation v Whybrow & Co* (1910) 11 CLR 311 at 340 per Higgins J. See also reasons of Callinan J at [833].

444 *R v Heagney; Ex parte ACT Employers Federation* (1976) 137 CLR 86 at 90.

445 *R v Heagney; Ex parte ACT Employers Federation* (1976) 137 CLR 86 at 105. See also *R v Turbet; Ex parte Australian Building Construction Employees and Building Labourers' Federation* (1980) 144 CLR 335 at 354-355.

respectively, the latter subsequently supported by Mason CJ and Deane J[446]. Indeed, by 1989, Mason CJ was becoming quite insistent on this point[447]:

> "It may be that the constitutional power (s 51(xxxv)) enables the Parliament to legislate for the prevention by conciliation and arbitration of industrial disputes which fall short of being threatened, impending or probable disputes. This is not the occasion to discuss that question. However, it is appropriate to recall that members of this Court have suggested from time to time that the Act may not exercise to the full the constitutional power reposed in the Parliament".

440 In the context, Mason CJ was making reference to the power for the "prevention" of industrial disputes. His suggestion was given legislative effect. Other attributes of the constitutional and statutory language derived from s 51(xxxv) were repeatedly worked over, elaborated, expanded and re-expressed in a century of this Court's decisional law.

441 *The unlikely hypothesis of oversight*: The question now presented by these proceedings, and the Amending Act with which they are concerned, is whether all that effort, and the hundreds of decisions of the Justices, were really a futile waste of time, because of the ever-ready availability of s 51(xx) to come to the rescue of federal lawmakers and to provide a new, and much larger and more direct, source of constitutional power to enact a comprehensive federal law on what the Amending Act still calls "workplace relations".

442 Of course, it is possible that even the experienced and insightful Justices who went before us, or most of them, were blind to the possibilities now presented in the legislation under scrutiny in these proceedings. It is part of the genius of our system of constitutional government that perceptions of the meaning of the Constitution change over time and that what seemed clear to earlier generations of judges sometimes appears differently to those who come

---

446 *Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Vic) Ltd* (1989) 166 CLR 311 at 318-320, 327.

447 *Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Vic) Ltd* (1989) 166 CLR 311 at 320-321. Following these observations, the Federal Parliament enacted the *Industrial Relations Reform Act* 1993 (Cth), which inserted a provision (s 170AH(4)) into the *Industrial Relations Act* 1988 (Cth) authorising the Australian Industrial Relations Commission to take "preventive action" to deal with a "situation that is likely to give rise to an interstate industrial dispute". This Court upheld the validity of that provision. See *Industrial Relations Act Case* (1996) 187 CLR 416 at 496-497.

later[448]. Context necessarily impinges on constitutional interpretation[449]. Thus, in *Victoria v The Commonwealth* ("the *Payroll Tax Case*")[450], Windeyer J correctly acknowledged the impact upon this Court's constitutional interpretations of considerations of history, economics, commerce and emerging nationhood. Such considerations deny the attempts to confine the meaning of the constitutional text either to the expectations of the founders in the Constitutional Conventions[451] or the reasoning of earlier Justices of this Court[452].

443 *The assumption of limited powers*: However, the substantially uniform approach to the available federal power with respect to industrial disputes, as expressed in s 51(xxxv) of the Constitution, evident in so many authorities for over a century, suggests, at the least, a need to pause before nonchalantly consigning those efforts to judicial oblivion. It is obvious that most of our predecessors accepted, or assumed, that a severe limitation existed on the availability of federal legislative power to make laws directly in respect of industrial disputes otherwise than through the independent procedures expressly provided for in s 51(xxxv).

444 The present proceedings thus afford both the opportunity, and the obligation, to consider whether the generally consistent authority of this Court, expressed for over a hundred years upon the basis of that assumption, express or implied, was mistaken. If it was, the Commonwealth is correct that the Federal Parliament enjoys (and always has enjoyed) a most substantial power under s 51(xx) to enact comprehensive national laws directly concerned with industrial disputes, without conforming to the two constitutional prerequisites contained in s 51(xxxv).

---

448 A good illustration is the adoption of the principle expressed in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers Case*") (1920) 28 CLR 129 (affirmed (1921) 29 CLR 406). Another is the enlarged perception of the ambit of the external affairs power as explained in *The Tasmanian Dam Case* (1983) 158 CLR 1.

449 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 624 [174]; cf at 589 [62].

450 (1971) 122 CLR 353 at 395; cf *Abebe v The Commonwealth* (1999) 197 CLR 510 at 581-582 [203].

451 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 599-600 [186]; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 522-523 [111].

452 *Re Wakim* (1999) 198 CLR 511; and *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178; *Gould v Brown* (1998) 193 CLR 346; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; together with *Singh v The Commonwealth* (2004) 222 CLR 322.

445 Because that conclusion would, in effect, render the industrial disputes power in par (xxxv) *otiose*, or at least optional for most purposes, effectively consigning it to the same insignificance as other provisions of the Constitution for which high hopes were once held[453], the step that the Commonwealth now invites this Court to take is not one to be taken lightly. This is so for reasons expressed in the long line of authority to which I have referred. But it is also the case because of the considerations of legal principle and legal policy which I will mention.

446 Such considerations include the part which the requirement of interstateness[454] has hitherto played in preserving features of the federal character of the Constitution in matters of industrial relations law. That element in Australia's constitutional arrangements, including in respect of State, federal and Territory laws on industrial disputes, has contributed to diversity and experimentation in lawmaking, inter-governmental cooperation within the Commonwealth and the protection of individual rights[455]. Moreover, the feature of the independent determination of industrial disputes[456] has the potential to encourage and promote collective agreements between parties and the protection of economic fairness to all those involved in industrial disputes, secured by the distinctive procedures of conciliation and arbitration. Such elements of fairness would not necessarily be assured by an unlimited focus of federal law on the activities of employers as constitutional corporations[457]. Under that power, attention is addressed to the corporation which is the employer, not, as such, the employment or the workplace relationship.

447 *The emerging issue*: As will appear, the central issue for consideration in these proceedings is not whether, in the course of its elaboration, especially in the thirty-five years since the decision in *Strickland v Rocla Concrete Pipes Ltd*[458] ("the *Concrete Pipes Case*"), understandings of the ambit of s 51(xx) of the

---

453 See, eg, ss 101, 102, 103 (Inter-State Commission); cf *The State of New South Wales v The Commonwealth* ("the *Wheat Case*") (1915) 20 CLR 54.

454 See above these reasons at [430].

455 See below these reasons at [609]-[610].

456 See above these reasons at [430].

457 See below these reasons at [609]; cf McCallum, "The Australian Constitution and the Shaping of our Federal and State Labour Laws", (2005) 10 *Deakin Law Review* 460.

458 (1971) 124 CLR 468.

Constitution have expanded so as to enhance the federal legislative power in that respect. Of course they have. I have myself acknowledged such expansion and called attention to it[459]. The real question now directly presented is whether this expansion of the ambit of par (xx), however large it may otherwise grow, is subject to restrictions or limitations, including those expressed or implied in par (xxxv). The answer to that question is important for the outcome of these proceedings. It is important for the operation of the Constitution, read as a whole. It is important for the preservation of significant features of the resulting federal legislative power with respect to the prevention and settlement of industrial disputes that has hitherto prevailed in Australia.

The facts, legislation and specific challenges

448 *The facts and litigation*: The facts relevant to the disposition of these proceedings, the identification of the parties and the questions they ultimately present to this Court for decision are stated, sufficiently for my purposes, in the reasons of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ ("the joint reasons"). There were no relevant disputed facts[460].

449 As appears from the joint reasons, the interests of the States in these proceedings were in their most significant respects similar, although there were different points of emphasis and argument. The position of the State of Victoria was somewhat different from that of the other States, in so far as its central constitutional argument was concerned. This was partly because of the referral, by the Parliament of Victoria to the Federal Parliament, of powers to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes *within* the limits of the State of Victoria and other related matters[461]. The Attorneys-General of Tasmania, the Northern Territory and the Australian Capital Territory intervened in support of the plaintiffs[462].

450 The result of the line-up of the parties before this Court was a governmental divide, not unique but not seen in this Court for some time, by which all of the States and Territories of the Commonwealth united, together

---

459 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 387 [216]; *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 at 548 [29] fn 37. In neither of those cases was the constitutional issue argued in these proceedings advanced by either party.

460 Joint reasons at [4].

461 *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic). See joint reasons at [6], [43]-[44].

462 Joint reasons at [6].

with the unions, against the Commonwealth, to challenge the validity of the amendments to the Act contained in the Amending Act. The inter-governmental unity amongst the States and self-governing Territories indicates a clear recognition of the very great significance of the outcome of the proceedings for the future of the governmental powers of those States (and possibly the Territories), if the Commonwealth's submissions on the ambit of s 51(xx) were to prevail.

451 As I shall show, the plaintiffs and interveners were not mistaken in this assessment. If the Commonwealth's view of the corporations power is correct, and is upheld without inhibitions derived from other heads of federal power, notably in s 51(xxxv), this will have profound consequences for the residual legislative and governmental powers of the States in this country. Not least is this so because of the enormous expansion in Australia in the number, variety and activities of the foreign and trading corporations described in s 51(xx), including in the out-sourcing and privatisation in Australia today of the delivery of many governmental or formerly governmental services[463].

452 *The legislation in issue*: The relevant provisions of the legislation are also described adequately, for my purposes, in the joint reasons. I shall use the same descriptions of the Act and the Amending Act, the "previous Act" and the "new Act", and of the Workplace Relations Regulations 2006 (Cth), as appear in the joint reasons[464].

453 In those reasons can be found not only the general provisions of the new Act, and a description of the new and different objects[465], constitutional foundations[466], general structure[467] and the continuing and new institutions[468] for which the new Act provides, but also the more detailed scheme of the legislation offering the contents of Australian Workplace Agreements ("AWAs") (which are

---

463 cf *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 71-72 [9]-[11]; *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at 281-282 [1]-[4] per Gleeson CJ, 297 [49] per McHugh, Hayne and Callinan JJ; *Griffith University v Tang* (2005) 221 CLR 99.

464 Joint reasons at [1]-[2].

465 Joint reasons at [7].

466 Joint reasons at [8]-[9].

467 Joint reasons at [10]-[12].

468 Including the Australian Fair Pay Commission. See joint reasons at [13]-[16].

to be encouraged[469] by the new Act) and the residuum of awards made by the Australian Industrial Relations Commission ("the AIRC") (which are to be "rationalised", confined in their content but not expanded in number) under the new Act[470].

454 In addition to these, and other general provisions of the new Act, the joint reasons set out, in terms, specific provisions of various sections, parts and schedules of the new Act, as amended[471], together with a description of the regulation-making powers[472]. I will not repeat any of these provisions. I agree with the conclusion in the joint reasons that "[m]uch of the new Act turns (including many of the [specific] provisions whose validity the plaintiffs challenge) on the definition of employer set out in s 6 of the new Act"[473].

455 Most significantly, the "employers" identified in par (a) of the definition of "employer" in s 6(1) are constitutional corporations, as defined in s 4[474]. In turn, the definition of "employee" in s 5(1) depends on the identification of an "employer", as so defined[475]. To a very large extent, the particular provisions of the Act, complained of by the plaintiffs, represent nothing more than the drafter's attempt to carry out a thorough makeover of the Act so as to replace (but not entirely extinguish) the former comprehensive reliance in the previous Act on the constitutional head of power stated in s 51(xxxv), eventually substituting the constitutional power supposedly derived from s 51(xx).

456 The clearest possible indication of the extremely wide conception of the corporations power which the joint reasons embrace emerges from the fact that not a single particular objection raised by the plaintiffs and interveners is upheld in those reasons. Not one of the complaints about the excessive width of the supposed ambit of the corporations power is found to have hit its constitutional mark. Not one sub-section, paragraph or regulation, challenged by the plaintiffs, is struck down.

---

469 Joint reasons at [19]-[23].

470 Joint reasons at [26]-[40].

471 Joint reasons at [239]-[294].

472 Joint reasons at [395]-[418].

473 Joint reasons at [239].

474 Joint reasons at [9].

475 Joint reasons at [8], [239].

457 Even in the significant challenge to the last substantial redrafting of the federal industrial relations law, *Victoria v The Commonwealth* (*Industrial Relations Act Case*) in 1996, which followed the 1993 amendments to the *Industrial Relations Act* 1988 (Cth), a majority of this Court found that a handful of provisions were invalid[476] or needed to be read down or would not bind the States in the specified respects unless confined in their meaning[477]. Here, although some few of the specific provisions are read in a way that postpones a final conclusion[478] or results in a narrow construction proffered by the Commonwealth to avoid a looming danger[479], the plaintiffs are held not to have landed a single constitutional blow. Truly, this demonstrates the extraordinary zenith of the federal constitutional power, most especially under s 51(xx), which the majority now upholds. It manifests, in respect of the particular provisions challenged by the plaintiffs, as described in the joint reasons, the remarkable ambit of the corporations power which the majority of this Court now embraces.

458 This conclusion is plain despite the often tenuous, insubstantial and highly contestable connections with the federal corporations power that the Commonwealth advanced to sustain specific provisions as they came up for separate constitutional justification. It is the very amplitude of the power to make laws with respect to constitutional corporations, thus upheld, that obliges this Court to face squarely what I regard as the central issue in these proceedings. This is whether the corporations power is completely unchecked and plenary, and disjoined from other powers granted by the Constitution to the Federal Parliament. Or whether (as past history, experience and authority suggest) that power is subject to restrictions suggested by other paragraphs of s 51, notably par (xxxv).

459 The textual foundation for the importation of such restrictions is the structure of the Constitution and its federal character, inherent in its overall expression and design. But it can also be found in the clear statement in the opening words of s 51 that each grant of legislative power in that section is made "subject to this Constitution". That expression obviously includes the other provisions in s 51, including par (xxxv). It also includes the federal character of the Constitution that pervades its entire provisions.

---

476 ss 170DE(2), 170EDA(1)(b). See *Industrial Relations Act Case* (1996) 187 CLR 416 at 573-577.

477 s 6 and ss 170AE, 170AH, 170BC, 170BI, 170DB, 170DC, 170DE(1), 170DF, 170KA, 170KB, 170KC, 170PM(3), 170PG. See also ss 150A(3) and 334A.

478 Joint reasons at [389].

479 Joint reasons at [286].

460 *Some legislative specificities*: In order to clear the decks somewhat (and because mine is a minority opinion with proposed orders that will not affect the orders of the Court that follow from the joint reasons), it is appropriate for me to deal more briefly than I otherwise would with three of the matters upon which specific conclusions are voiced in the joint reasons. Upon each of these I wish to express a particular opinion.

(1) *Hybrid revised awards*: The first concerns the specific challenge to the provisions of Sched 6 to the new Act, which is purportedly brought into operation by s 8. Schedule 6 is one of the comparatively few provisions of the new Act that continues to depend for its constitutional validity on s 51(xxxv) of the Constitution. It purports to impose obligations on the AIRC, during a "transitional period" of five years for which it provides, to disturb the provisions of already existing awards, earlier made by the AIRC by conciliation and arbitration in a way laid down by the earlier legislation[480]. For the reasons which I stated in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union*[481], in my view, in circumstances such as this, the attempt by direct federal legislation to mandate particular alterations to such an award, which draws for its initial validity upon constitutional and statutory provisions founded ultimately in s 51(xxxv) of the Constitution, fails.

Although my view in *Pacific Coal* was a dissenting one, in a closely divided Court, it is one that rests on the essential constitutional character of an award as an outcome arrived at by the independent processes of conciliation and arbitration contemplated in the constitutional grant of power in s 51(xxxv). Purportedly to alter and reconstitute the balances within such an award is not something that the Federal Parliament lawfully can do. At least, it cannot do so in reliance upon s 51(xxxv) of the Constitution. The outcome which results from such legislation is no longer a constitutionally valid award achieved by conciliation or arbitration. It is a kind of hybrid, imposed by legislation, that must find another constitutional source if its validity is to be sustained.

I recognise that the view I expressed in this respect did not prevail in *Pacific Coal*. However, I adhere to it. Because it rests on my view of what the Constitution obliges, I would continue to give effect to it. Nevertheless, as this particular issue is caught up in the disposition of the general attack on the constitutional validity of the Amending Act, I need say no more than that, separately from my general conclusion, I consider Sched 6 to be invalid on this additional ground.

---

480 Joint reasons at [299]-[302].

481 (2000) 203 CLR 346 at 442-446 [279]-[290].

(2) *Invoking the territories power*: The joint reasons reject the challenge by the plaintiffs to the attempt made by the new Act to rely, in support of the new collection of federal legislative powers nominated to sustain validity, on s 122 of the Constitution[482]. That section affords power to the Federal Parliament to make laws for the government of the territories of the Commonwealth.

The extent to which limitations upon the powers specifically granted to the Parliament by s 51 of the Constitution fetter the legislative power to make laws for the government of any territory, has been a matter of controversy upon which, in the past, this Court has divided[483]. In *Newcrest Mining (WA) Ltd v The Commonwealth*[484], Gaudron and Gummow JJ and I concluded, contrary to some earlier authority, that the grant of power in s 122 was subject, in that case, to the restriction on the making of federal laws expressed in s 51(xxxi). I accept that the issue is not settled by *Newcrest*. Nor is this the case to settle it. Apart from anything else, there are differences between the restriction, relevant to laws for the federal acquisition of property contained in s 51(xxxi) of the Constitution, and the suggested restriction on federal laws with respect to industrial relations contained in s 51(xxxv). The reference in the latter to the consideration of interstateness suggests that, in this respect, the power of the Parliament to make laws for the government of any territory stands apart, is relevantly plenary and is not, in the case of the territories, subject to any express or implied restriction or limitation imported from the industrial disputes power contained in s 51(xxxv)[485].

Whilst, therefore, I am inclined to agree with the conclusion and reasoning of the majority concerning those provisions of the new Act that rely on the constitutional power to make laws by reference to the connection between the "employer" and "employee" and a territory[486], it is unnecessary for me to reach a final opinion on the issue. As I shall show, the Act's stated objects and overall scheme are addressed to the relations between

---

482 Joint reasons at [345].

483 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 568, 614, 661; cf *Teori Tau v The Commonwealth* (1969) 119 CLR 564.

484 (1997) 190 CLR 513.

485 *Spratt v Hermes* (1965) 114 CLR 226 at 242; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 611; *Svikart v Stewart* (1994) 181 CLR 548 at 563.

486 Joint reasons at [329], setting out ss 5(1) and 6(1) of the new Act.

employers and employees. These features confirm the general character of the law as one with respect to the prevention and settlement of "industrial disputes" and the many associated aspects of "industrial relations". But could the law be read down so as to apply to the territories only? In my view, the new Act "was intended to operate fully and completely according to its terms, or not at all"[487]. Reading down the law in this way would have the result of producing a set of provisions "which the Parliament did not intend"[488]. To turn this Act into a law applying to territories only, when the Parliament clearly intended it to cover, comprehensively and generally, national industrial relations, would require this Court to "reconstruct out of the ruins of one invalid law of general application a number of valid laws of particular application"[489], essentially, to "manufacture a new web"[490]. Legislative "plastic surgery" of this nature is the province of the Parliament. It would be preferable to dispose of the precise ambit of the territories power in relation to s 51(xxxv) in proceedings where the orders required an answer to that question. As I shall show, that is not the case here because the plaintiffs are entitled to succeed on other grounds and the Amending Act wholly fails.

(3) *Opaque regulation-making power*: A third matter of particularity where I have specific reservations about the analysis of particular provisions of the challenged legislation in the joint reasons, relates to the treatment of the regulation-making powers provided by the new Act[491]. The joint reasons conclude that the challenge to s 356, to s 846(1) and to the other regulation-making powers, as mounted specifically by the Australian Workers' Union ("the AWU"), fails. The joint reasons reject the AWU's argument that those provisions are impermissibly vague and devoid of content. They conclude that the provisions confine the impugned regulations to matters adequately identified by the Parliament itself.

The joint reasons content themselves with chastisement of the impugned legislation as instancing an "undesirable" technique of drafting "which

---

487 *Pidoto v Victoria* (1943) 68 CLR 87 at 108.

488 cf *Sportodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63 at 73 [19].

489 *Concrete Pipes Case* (1971) 124 CLR 468 at 506.

490 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 386.

491 Joint reasons at [395]-[421].

ought to be discouraged"[492]. They point to the burden which the challenged provisions present to lawyers and non-lawyers forced to look outside the statute in order to find the criteria for lawmaking which the Parliament has approved.

With all respect, this is an inadequate response. It is redolent of the judicial attitude that sustained the majority reasoning in *Combet v Commonwealth*[493]. Under the Constitution, it is the duty of this Court to uphold the law-making and supervisory powers of the Parliament. We should not sanction still further erosion of those powers and their effective transfer to the Executive Government, whether appearing in vague, indeterminate and open-ended appropriations (as upheld in *Combet*) or in vague, indeterminate and open-ended regulation-making powers (as purportedly provided in ss 356 and 846(1) of the new Act[494]). There comes a point when a regulation-making power becomes so vague and open-ended that the law which establishes it ceases to be a law with respect to a subject of federal law-making power, becoming instead a bare federal attempt to control and expel State laws. When that line is crossed, this Court has a duty to say so.

Until this Court exhibits its disapproval in a judicial fashion, by invalidating such provisions, the lesson of history is that executive governments will present such provisions in increasing number to distracted or inattentive legislators. The legislators will be unlikely to notice them in the huge mass of legislative materials, such as those presented in the present case, and contest them. They will overlook the affront to proper parliamentary supervision, particularly in the context of regulation-making provisions that are typically found at the end of bills and ordinarily attract little parliamentary attention because they are assumed to be in the standard form.

The relationship between the Parliament's function of lawmaking and the legitimate delegation to the Executive Government of promulgating regulations to carry a law into effect, is a point of great constitutional significance. Contemporary debates in the Parliament of the United

---

492 Joint reasons at [399].

493 (2005) 80 ALJR 247 at 253 [6]-[7], 286 [158]-[161]; 221 ALR 621 at 623-624, 668-669.

494 Joint reasons at [398].

> Kingdom illustrate this fact[495]. The plaintiffs' challenge to the constitutional acceptability of the mode of delegation adopted in the present legislation should be upheld both to defend the proper constitutional role of the Federal Parliament and to discourage future similar measures. The impugned provisions border on an endeavour to enact an abdication of the Parliament's responsibilities. This Court should say so and forbid it.
>
> Once again, however, because on other grounds the entirety of the Amending Act falls, the separate disposition of the particular issue concerning the regulation-making power is not essential in order to arrive at the orders that I favour. Nevertheless, this instance does illustrate, in a most vivid way, the indulgent approach of the majority, expressed in the joint reasons, to the entirety of the legislation. I find it impossible to believe that in earlier times this Court would have approved such an open-ended delegation by the Parliament to the Executive of the Parliament's proper law-making functions[496].

461 *Centrality of the s 51(xx) issue*: Apart from these specific matters, the remaining particular challenges to provisions of the Amending Act stand or fall with the plaintiffs' attack on the Commonwealth's reliance on s 51(xx) of the Constitution. It is that head of legislative power that is said to provide the constitutional underpinning for the new federal law on workplace relations. Therefore, it is to that central postulate of the new Act that I now turn. But first it is appropriate to notice the large measure of common ground and some general considerations of approach.

Common ground and approach

462 *The basic case law*: In these proceedings, no party challenged the approach to the interpretation of the heads of legislative power of the Federal Parliament expressed in the majority reasons in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers Case*")[497]. In so far as

---

495 See debate of the House of Lords on the Legislative and Regulatory Reform Bill 2006 (UK): United Kingdom, House of Lords, *Parliamentary Debates* (Hansard), 13 June 2006.

496 Contrast *Shrimpton v The Commonwealth* (1945) 69 CLR 613 at 620-621, 625, 629, 632; *Kostrzewa v Southern Electric Authority of Queensland* (1969) 120 CLR 653 at 656 and *Dainford Ltd v Smith* (1985) 155 CLR 342 at 357, 361-362 (citing *Geraghty v Porter* [1917] NZLR 554 at 556).

497 (1920) 28 CLR 129 (affd (1921) 29 CLR 406); cf *Airlines of NSW Pty Ltd v New South Wales [No 2]* ("the *Second Airlines Case*") (1965) 113 CLR 54 at 79; *Grain Pool* (2000) 202 CLR 479 at 524 [115]; cf joint reasons at [190].

they referred to considerations of federalism, neither the States, nor any of the unions, sought to revive the notion of reserved State powers that pre-existed the decision in the *Engineers Case*[498].

463 None of the States submitted that the propounded reliance by the Commonwealth on s 51(xx) of the Constitution should be rejected because, to uphold it, would "invade the field of State law"[499]. Specifically, the State and union submissions, urging their construction of the ambit of the corporations power by reference to the Constitution, did not posit a notion that a restriction or prohibition grew out of a pre-existing field of State law with respect to the operation of corporations "the control of which is exclusively reserved to the States"[500]. The plaintiffs all accepted that such an implied zone of restriction on the operation of federal law, including as it was validly founded on s 51(xx) of the Constitution, is forbidden by the settled approach to the ascertainment of the boundaries of such powers expressed in the *Engineers Case*.

464 Likewise, no party sought to challenge the correctness of the fundamental step taken by this Court in its decision in the *Concrete Pipes Case*[501], in expanding the ambit of the corporations power. Neither did any party seek to advance a re-argument of *New South Wales v The Commonwealth* (*The Incorporation Case*)[502], although several of the plaintiffs pointed to the limited significance of the majority conclusion in that case (so far as it addressed the ambit of s 51(xx)), because the issue now for decision was conceded there and not argued before, or decided by, the Court.

465 The parties did not stay, in these proceedings, to challenge what was said in the divided course of authority in recent years concerning the identity of a trading and financial corporation and the broad direction of this Court's recent authority upholding, with increasing majorities, the constitutional power provided by s 51(xx)[503]. These matters of approach identify the battle grounds

---

498 See generally *R v Barger* (1908) 6 CLR 41 at 84 per Isaacs J, 113 per Higgins J and *Attorney-General for NSW v Brewery Employés Union of NSW* ("the *Union Label Case*") (1908) 6 CLR 469. See also joint reasons at [82] *et seq*.

499 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 354.

500 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 354. See joint reasons at [74].

501 (1971) 124 CLR 468. See joint reasons at [153]-[156].

502 (1990) 169 CLR 482. See joint reasons at [137].

503 Joint reasons at [46]-[47], [54].

that the plaintiffs were content to accept. In view of the state of this Court's authority, it is appropriate for this Court to act upon the foregoing concessions.

466 *Matters of history*: Nor was there much real contest in argument over considerations of history, whether addressed to the development before federation of the corporation as a legal fiction[504]; the various debates and moves anterior to the adoption of s 51(xx) in the Constitution[505]; the record of failed referendums wherein fruitless attempts were made to persuade the Australian electors to amend the Constitution in ways designed to enhance the federal legislative power in regard to lawmaking with respect to industrial disputes[506]; and the course of relevant authority in this Court that followed federation[507].

467 Although I do not ultimately draw the same conclusions from these considerations of history, I adopt, as accurate and generally adequate for the purposes of these reasons, the broad outline of the history set out in the joint reasons. So far as the founders of the Commonwealth are concerned, some of whom were among the original Justices of this Court, the proof of the pudding may be seen in what they did and wrote and obviously assumed and believed when questions concerning the ambit of the corporations power came up for decision, and also when they turned to elucidate the conciliation and arbitration power provided in s 51(xxxv).

468 The joint reasons acknowledge that the people of Australia have repeatedly declined to confer on the Federal Parliament, through referendum, a power to make laws with respect to "industrial relations generally" and the "terms and conditions of employment in industry"[508]. They suggest that the failure of these referendums casts no light on the power of the Federal Parliament to make laws with respect to industrial relations. Various reasons are offered in support of this view, including the "problem of equivalence"[509] and the decisiveness of party politics[510]. However, the fact that it would be difficult to ascertain the intention of the people at referendum does not make that intention

---

504 Joint reasons at [96]-[124].

505 Joint reasons at [111]-[124].

506 Joint reasons at [125]-[135].

507 Joint reasons at [136]-[182].

508 Joint reasons at [129].

509 Joint reasons at [131].

510 Joint reasons at [132].

"irrelevant" to the questions at hand. In analogous cases, this Court is regularly called upon to determine the "intention" of the Parliament, expressed in legislation. It certainly cannot be denied that the law-making process is affected by factors like "party politics". In a pluralist democracy, the process of construing parliamentary intention is not a simple and direct one. Yet this Court performs its duty, and constantly construes those "intentions". It does so in light of authority, historical circumstances and many other available tools that may not be exactly "equivalent" to the circumstances prevailing in the instant case, but whose relevance cannot be ignored[511]. If we acknowledge that the ultimate foundation of the legitimacy of the Constitution is now derived from its acceptance by the Australian people[512], the continued refusal of the Australian electors to approve the creation of a general power of industrial relations by constitutional amendment, while obviously not decisive of the outcome in these proceedings, remains a relevant factor to be considered when construing the contemporary meaning of the constitutional text and structure, including the interaction between ss 51(xx) and 51(xxxv)[513]. If amendments that are agreed to are relevant to the meaning of the Constitution[514], those that have been repeatedly rejected should not be so lightly cast aside as irrelevant[515].

469 *Coherent constitutional interpretation*: Given that the proceedings involve constitutional validity, it is important to say that, on many of the matters of approach also, the parties were in agreement. Thus, they agreed that the Constitution must be read as a whole and as a coherent document[516].

---

511 cf *Cole v Whitfield* (1988) 165 CLR 360 at 385.

512 *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 383 per Murphy J, 442 per Deane J; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 486 per Deane and Toohey JJ; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138 per Mason CJ, 216 per Gaudron J; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171 per Deane J. See also *McGinty v Western Australia* (1996) 186 CLR 140 at 230 per McHugh J, 274-275 per Gummow J; *Sue v Hill* (1999) 199 CLR 462 at 490-493 [59]-[66], 503 [95]-[96] per Gleeson CJ, Gummow and Hayne JJ, 526-528 [168]-[173] per Gaudron J.

513 See also *Cole v Whitfield* (1988) 165 CLR 360 at 385.

514 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 404-411 [137]-[152], 413 [157].

515 See also *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 428 [65]; reasons of Callinan J at [115]-[119].

516 Joint reasons at [52].

470 The joint reasons express fear that this principle of interpretation, unless kept in check, might lead to the importation of a negative implication protective of State legislative rights, akin to the reserved powers doctrine[517]. However, this is not how I understood the plaintiffs' argument to be advanced. It was not for its impact on "preserving" State legislative "rights" that the coherency principle was invoked, but for the anterior question of ascertaining the content of federal legislative powers, such as those expressed in s 51 of the Constitution. In the interpretation of legal words, it is accepted today that serious errors can result from focusing on the words alone, in isolation, and omitting the context in which those words appear. Paying regard to context is now a settled requirement for the construction of statutes[518]. The same is true in ascertaining the meaning of a constitutional provision. Context is critical to the understanding of communication by the use of human language. This is nowhere more so than in deriving the meaning of a constitutional text, typically expressed (as in the Australian instance) in sparse language, designed to apply for an indefinite time and to address a vast range of predictable and unpredictable circumstances.

471 It follows that, to take the language of the corporations power in par (xx) of s 51 in isolation and to ignore the other paragraphs of that section, would involve a serious mistake. It is not a mistake that our predecessors in this Court made. They read pars (xx) and (xxxv) together as part of the one section of the Constitution containing a grant of many powers. Clearly, it was not intended that s 51(xxxv) should be otiose, irrelevant or entirely optional to the Commonwealth in its application. Nor was it intended that the important restrictions imposed on the federal exercise of legislative powers in par (xxxv), with respect to laws on industrial disputes, should be set at nought by invoking another head of power, such as that contained in par (xx).

472 As I shall show, the principle of coherency in the interpretation of a legal text lies behind the reconciliation in several decisions of this Court of the restrictions appearing in the grants of legislative power in respect of banking (s 51(xiii)), insurance (s 51(xiv)) and acquisition of property (s 51(xxxi)). Of course, being a Constitution that contains grants of legislative power to a national legislature, it is appropriate to construe each of the heads of power expressed in s 51 "with all the generality which the words used admit"[519]. The words must

---

517 Joint reasons at [82].

518 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 397 citing *R v Brown* [1996] AC 543 at 561.

519 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225; *Grain Pool* (2000) 202 CLR 479 at 492 [16].

also be interpreted remembering their constitutional function[520]. They must reflect the fact that the Constitution is a "living instrument"[521], intended to respond to the needs of changing times[522]. Merely because of the existence of one provision having a "more particular scope", one should not infer a limit on the deployment of other powers in ways that also affect the nominated subject[523]. Nevertheless, the abiding object of the task at hand is to secure an interpretation of the constitutional provisions that gives harmonious effect to the entire document. And this includes s 51.

473 *Necessity of characterisation*: Because the constitutional validity of the impugned provisions is challenged, it is necessary for this Court to ask whether the provisions, taken separately and together, are laws "with respect to" the propounded head of power. Those words of connection "ought never be neglected". They "require … relevance to or connection with the subject assigned to the … Parliament"[524]. The well-known passage from the reasons of Kitto J in *Fairfax v Federal Commissioner of Taxation*[525] was invoked. It was accepted by both sides to this contest.

474 In accordance with those words, the central question thus became whether the several provisions of the Amending Act, read in context, according to their "*true* nature and character" and "*real* substance", constituted a "law upon, 'with respect to'", one or more of the enumerated subjects. Alternatively, were the provisions "so incidental as not *in truth* [such as] to affect its character"[526]? Any

---

520 cf *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 257 [221].

521 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171 per Deane J.

522 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 114-115.

523 *Concrete Pipes Case* (1971) 124 CLR 468 at 507.

524 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77; *Re Dingjan* (1995) 183 CLR 323 at 352.

525 (1965) 114 CLR 1 at 7. Likewise the reference to the obligation to ascertain the really essential features of the head of power. See *Union Label Case* (1908) 6 CLR 469 at 616 per Higgins J.

526 The references to the "true" nature and character and the "real" substance of the law in question appear in the reasons of Kitto J in *Fairfax* (1965) 114 CLR 1 at 7 (emphasis added).

decision-maker, approaching criteria expressed by reference to adjectival expressions such as "true", "real" or "in truth", will understand that he or she has reached the point where further verbal explanation is impossible. An opinion, in the nature of a judgment, must be provided. Legal analysis, expressed in words, can only go so far. To pretend otherwise is to succumb to the mesmerising effect of verbal formulae. It is to deny the inescapably personal judgment of the decision-maker in an illusory quest for an entirely scientific objectivity that does not exist in the task of legal characterisation.

475 This conclusion does not make the task at hand extra legal in its basic character. But it does demand recognition of the opinionative assessment that is ultimately involved in constitutional characterisation. Such assessments are matters upon which, inevitably, reasonable minds can differ. Of their nature, there will often be more than a single available answer. We do not extinguish such difference today by the cry of heresy[527]. To have heresy alleged by those who participated in the joint reasons of this Court in *Combet*[528] is an accusation to be borne with an easy heart.

476 In making the assessment, each decision-maker will view the matter to be assessed through a lens affected by experience and constitutional values as much as by the verbal elaborations contained in the past authority of this Court in more or less analogous cases. This is why it is important to make the process of decision-making on such questions as transparent as possible and not to pretend that it involves only the application of past judicial *dicta*. Such *dicta* may light the path. But the ultimate destination is taken by the judicial traveller who cannot escape the obligation of choice.

477 If, applying the foregoing approach, the impugned law may be characterised as one with respect to the nominated head of power, that is sufficient for the discharge of the judicial function. It is then no part of that function to deny constitutional validity because of a judge's doubts about the wisdom, justice or efficacy of the legislative choices[529]. Constitutional and legal values affect judicial choices; but, within the constitutional boundaries, political, economic and social choices in the text and design of legislation belong to the Parliament, which is answerable to the electors.

---

527 Joint reasons at [51].

528 (2005) 80 ALJR 247; 221 ALR 621.

529 *Leask v The Commonwealth* (1996) 187 CLR 579 at 602; *Grain Pool* (2000) 202 CLR 479 at 492 [16], 522-525 [111]-[118].

478 Although the principal objects of an Act are not decisive of its character, in this case, they are telling. The objects[530] make it clear that the law is addressed to the prevention and settlement of industrial "disputes", inherent in dealing comprehensively and generically with "workplace relations". The objects make no mention of "corporations", constitutional or otherwise. They are relevantly addressed to the relationship between employers and employees. So much is confirmed by the Act's key provisions, which are applied to "employers" and "employees"[531]. Those provisions directly impose terms and conditions on the employment relationship between affected "employers" and "employees"[532]; and modify the content of awards made by the AIRC regulating the terms and conditions of that relationship[533]. They regulate the payment of redundancy pay to affected employees[534], the manner in which collective agreements may be negotiated and entered into[535], and the content of those agreements[536]; and they substantially restrict the extent to which affected employees may engage in industrial action[537].

479 "The mere fact of mentioning corporations [in ss 5 and 6] does not necessarily make [the new Act] a law 'with respect to' – *on the subject of* – corporations."[538] The only connection between the Act's key provisions and ss 51(xx) of the Constitution is that they may have some impact on the rights, duties and obligations of corporations and their employees. Taken separately and in sum, the "rights, duties, powers and privileges" which the Act "changes, regulates or abolishes"[539] properly pertain to the prevention and settlement of

---

530 New Act, s 3.

531 Defined in ss 6 and 5.

532 Pts 7 and 12.

533 Pt 10 and Sched 8.

534 Pt 10, Div 2.

535 Pt 8.

536 Pt 8.

537 Pt 9; Sched 8, Pt 2, Div 7; s 400.

538 See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 410 per Higgins J (emphasis in original).

539 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7.

industrial disputes inherent in the comprehensive regulation of industrial relations[540]. Such is the proper characterisation of the new Act.

480 Nonetheless, the key operative provisions of the new Act are applied by reference to the employer as a constitutional corporation. The constitutional validity of the new Act depends on a sufficient connection with the corporations power. It must be established that the corporations power authorises any law directed to a corporation, regulating any interaction with it, or within it. In this respect, the intention of the Federal Parliament to circumvent the requirements of s 51(xxxv) by relying on a connection with s 51(xx) is irrelevant to the process of characterisation. However, if the new Act is to be characterised as a law with respect to s 51(xx), and not solely s 51(xxxv) as it appears to be in substance, the constitutional validity of that Act turns directly on the relationship between those two heads of power[541].

481 *The corporations power*: As the joint reasons demonstrate, this Court's explanation of the ambit of the corporations power, granted by s 51(xx), has changed, and effectively expanded, in the course of judicial authority decided over a century[542]. It would be contrary to my inclination, and in any case fruitless in these proceedings, to question such developments. I would accept the submission of Victoria, quoting from the *Concrete Pipes Case*[543], that it is unnecessary in these proceedings to determine "the full ambit of the power conferred by s 51(xx) or to state definitive tests or criteria by which in every case the question may be determined whether a law is or is not a law with respect to the topic described in that paragraph".

482 *The intersection issue*: What is, in my view, essential to the disposition of these proceedings is a decision on a narrower constitutional question. That question concerns the inter-relationship between s 51(xx) and s 51(xxxv). The issue posed by that inter-relationship may be stated in the alternative: Does the existence of par (xxxv) in s 51 limit the ambit and operation of par (xx), by restricting the availability of the latter to sustain a federal law? Or, is the content of par (xx) itself limited by any restriction upon laws with respect to industrial disputes inherent in giving true effect also to the provisions of par (xxxv)? In my

---

540 See further reasons of Callinan J at [789]-[799].

541 See further reasons of Callinan J at [799], [821]-[822], [834].

542 Joint reasons at [136]-[178].

543 (1971) 124 CLR 468 at 515 per Walsh J agreeing with Barwick CJ at 490-491 on this point. See also *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 182; *The Tasmanian Dam Case* (1983) 158 CLR 1 at 240-241, 316.

view, although the same result is achieved by either approach, the latter expresses the correct constitutional principle.

483 It follows that the content of s 51(xx) takes on a reduced scope from what it otherwise might have had if par (xxxv) had not appeared in the Constitution at all, indeed in the very same section within which each paragraph is to be read together with the others. A law can be validly made with respect to more than one head of power[544]. The fact that it might be characterised as a law with respect to some other subject matter(s) is irrelevant if it properly answers to the description of a law with respect to another subject matter designated in s 51. This will be so even if there is no independent connection between the two constitutional subject matters[545]. What is forbidden is the making of a law in reliance upon a specified subject matter (such as s 51(xx)) when that law is properly characterised as one *with respect to* another head of power (such as s 51(xxxv)) in circumstances where the latter power is afforded to the Federal Parliament "subject to a safeguard, restriction or qualification"[546].

The resulting central question

484 *Stating the issue*: It follows from the foregoing analysis that the central issue in these proceedings is not, as such, the reach of the corporations power, standing alone. For present purposes, it may be accepted, on the authority of this Court, that it is wide and comprehensive. Its exact contours and boundaries need not be defined in order to reach my orders in these proceedings.

485 The issue, rather, is to what extent the ambit of the corporations power is qualified (if at all) by the existence of the power to make laws with respect to industrial disputes, which is expressed as subject to identified restrictions. This issue is not solved by resorting to generalities, such as by saying that the corporations power, like that with respect to aliens (s 51(xix)), is a power to make laws by reference to identified (legal) persons[547]. Nor does it really help to describe the corporations power as "plenary". It certainly is not uncontrolled. It is confined by the words in which it is expressed, most significantly the word "formed"[548], and also by its appearance in the context of the grant of other

---

544 *Fontana* (1982) 150 CLR 169 at 192-194. See joint reasons at [51].

545 *Re F; Ex parte F* (1986) 161 CLR 376 at 388; *Grain Pool* (2000) 202 CLR 479 at 492 [16].

546 *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371 per Dixon CJ (Fullagar, Kitto and Taylor JJ agreeing at 373; Windeyer J agreeing at 377).

547 *Fontana* (1982) 150 CLR 169 at 181. See joint reasons at [163].

548 *The Incorporation Case* (1990) 169 CLR 482 at 497-498.

powers, some of them subject to express safeguards, restrictions and qualifications[549].

486 *The dicta in Pacific Coal*: The joint reasons[550] attach great significance to the remarks of Gaudron J in her reasons in *Pacific Coal*[551]. Her Honour is there quoted as expressing her belief as to the amplitude of the "power conferred by s 51(xx) of the Constitution", including with respect to the "regulation of the conduct of those through whom [the corporation] acts, its employees and shareholders". Three observations can be made on this passage, which the joint reasons say should be adopted by the Court as a correct "understanding of the power"[552].

487 First, in *Pacific Coal*, Gaudron J (along with McHugh J and myself) was in dissent. Her reasoning therefore forms no part of the *ratio decidendi* of that case. Secondly, the quotation from Gaudron J in the joint reasons omits the sentence that introduces the passage which the majority has now approved. That sentence makes it clear that Gaudron J was confining her remarks to the issue in hand, namely the constitutional validity under s 51(xx) of s 7A(1) of the *Workplace Relations Act* 1996 (Cth)[553]. In the omitted sentence, Gaudron J said[554]:

> "Even if s 7A(1) did apply in this case, item 50 in Pt 2 of Sch 5 could not, in my view, be characterised as a law with respect to constitutional corporations."

488 The fact that the approved passage was not intended by Gaudron J to be as unqualified as the words quoted in isolation might suggest is confirmed by the conclusion which her Honour reached, based on the invocation by the employer in that case of s 51(xx) to sustain the validity of the contested provision. Gaudron J actually rejected the conclusion that the provision could rely for its validity on s 51(xx). Thus, her Honour went on to explain why the paragraph was not available[555]:

---

549 Such as s 51(xiii), (xiv), (xxxi), (xxxiii), (xxxiv).

550 Joint reasons at [178].

551 (2000) 203 CLR 346 at 375 [83]. See joint reasons at [178].

552 Joint reasons at [177].

553 See *Pacific Coal* (2000) 203 CLR 346 at 354-355 [1]-[4], 374-375 [82]-[83].

554 (2000) 203 CLR 346 at 375 [83].

555 (2000) 203 CLR 346 at 375 [85].

> "The only connection between item 50 in Pt 2 of Sch 5 to the [*Workplace Relations and Other Legislation Amendment Act* 1996 (Cth)] and s 51(xx) of the Constitution is that it may have some effect on the rights and obligations of corporations and their employees. That is not sufficient to give s 3 of [that] Act, to the extent that it purports to give effect to item 50, the character of a law with respect to corporations."

This is therefore yet another instance of the oft-expressed danger of taking words (whether in a constitutional grant of power or in judicial elaborations of it) out of context[556].

489 Thirdly, no argument was addressed in *Pacific Coal* to the reconciliation of the powers granted by pars (xx) and (xxxv) of s 51 of the Constitution. In these proceedings, that argument is at the very centre of the matters for decision. Remarks made by a judge without regard to that argument are of limited utility in the present proceedings. They should not be inflated into a general principle to be endorsed by this Court.

Powers subject to safeguards, restrictions or qualifications

490 *The emerging question*: The resulting question can therefore now be stated. Is reading s 51(xx), so that it does not apply where the propounded law is truly one "with respect to" industrial disputes but without conforming to the safeguards, restrictions or qualifications contained in s 51(xxxv), inconsistent with the authority of this Court on the ambit of such powers? Would it, for example, cut across the principle of constitutional interpretation that each grant of power is to be construed with ample generality, despite the possibility of dual characterisation where another grant of power, on its own, might not sustain the validity of the challenged law[557]?

491 *Powers subject to restrictions*: Whilst the ample approach to the elucidation of the meaning of the several heads of legislative power in ss 51 and 52 of the Constitution is well settled, it is subject to a qualification that derives from the requirement to construe the Constitution as one coherent instrument of

---

556 See also the treatment of s 51(xx) in my reasons: *Pacific Coal* (2000) 203 CLR 346 at 446-448 [291]-[296].

557 *Herald and Weekly Times Ltd v The Commonwealth* (1966) 115 CLR 418 at 434; *Concrete Pipes Case* (1971) 124 CLR 468 at 512; *Russell v Russell* (1976) 134 CLR 495 at 539; *Fontana* (1982) 150 CLR 169 at 191-194; Zines, "Characterisation of Commonwealth Laws", in Lee and Winterton (eds), *Australian Constitutional Perspectives*, (1992) 33.

government[558]. Such an approach is really rudimentary. It derives not from implications external to the Constitution but from that document's text and structure. As Latham CJ explained in *Bank of NSW v The Commonwealth* ("the *Bank Nationalisation Case*")[559]:

> "[N]o single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament. Each provision of the Constitution should be regarded, not as operating independently, but as intended to be construed and applied in the light of other provisions of the Constitution. Thus an endeavour should be made to 'reconcile the respective powers … and give effect to all'".

492 In the same decision, Rich and Williams JJ said, to like effect[560]:

> "[There is] no reason why a Constitution, like any other statute or document, should not be subject to the general rule that every clause should be construed with reference to the context of the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute and to give a meaning if possible to every part thereof".

493 In fact, this approach has been consistently applied in at least two particular categories of constitutional interpretation. These are outlined below. The issue is whether, in these proceedings, the same principle applies, by analogy, in the intersection between s 51(xx) and (xxxv).

494 *Express exclusions from power*: The first category arises where the head of power in question contains an express exception from the subject matter that it states[561]. There are several paragraphs of s 51 that answer to this description. They include par (xxxii) with respect to the control of railways by the Commonwealth which is limited to "transport for … naval and military purposes"; and par (xxxiii) referring to the acquisition of any railways of a State but only "with the consent of [the] State" and "on terms arranged between the

---

558 *Bank of NSW v The Commonwealth* ("the *Bank Nationalisation Case*") (1948) 76 CLR 1 at 304; *Lamshed v Lake* (1958) 99 CLR 132 at 154.

559 (1948) 76 CLR 1 at 184-185.

560 (1948) 76 CLR 1 at 256-257.

561 Such a limitation need not be express; it may be "made manifest" by "necessary implication"; cf *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160; *Newcrest* (1997) 190 CLR 513 at 577.

Commonwealth and the State". Likewise, par (xxxiv) concerns railway construction and extension in any State but only "with the consent of that State". Obviously, the grant of power with respect to trading and financial corporations in par (xx) could not be given effect so as to ride roughshod over these restrictions.

495 Two further express provisions in s 51 make the point even more clearly, being pars (xiii) and (xiv), which empower the Federal Parliament to make laws respectively with respect to banking and insurance. In each such head of power State banking or insurance, as the case may be, is excluded from the designated subject of federal lawmaking but may yet be the subject of federal laws where such excluded activities "extend[] beyond the limits of the State concerned". These provisions were the subject of close examination by this Court in the *Bank Nationalisation Case*[562] and in several cases since.

496 In *Bourke v State Bank of New South Wales*[563], the relationship between the constitutional provision with respect to laws on "State banking" (s 51(xiii)) and the corporations power (s 51(xx)) received particular attention. The reasons of the entire Court, comprising Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, observed[564]:

> "In this context, some qualification must be made to the general principle that a law with respect to a subject-matter within Commonwealth power does not cease to be valid because it affects a subject outside power or can be characterized as a law with respect to a subject-matter outside power ... The principle cannot apply when the second subject-matter with respect to which the law can be characterized is not only outside power but is the subject of a positive *prohibition* or *restriction*. If a limitation is found to be of general application, then the fact that it is contained within one of the paragraphs of s 51 does not deny it a wider operation; the remaining paragraphs are then to be construed as being subject to the limitation".

497 The result of this analysis was that, in *Bourke*, this Court unanimously, and in a single opinion, accepted that the words of limitation in s 51(xiii) restricted what would otherwise, read entirely on its own, involve such an ample scope for s 51(xx) as to render the prohibition or restriction in par (xiii) nugatory.

---

562 (1948) 76 CLR 1 at 203-204 per Latham CJ, 256 per Rich and Williams JJ, 304 per Starke J, 330 per Dixon J.

563 (1990) 170 CLR 276.

564 (1990) 170 CLR 276 at 285 (emphasis added).

This Court held that the proper way to understand the limitation expressed in the latter paragraph was so that[565]:

> "the words of s 51(xiii) … require that, when the Commonwealth enacts a law which can be characterized as a law with respect to banking, that law does not touch or concern State banking, except to the extent that any interference with State banking is so incidental as not to affect the character of the law as one with respect to banking other than State banking".

498 Section 51(xx) refers expressly to "financial corporations formed within the limits of the Commonwealth". It also refers expressly to "foreign corporations". Giving those phrases an "ample" meaning, they would obviously include many, if not most (perhaps all), banking corporations operating in Australia. Certainly, that is what such banking corporations typically were in 1900, were also in 1990, and still are. Clearly, if those words are to be given the full and unrestricted ("plenary") approach which the Commonwealth urges to the entirety of the language of s 51(xx) of the Constitution, this would render the limitation on federal laws with respect to banking (and insurance), expressed in s 51(xiii) and (xiv), worthless. Parliamentary counsel would simply express the law in question as one with respect to "foreign corporations" and "financial corporations" and the law would, on this hypothesis, walk straight out of the restrictions that the Constitution imposes on the grant of power to make laws with respect to banking and insurance. This would be so despite the language of s 51(xiii). Because that could not possibly be the way to construe the Constitution, read as a whole, coherently and consistently, this Court has denied that possibility[566]. By analogy, the plaintiffs invoke a similar approach to the available federal legislative powers in issue in the present proceedings, namely pars (xx) and (xxxv) of s 51.

499 *Powers subject to a guarantee*: A second category where, to be made effective as obviously intended, a federal head of power has been read so as to diminish or confine what might otherwise seem to be the grant of plenary powers without restrictions, arises in the case where the constitutional text contains a specific provision with respect to a subject matter but limits the exercise of the power by reference to a constitutional guarantee, protective of the legal rights of those potentially affected by the federal law.

500 One such obvious case arises where the Federal Parliament is empowered to make laws with respect to the "acquisition of property … from any State or

---

565 (1990) 170 CLR 276 at 288-289.

566 *Bourke* (1990) 170 CLR 276 at 290-292.

person"[567]. In respect of this head of power, there is a restriction of the first type, already described. It limits the acquisition of property envisaged to acquisition of property "for any purpose in respect of which the Parliament has power to make laws". However, there is, as well, a second, express, restriction, stated by reference to a guarantee protective of the rights of persons who are subject to the exercise of the power. This is the guarantee that such acquisition must be "on just terms".

501 This second safeguard, restriction or qualification has been described as a "guarantee" in countless cases, since *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*)[568] and even before[569]. In the face of such a "constitutional guarantee", this Court has been unwilling to permit federal legislation to avoid the obligation of providing "just terms" by the simple expedient of nominating some other head of legislative power, or subject matter, as the source of the law's constitutional validity. In *Theophanous v Commonwealth*, Gleeson CJ explained the relationship between s 51(xxxi) and the other heads of federal legislative power in s 51 on this footing[570]:

> "The qualification to the power [in s 51(xxxi)], contained in the reference to just terms, protects rights of private property. Whatever arguments

---

567 Constitution, s 51(xxxi).

568 (1983) 158 CLR 1 at 282. In *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 48 [126] fn 149, the following authorities that also refer to s 51(xxxi) as a guarantee are cited by McHugh J: *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 168, 180, 184, 185; *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 241; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 277, 283, 285; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303, 312, 320; *Gambotto v Resolute Samantha Ltd* (1995) 69 ALJR 752 at 754; 131 ALR 263 at 266-267; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 534-535, 549-551, 551-552, 556-558; *Newcrest* (1997) 190 CLR 513 at 541-542, 560-561, 561-562, 565-566, 584-585, 589-590, 594-595, 600-601, 602-603, 604-605, 607, 610-611, 612-613, 613-614, 618-619, 652-653, 654-655. In *WMC* itself, see (1998) 194 CLR 1 at 15 [12], 27 [45], 34-35 [75]-[77], 69 [181], 73 [194], 90-92 [237], 93 [240], 99 [252]-[253], 100-101 [256]-[257], 102 [259]-[261].

569 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276, 284-285, cited in *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ.

570 (2006) 80 ALJR 886 at 888-889 [5]; 226 ALR 602 at 604 (emphasis added).

> there may be about the extent of that protection in various circumstances, the existence of the protection has been recognised as an 'implied guarantee', with significant consequences for an understanding of the relationship between par (xxxi) and the rest of s 51[571]. If par (xxxi) were intended to be no more than an express conferral of a power of acquisition that would otherwise be implicit in other paragraphs of s 51, then that would not explain the presence of the qualification. *It is an important limitation on power*."

502 In a number of cases, particular members of this Court have questioned the use of the language of "guarantee"[572]. They have preferred to describe s 51(xxxi) as the grant of a "power hedged with a qualification"[573]. For my own part, I am content with the description of the requirement of "just terms" as a "constitutional guarantee". Effectively, that is what it certainly is. But whatever the label, it is now established that the legislative powers existing in many of the other paragraphs of s 51, to authorise federal acquisitions, are subject to the "just terms" requirement in s 51(xxxi). No other interpretation of the interacting powers of the Federal Parliament would uphold the purpose of the Constitution, viewed as an entire, inter-related and coherent instrument. It is no answer, in such a case, for the Commonwealth to incant, as it does here, that this is merely another instance of "dual characterisation".

503 In *Nintendo Co Ltd v Centronics Systems Pty Ltd*[574], six Justices of this Court explained[575]:

> "It is well settled that s 51(xxxi)'s indirect operation to reduce the content of other grants of legislative power is through the medium of a rule of construction, namely, that 'it is in accordance with the soundest principles of interpretation to treat' the conferral of 'an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect' as inconsistent with 'any

---

571 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 189.

572 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 48 [126], 56 [145], 57-58 [149] per McHugh J; cf *Cheng v The Queen* (2000) 203 CLR 248 at 276-277 [77]-[78] per Gaudron J.

573 *The Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 48 [126] per McHugh J.

574 (1994) 181 CLR 134.

575 (1994) 181 CLR 134 at 160 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification'".

504 The principle of construction, cited in *Nintendo*, is taken directly from the reasons of Dixon CJ in *Attorney-General (Cth) v Schmidt*[576]. Three points must be noted about the oft-quoted passage in *Schmidt*. First, the principle stated is founded on a general rule of construction. It is not a consequence peculiar to constitutional interpretation, still less the language and purposes of s 51(xxxi). Secondly, the principle explained in *Schmidt* attracted the concurrence of four other Justices[577]. It has been repeatedly applied by this Court so that it is now to be regarded as "settled". Thirdly, as indicated, the principle is addressed not to a paragraph in s 51 expressed in terms of a "prohibition" but by reference to the existence in the paragraph of a "safeguard, restriction or qualification". That phrase connotes a provision that may not, as such, be expressed in prohibitive terms.

505 In the joint reasons in these proceedings, the majority endorses[578] a passage in the reasons of Gleeson CJ in *Pacific Coal*[579]. In those reasons, Gleeson CJ states that the constitutional limitation on doing indirectly what could not be done directly is confined to circumstances where the allegedly indirect activity is "prohibited directly". This criterion is then applied to s 51(xxxv) of the Constitution in its relation to s 51(xx). Because no express "prohibition" is found in s 51(xxxv), it is concluded that that paragraph affords no obstacle to an unbridled interpretation of the ambit of s 51(xx).

506 The majority in these proceedings may re-express the law to adopt a principle of construction different from that which this Court has earlier adopted and treated as settled[580]. Their Honours may, as they please, adopt a test of "prohibition" in deriving their conclusion about the Constitution's meaning in this case. However, they should at least do so acknowledging that they are altering the expression of the criterion stated by Dixon CJ in *Schmidt* and applied many times since. That criterion asks not whether the competing head of power (here s 51(xxxv)) contains a *prohibition* upon a law based on s 51(xx). As applied to

---

576 (1961) 105 CLR 361 at 371-372.

577 (1961) 105 CLR 361 at 373 per Fullagar, Kitto and Taylor JJ, 377 per Windeyer J.

578 Joint reasons at [228].

579 (2000) 203 CLR 346 at 359-360 [29].

580 Joint reasons at [228].

the facts of this case, it asks whether, if a law were enacted, reliant on s 51(xx), it would involve legislation "without the *safeguard, restriction or qualification*" on the propounded subject matter that must be included in order to conform to the constitutional requirements of s 51(xxxv).

507 If one asks a different constitutional question, one will often receive a different constitutional answer. I prefer to ask the constitutional question that is "well settled" in this Court[581]. I prefer not to substitute a new question, which has not hitherto been endorsed by the Court. Especially so where that question weakens the obligation to read the Constitution as a whole and carries the risk of enlarging federal power at the cost of safeguards, restrictions or qualifications contained in the constitutional text.

508 *The industrial disputes power*: Applying the established authority, can it be said, by analogy with the foregoing settled principles, that s 51(xxxv) of the Constitution contains a "safeguard, restriction or qualification" that results in a conclusion, in accordance with *Schmidt*, that a correct understanding of the ambit of the corporations power in s 51(xx) renders the latter more confined than would be the case if s 51(xxxv) did not exist? If so, as so confined, does the corporations power sustain the Act in question in these proceedings, as altered by the Amending Act?

509 There are further questions: Would such a conclusion be inconsistent with past decisions of this Court concerning the inter-relationship between s 51(xxxv) and other paragraphs contained in s 51? Does past authority support the proposition that s 51(xxxv) of the Constitution is not the only constitutional source for federal legislation that may be characterised as laws with respect to "industrial disputes", "industrial relations" or "workplace relations"? If so, can such other cases be explained and reconciled with the suggested consequences of the inter-relationship between s 51(xx) and (xxxv) argued in this case? Despite the apparently long-held assumptions, decisions and actions to the contrary, does the Amending Act afford this Court the opportunity to set the Federal Parliament free from the necessity to enact federal legislation on such topics, not by direct federal legislative prescription but only by the decisions of independent conciliators and arbitrators, acting in conjunction with the parties? Does s 51(xx) of the Constitution, even if surprisingly, sustain the legislation in question in these proceedings although it relies on such radically different constitutional underpinning from that hitherto accepted or assumed as necessary to support valid federal legislation with respect to such topics?

510 *Section 51(xxxv) is analogous*: In my opinion, s 51(xxxv) is analogous to other provisions in s 51 of the Constitution so that it attracts the settled rule of

---

581 *Nintendo* (1994) 181 CLR 134 at 160.

constitutional construction stated by this Court in *Schmidt*. The paragraph authorises federal legislation on industrial disputes but subject to the two "safeguards, restrictions or qualifications" already mentioned[582]. To be valid, such federal legislation must have the character of interstateness. It must also provide for the means of independent resolution, that is, resolving ultimate differences by the decision of an independent person or body in a process that answers to the description of "conciliation" or "arbitration". The Federal Parliament does not enjoy a more general power to make laws with respect to industrial disputes. It cannot do so by purporting to invoke another, less specific, head of power.

511 There is no concluded authority of the Court upon the foregoing particular propositions. However, in these proceedings the arguments were advanced in various ways[583]. It is therefore necessary for the first time to decide the issue. It was not necessary earlier. General observations deployed in earlier decisions are therefore of limited assistance.

512 For most of the last century, the invocation of s 51(xx) to support federal laws providing *directly* for what s 51(xxxv) requires to be done through conciliation and arbitration would have been treated as self-evidently erroneous. In this respect, the earlier conceptions as to the scope of s 51(xx) simply conform to the assumption inherent in the debates at the Constitutional Conventions that preceded the adoption of the Constitution. The assumption was that the particular heads of legislative power conferred on the Federal Parliament did not extend to, or include, a power to regulate the incidents and outcomes of industrial disputes (however expressed).

513 In particular, for most of the last century it would have been regarded as inconceivable that the power to make federal laws with respect to corporations, contained in s 51(xx), extended to sustain such direct federal legislation with respect to industrial disputes. To be valid, such legislation was to be brought within the hard-fought, and narrowly adopted, constitutional power provided in the limited terms of s 51(xxxv). It was a power added to the draft Constitution at a late stage in its gestation. Sir Joseph Abbott would, in my view, have spoken for virtually all of the delegates at the Convention when he said[584]:

---

582 cf these reasons at [430]; joint reasons at [230].

583 See especially the written submissions of Victoria at [62]-[100] and the AWU at [93]-[110]. See also the written submissions of New South Wales at [117]-[136] and South Australia at [45]-[48].

584 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 27 January 1898 at 198; cf at 203-204. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 646-647.

> "The Commonwealth may determine to leave the whole question to the states themselves to settle, but if this power is not given to the Commonwealth, in no instance can they [that is, the Commonwealth] interfere in a dispute, although they may be deeply interested in it."

514 The desires and expectations of the founders of the Constitution, and the understandings of earlier Justices, do not limit the response which this Court may give to the central issue now presented[585]. New times may give rise to new insights. But the considerations of history, purpose, envisaged institutions and outcomes over more than a century, not to say the Herculean labours of our predecessors in this Court over s 51(xxxv) which were otherwise effectively unnecessary, suggest that any construction of s 51(xx) must accommodate itself to the co-equal inclusion of a particular, and restricted, grant of power to the Federal Parliament to make laws with respect to industrial disputes. If this is correct, it is no more permissible to rely on s 51(xx) to make laws with respect to the industrial disputes of corporations, than it is to acquire the assets of a constitutional corporation for the purposes of the Commonwealth and then to argue that the "just terms" requirements of s 51(xxxi) can be ignored because of the ample, generous, even "plenary", legislative powers otherwise conferred on the federal lawmakers, including by s 51(xx).

515 It is not irrelevant that the legislative power conferred on the Federal Parliament by s 51(xxxv) appears amongst the powers granted towards the end of the list in s 51. Each of the immediately preceding legislative powers (s 51(xxxi), (xxxii), (xxxiii) and (xxxiv)) contains a grant of power subject to a "safeguard, restriction or qualification". As a matter of structure, therefore, it would not be surprising to view s 51(xxxv) in the same light. History, and the Convention debates, suggest the same conclusion.

516 Strong reservations were expressed at the Conventions about the idea (initially propounded by Mr Charles Kingston[586]) that *any* legislative power should be given to the new Federal Parliament to make laws with respect to industrial disputes. In the end, only by restricting the grant of power in the two ways stated (compliance with the necessity of interstateness and indirect, independent, decision-making) did the provision squeak through to find its place in par (xxxv) of s 51. Clearly, had those two requirements not been included, s 51(xxxv) would not have become part of the Constitution. Having become

---

585 *Grain Pool* (2000) 202 CLR 479 at 522-523 [111].

586 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 6 April 1891 at 780; Kirby, "Industrial Conciliation and Arbitration in Australia – A Centenary Reflection", (2004) 17 *Australian Journal of Labour Law* 229 at 232.

part, it is not historically or textually valid to treat the paragraph as no more than a grant of legislative power in respect of interstate disputes for which independent resolution by conciliation and arbitration is selected and provided in the law. That would be to turn the clearly intended *restrictions* on federal lawmaking into nothing more than an *optional feature* of a power of a confined kind that could be ignored by invoking other, unconfined, heads of power.

517 Neither history, nor text, support such an optional meaning for par (xxxv). The reading which the Commonwealth now urges would effectively render the head of power irrelevant. Indeed, this is evident in the major reconstruction of the Act, attempted by the Amending Act. Substantially, save for a few particular provisions, transitional and residual circumstances, the constitutional underpinning upon which the new Act relies is the corporations power. On this hypothesis, s 51(xx) has become a power to make laws with respect to the industrial disputes, industrial relations and workplace relations of constitutional corporations. Yet this is to ignore what s 51(xxxv) says. To confine s 51(xx) by reference to s 51(xxxv) involves no more than giving meaning to both paragraphs of the Constitution, paying due regard to the safeguards, restrictions or qualifications expressed in par (xxxv).

518 It is not an inappropriate choice of language to describe the preconditions for federal legislation with respect to "industrial disputes", contained in s 51(xxxv), as fitting within the tripartite expression described by Dixon CJ in *Schmidt*. Indeed, even if one were to confine the broad principle of constitutional construction stated in that decision to instances where the expressed elements of the grant of power constitute a constitutional "guarantee", the requirement that federal laws operate indirectly through independent resolution by way of conciliation and arbitration can, in my view, properly be described as a type of "guarantee". Both in its language, and in its history, this is how the power in par (xxxv) has been understood and has operated in Australia for more than a century.

519 *Section 51(xxxv) protects industrial fairness*: If the Federal Parliament can directly enact provisions that generically fall within the description of laws with respect to the subject of industrial disputes, such issues are likely to be decided by unilateral determination according to political, sectional or exclusively economic factors focused on the propounded subject of the power, namely the corporation, that is, the employer in the posited industrial dispute. They would not need to be decided by collective bargaining between the parties most immediately affected by the outcomes, taking into consideration the interests of those parties, the public interest, the ideal of "a fair go", due process,

transparent negotiations and, ultimately (where necessary), public disposition by an independent decision-maker, acting by conciliation or arbitration[587].

520 In the wake of the lessons learned from the widespread industrial strikes late in the nineteenth century, which evidenced 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. In fact, the procedure envisaged by s 51(xxxv) was aimed at "shap[ing] the political economy according to the national ethos of the fair go"[588].

521 Partly in consequence of the compromise reached on the grant to the Federal Parliament of such a restricted and qualified head of legislative power, the independent institutions of conciliation and arbitration became "the fulcrum of an industrial system evolved from societal and constitutional acknowledgement of the conflicting interests of participants and their collective organisations"[589]. I agree with the Hon Paul Munro, a longtime presidential member of the AIRC, who has written[590]:

> "The provision in the Constitution for the prevention and settlement of industrial disputes by conciliation and arbitration proceeds upon an egalitarian value and principle. Literally and by necessary implication, s 51(xxxv) of the Constitution connotes the existence and recognition of participants in disputes, including employers, employees and their

---

587 Munro, "Changes to the Australian Industrial Relations System: Reforms or Shattered Icons? An Insider's Assessment of the Probable Impact on Employers, Employees and Unions", (2006) 29 *University of New South Wales Law Journal* 128 at 161.

588 Macintyre, "Arbitration", in Davison, Hirst and Macintyre (eds), *The Oxford Companion to Australian History*, rev ed (2001) 30 at 31.

589 Munro, "Changes to the Australian Industrial Relations System: Reforms or Shattered Icons? An Insider's Assessment of the Probable Impact on Employers, Employees and Unions", (2006) 29 *University of New South Wales Law Journal* 128 at 135.

590 "Changes to the Australian Industrial Relations System: Reforms or Shattered Icons? An Insider's Assessment of the Probable Impact on Employers, Employees and Unions", (2006) 29 *University of New South Wales Law Journal* 128 at 135, citing Crisafulli, "Conciliation and Arbitration", in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001) 126 at 129.

> respective organisations within industries. By stipulating conciliation and arbitration, the Constitution ordained a relatively well-understood process and associated principles for dealing with the conflicting interests at stake. From that stipulation 'an industrial process that is uniquely Australian' has evolved."

522 In effect, the constitutional preconditions for valid federal laws with respect to industrial standards enforce a "safeguard, restriction or qualification" that obliges the persons affected, usually through representative organisations, to take responsibility for negotiating, settling or resolving their own disputes in a collective way. This was a much more decentralised procedure than a federal legislative *fiat* would be. By the facility of conciliation and through the procedures of arbitration, workplace agreements have come, in recent years, to play an increasing role. They have done so without removing the protective machinery of conciliation and arbitration which the Constitution contemplates[591].

523 Before a *quietus* is administered by this Court to these longstanding, basic and beneficial features of Australia's constitutional arrangements, reflected in past federal legislation adopted and amended by successive Parliaments and a mass of case law, it is necessary to recall to mind the important guarantee of industrial fairness and reasonableness that has been secured by this Court's adherence to the requirements of s 51(xxxv) over more than a century[592].

524 The story can be traced back at least to the decision of Higgins J in *Ex parte H V McKay* ("the *Harvester Case*")[593] which, with its successors, had a profound effect on the wages and conditions of life of Australian workers and their families. But it also extended to decisions concerning standard hours of

---

591 Crisafulli, "Conciliation and Arbitration", in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001) 126 at 129.

592 Kirby, "Industrial Conciliation and Arbitration in Australia – A Centenary Reflection", (2004) 17 *Australian Journal of Labour Law* 229, especially at 242-244.

593 (1907) 2 CAR 1. See also *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)* (1967) 118 CLR 219 at 231-232 per Barwick CJ, 265 per Windeyer J. Eventually the use of a general hearing for the purpose of deciding the basic wage received the sanction of this Court in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389. See also *R v Blackburn; Ex parte Transport Workers' Union of Australia* (1952) 86 CLR 75; McGarvie, "Principle and Practice in Commonwealth Industrial Arbitration After Sixty Years", (1964) 1 *Federal Law Review* 47 at 72-74.

work[594]; the development of the principle of equal pay for women workers[595]; fairness and training requirements in the conditions of juniors and apprentices[596] and the removal of discriminatory employment conditions for Aboriginals[597]. The regulation of excessive overtime to compensate workers[598] and to encourage employers to a better system of organising the work[599]; the introduction of bereavement or compassionate leave entitlements[600]; the introduction of provisions for retrenchment for redundancy[601]; and reinstatement in cases of unfair termination[602] are just some of the matters arising in industrial disputes in Australia decided by processes of federal conciliation and arbitration over the course of a century. Work value cases frequently ensured attention to the provision of fair wages and conditions to manual and other vulnerable workers

---

594 *Australian Timber Workers' Union v John Sharp and Sons Ltd* (1920) 14 CAR 811, (1921) 15 CAR 836 and (1922) 16 CAR 649; cf *Amalgamated Engineering Union v J Alderdice & Co Pty Ltd* (1927) 24 CAR 755; *Australian Railways Union v Victorian Railways Commissioners* (1937) 37 CAR 937 at 938; *R v Galvin; Ex parte Metal Trades Employers' Association* (1949) 77 CLR 432 at 447-448.

595 *National Wage Cases* (1967) 118 CAR 655 at 660. See *Equal Pay Cases* (1969) 127 CAR 1142; *National Wage and Equal Pay Cases* (1972) 147 CAR 172.

596 *Amalgamated Society of Engineers v Adelaide Steam-ship Co Ltd* (1921) 15 CAR 297 at 325; *Australian Telegraph and Telephone Construction and Maintenance Union v Public Service Commissioner and Postmaster-General* (1916) 10 CAR 602 at 613-614 per Higgins J; *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 34 CAR 449 at 459-462.

597 *Cattle Station Industry (Northern Territory) Award* (1966) 113 CAR 651; *Pastoral Industry Award* (1967) 121 CAR 454 at 457-458.

598 *Glass Workers Award* (1953) 76 CAR 122.

599 *Kennedy and Bird v Carpenters, Painters and Labourers employed by the Company* (1962) 100 CAR 524; *Metal Trades Award* (1963) 105 CAR 1015.

600 *Commonwealth Hostels Award* (1962) 100 CAR 775.

601 *Merchant Service Guild of Australia v Department of Main Roads, New South Wales* (1971) 140 CAR 875. But see *R v Hamilton Knight; Ex parte The Commonwealth Steamship Owners Association* (1952) 86 CLR 283.

602 O'Donovan, "Reinstatement of Dismissed Employees by the Australian Conciliation and Arbitration Commission; Jurisdiction and Practice", (1976) 50 *Australian Law Journal* 636; cf *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 at 548 [28]-[29].

which market forces and corporate decisions alone would probably not have secured[603]. Attention to particular conditions of work, including arduous, distressing, disagreeable, dirty or offensive work, instilled in Australian work standards an egalitarian principle not always present in the pure operation of the market[604] or the laws and practices of other countries.

525 The effect of this history, clearly anticipated by the language of the grant of constitutional power in s 51(xxxv), profoundly affected the conditions of employment, and hence of ordinary life, of millions of Australians. It did so in the years following federation, and indeed until very recently. Inherent in the guaranteed procedures of "conciliation and arbitration" was a safeguard, restriction or qualification upon the deployment of federal governmental power that ultimately committed outcomes to determinations by independent decision-makers who were obliged to take into account not only economic considerations but also considerations of fairness and reasonableness to all concerned and the consistent application of the principles of industrial relations in Australia. It is in this sense that the obligatory constitutional procedures involved in federal lawmaking with respect to industrial disputes imposed a "guarantee" for employer and employee alike: that their respective arguments would be considered and given due weight in a just and transparent process, decided in a public procedure that could be subjected to appeal and review, reasoned criticism and continuous evolution.

526 *The different character of s 51(xx)*: Laws made solely by reference to the characteristics inherent in a constitutional corporation are not, of their nature, equally subject to the "safeguard, restriction or qualification" of a commitment to industrial fairness and reasonableness[605]. If the Commonwealth's submissions are correct, there is therefore no equal "guarantee" either inherent in the power provided by s 51(xx) or necessary to the operation upon the boundaries of that power of the more specific provisions contained in s 51(xxxv).

527 Professor Ronald McCallum has argued that "laws based upon the corporations power [alone] will be centred around corporations to the detriment

---

603 See, eg, *Metal Trades Award* (*re Work Value Inquiry*) (1967) 121 CAR 587; *Vehicle Industry Award* (1968) 124 CAR 293 at 308.

604 *Waterside Workers Federation v Commonwealth Steamship Owners Association* (1915) 9 CAR 293 at 302-303; *Amalgamated Society of Engineers v Broken Hill Proprietary Co Ltd* (1920) 14 CAR 22.

605 McCallum, "The Australian Constitution and the Shaping of our Federal and State Labour Laws", (2005) 10 *Deakin Law Review* 460 at 469.

of flesh and blood persons who interact with corporations"[606]. In the context of considering the outcome of these proceedings, if the Commonwealth's submissions were to prevail, he observed[607]:

> "[G]eneral 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 [the] 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."

528 If the Commonwealth's submissions are correct, and the relevantly uncontrolled federal law-making power exists in s 51(xx) of the Constitution, any such consequences must be left to the future. However, in deciding how the federal legislative powers, specifically s 51(xx) and (xxxv), operate in relation to each other, it is relevant for this Court to be aware of the constitutional values that are at stake in this decision. Those values, inherent in s 51(xxxv), have pervaded the outcomes of industrial disputes in Australia for more than a century. They have done so in respect of the majority of employees who, since 1901, have become subject to awards and agreements under federal law.

529 This Court has contributed to, and generally upheld, the industrial fairness guarantee by its decisions on the ambit of the federal power with respect to industrial disputes. Its contribution grew out of the understandings expressed by the participants at the Constitutional Conventions, the language of the constitutional text and the long-held and often expressed assumption that the only way federal laws on industrial relations could be enacted was if they conformed to the dual requirements of interstateness and independent resolution by conciliation and arbitration.

530 In my view, the long-held and shared assumptions, given effect by this Court, involved a correct view of the grant of legislative power in this respect to the Federal Parliament. The applicable grant of power imported a safeguard, restriction or qualification protective of all those involved in collective industrial

---

606 McCallum, "The Australian Constitution and the Shaping of our Federal and State Labour Laws", (2005) 10 *Deakin Law Review* 460 at 469. Professor McCallum is Dean of the Faculty of Law at the University of Sydney and a noted expert in the Australian law of industrial relations.

607 McCallum, "The Australian Constitution and the Shaping of our Federal and State Labour Laws", (2005) 10 *Deakin Law Review* 460 at 469.

bargaining: employer and worker alike. It provided an ultimate constitutional guarantee of fairness and reasonableness in the operation of any federal law with respect to industrial disputes, including for the economically weak and vulnerable. It afforded machinery that was specific to the concerns of the parties, relatively decentralised in operation and focused on the public interest in a way that laws with respect to constitutional corporations made in the Federal Parliament need not be. These values profoundly influenced the nature and aspirations of Australian society, deriving as they did from a deep-seated constitutional prescription. They should not be swept aside lightly by this Court. Doing so would renounce an important part of the nation's institutional history and the egalitarian and idealistic values that such history has reinforced in the field of industrial disputes and employment standards because of the constitutional prescription.

531 *Conclusion: statutory invalidity*: Subject to what follows, I therefore consider that this Court should adhere to the conclusion inherent in the hundreds of earlier cases over more than a century in which the Court has held or implied that, whatever the expanding content of the corporations power in s 51(xx) might otherwise permit, it does not sustain a law which, properly characterised, is one "with respect to" the subject matter of s 51(xxxv), that is, the prevention and settlement of interstate industrial disputes. This new Act is such a law. It does not comply comprehensively with the dual requirements laid down in s 51(xxxv) for laws with respect to that subject. That conclusion presents the issue of its constitutional invalidity[608].

The relevance of the Constitution's federal character

532 *The federal structure*: An additional consideration supporting the foregoing approach should be mentioned. I refer to the federal structure and character of the Constitution and the support that this consideration provides to "subtracting" from the powers of the Federal Parliament to make a law with respect to corporations what is in truth a claim to an entitlement, under that guise, to enact a comprehensive law with respect to the prevention and settlement of industrial disputes but without observing the restrictions proper to that constitutional subject matter[609].

---

608 See also reasons of Callinan J at [834].

609 *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 283 per Deane and Gaudron JJ, who stated that "to the extent that s 51(xxxi) confers legislative power, it also abstracts power with respect to the acquisition of property from the other paragraphs of s 51". This formula was approved by this Court in *Theophanous v Commonwealth* (2006) 80 ALJR 886 at 896 [55]; 226 ALR 602 at 614.

533 The majority's reasons in these proceedings potentially cut a swathe through a very important feature of the constitutional design, expressed in s 51(xxxv), protective of diversity in the legal regulation of matters broadly answering to the description of industrial relations.

534 From before the commencement of the Constitution and during the first century of its operation, federal regulation of industrial relations in Australia co-existed with various forms of State (and later Territory) laws. The resulting diversity of legal regulation has permitted a legal and administrative symbiosis. It has resulted in occasional diversity of approach, inventiveness in standards and entitlements and appropriate innovation. Such innovation, by which industrial standards determined in one jurisdiction of Australia are tested and sometimes copied in another, constitutes a good illustration of an important advantage of the federal form of government enshrined in the Constitution.

535 When it comes to defending the rights of property owners from the purported deployment of other federal powers which would deprive them of the protections in s 51(xxxi) of the Constitution, this Court has been rightly protective[610]. Within the Constitution, it has been vigilant, even sometimes vigorous, in upholding the entitlement of State lawmakers to experiment and innovate[611]. Unfortunately, in recent times, this Court's willingness to do so has been missing in the field of laws on industrial disputes[612]. When it comes to defending employees from analogous legislative incursions into the protections provided to *their* rights by s 51(xxxv), the Court's vigilance wanes noticeably, as it has in this case. Both capital and labour deserve the even-handed protection that the Constitution provides in the language respectively of s 51(xxxi) and (xxxv). There should be no double standards in constitutional protection. Yet, once again, it is revealed that double standards exist.

536 *Avoiding offence to the Engineers Case*: The joint reasons hint that the concerns of the States, expressed in these proceedings, about the federal

---

610 *Schmidt* (1961) 105 CLR 361 at 371-373; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 283.

611 See, eg, *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519; 210 ALR 50; *Baker v The Queen* (2004) 78 ALJR 1483; 210 ALR 1; *Forge v Australian Securities and Investments Commission* (2006) 229 ALR 223.

612 See, eg, *Fish v Solution 6 Holdings Ltd* (2006) 80 ALJR 959; 227 ALR 241; *Batterham v QSR Ltd* (2006) 80 ALJR 995; 227 ALR 212; *Old UGC Inc v Industrial Relations Commission of New South Wales in Court Session* (2006) 80 ALJR 1018; 227 ALR 190.

implications of the Commonwealth's submissions as to the ambit of s 51(xx), amount to an illicit attempt to undermine the doctrine of this Court as stated in the *Engineers Case*[613]. It is true that that decision has been criticised in recent years as inflicting a "debilitating blow to federalism"[614]. But none of the plaintiffs, whether States or unions, challenged the general approach stated in the *Engineers Case*. None of them asserted reserved powers for the States or an implied immunity of new pockets of State law from federal legislative incursion.

537 *Ambit of s 51(xx) and the States*: Nevertheless, the plaintiffs did draw to notice the extremely large potential of the Commonwealth's submissions, if accepted, to exclude State law from operation in areas that for more than a century they have occupied in a hitherto creative interaction with federal law[615]. If, by the use of definition provisions, as in the Amending Act, comprehensive federal legislation that is really a law with respect to another subject matter (such as the prevention and settlement of industrial disputes and how they are to be resolved) may be dressed in the raiments of legislation with respect to constitutional corporations, a very significant risk is presented to the overall balance envisaged by the constitutional distribution of powers. That risk, in the field of resolving industrial disputes, is the almost total exclusion of State law from a significance it has enjoyed from the birth of the Commonwealth.

538 Indeed, such exclusion is the announced intention of the Amending Act whose ambit, if valid, is proclaimed to extend immediately to an asserted 85% of Australian employees[616]. Moreover, if the Amending Act is valid, it affords non-corporate employers, at their option, an entitlement (by the relatively simple and inexpensive procedure of incorporation) unilaterally to alter the industrial disputes regime applying to themselves and all of their employees.

---

613 Joint reasons at [82].

614 Meale, "The History of the Federal Idea in Australian Constitutional Jurisprudence: A Reappraisal", (1992) 8 *Australian Journal of Law and Society* 25 at 55. See also Gibbs, "Australia Day Messages, 2001-2005", in Samuel Griffith Society, *Upholding the Australian Constitution*, vol 17 (2005) 363 at 366, 386-387.

615 Munro, "Changes to the Australian Industrial Relations System: Reforms or Shattered Icons? An Insider's Assessment of the Probable Impact on Employers, Employees and Unions", (2006) 29 *University of New South Wales Law Journal* 128 at 159.

616 Australian Parliament, Explanatory Memorandum circulated with the Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) at 9-10. See joint reasons at [45].

539 The States, correctly in my view, pointed to the potential of the Commonwealth's argument, if upheld, radically to reduce the application of State laws in many fields that, for more than a century, have been the subject of the States' principal governmental activities. Such fields include education, where universities, tertiary colleges and a lately expanding cohort of private schools and colleges are already, or may easily become, incorporated. Likewise, in healthcare, where hospitals (public and private), clinics, hospices, pathology providers and medical practices are, or may readily become, incorporated. Similarly, with the privatisation and out-sourcing of activities formerly conducted by State governments, departments or statutory authorities, through corporatised bodies now providing services in town planning, security and protective activities, local transport, energy, environmental protection, aged and disability services, land and water conservation, agricultural activities, corrective services, gaming and racing, sport and recreation services, fisheries and many Aboriginal activities. All of the foregoing fields of regulation might potentially be changed, in whole or in part, from their traditional place as subjects of State law and regulation, to federal legal regulation, through the propounded ambit of the corporations power.

540 Upon the Commonwealth's theory of s 51(xx) of the Constitution, evident in the Amending Act in issue in these proceedings, such a shift of lawmaking in Australia could be achieved by the simple enactment by the Federal Parliament of a law dealing with any of the foregoing subjects but applied to corporations performing functions relevant in some way to such fields. The Amending Act provides the new federal template. This Court cannot complain that it was not warned by the States of the constitutional implications of these proceedings for a major shift in the balance of governmental power in Australia. Not all the foregoing fields of legislation are subject to a countervailing "safeguard, guarantee or qualification" appearing expressly in another head of constitutional power as a brake on such constitutional destabilisation. But where such a brake exists, there is good constitutional reason for engaging it.

541 *Testing propositions by outcomes*: It is not appropriate, as the joint reasons suggest, to postpone all such questions to future cases. It is always valid to test a legal proposition by reference to the consequences that would flow from its acceptance. Such an approach applies as much in constitutional adjudication as to decision-making on anything else. It would not normally be assumed that such a potentially radical shift of governmental responsibilities from the States to the Commonwealth could be achieved by the expedient of utilising a federal head of power (s 51(xx)) which successive Federal Parliaments and governments have overlooked or misread these past hundred years. In the design of the Constitution, such a major shift would normally require the concurrence of Australian electors in accordance with s 128 of the Constitution – as successive governments have accepted or assumed.

542 Therefore, when such a radical proposition, of such substantial constitutional potential, is advanced before this Court, this Court should test its correctness by its possible consequences. In my view, the use of s 51(xx) exhibited in the Amending Act carries with it, if valid, a very large risk of destabilising the federal character of the Australian Constitution. When such a conclusion is reached, only a formulaic approach to the law of the Constitution would lead this Court to ignore it[617].

543 In effect, the risk to which I refer is presented by a shift in constitutional realities from the present mixed federal arrangements to a kind of optional or "opportunistic" federalism in which the Federal Parliament may enact laws in almost every sphere of what has hitherto been a State field of lawmaking by the simple expedient (as in this case) of enacting a law on the chosen subject matter whilst applying it to corporations, their officers, agents, representatives, employees, consumers, contractors, providers and others having some postulated connection with the corporation.

544 The present majority of this Court may uphold such a radical shift in the constitutional arrangements of the nation. But it should at least do so with eyes open to the results of its reasoning. Even those, like myself, who accept the need to which Windeyer J referred in the *Payroll Tax Case*[618] for gradual accretions of some legislative powers to the Commonwealth to reflect "developments that had occurred outside the law courts"[619], must baulk at the dysfunctional potential of the Commonwealth's central proposition in these proceedings. It is that potential that demands from this Court, which is the guardian of the Constitution[620], a response protective of the text and structure of the document. If this Court does not fulfil its protective role under the Constitution, what other governmental institution will do so? What other institution has the power and the will to do so?

545 *Confining the federal issue*: The larger issues involved in delimiting the scope of the corporations power (and in identifying the full range of laws that could be characterised as laws "with respect to" constitutional corporations) can indeed be postponed to future cases that will now surely follow the outcome of

---

617 *Fontana* (1982) 150 CLR 169 at 181-182; *Austin v The Commonwealth* (2003) 215 CLR 185; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595; Craven, "Industrial Relations, the Constitution and Federalism: Facing the Avalanche", (2006) 29 *University of New South Wales Law Journal* 203 at 213.

618 (1971) 122 CLR 353 at 396-397.

619 (1971) 122 CLR 353 at 396.

620 *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 118 per Barwick CJ.

these proceedings. Where, as here, the entire scheme of the law in question, including the "rights, duties, powers and privileges which it changes, regulates or abolishes"[621], requires it to be characterised in such a way that it corresponds to s 51(xxxv), rather than s 51(xx), the precise ambit of the corporations power need not be determined. As explained, the Act is concerned with the relations between employers and employees, a fact which confirms its general character as a law with respect to the prevention and settlement of "industrial disputes" and the associated regulation of "industrial" or "workplace" relations.

546 In the present proceedings it is sufficient to say that the content of the power afforded to the Federal Parliament under s 51(xx), with respect to the corporations defined in that paragraph, does not extend to a power to make laws that, in truth, relate to industrial disputes. As the majority suggests[622], it is necessary to give effect to certain basic principles of constitutional interpretation, including the requirement that each provision of the Constitution, including the powers contained in s 51, be read in light of the remaining provisions, and any implications drawn from the document's overall structure and design. In short, the limitations suggested by the text of the two paragraphs in question, read together (pars (xx) and (xxxv)), are reinforced by the overall federal structure and design of the Australian Constitution, and by the offence to that structure and design that would be inflicted by a failure on the part of this Court to uphold the limitation imported into the legislative power afforded by par (xx) of s 51 by the power conferred in par (xxxv).

547 Yet is this approach to the interaction of the two paragraphs, suggested by the language of the powers and the federal character of the Constitution, as claimed, an unacknowledged reversion to the constitutional notions that held sway before this Court's decision in the *Engineers Case*? The Commonwealth says so. I would reject that description.

548 The rule of construction expressed in the *Engineers Case* is not an absolute one. It does not contemplate that the Federal Parliament could use its identified heads of legislative power to destroy the States and their express and implied role in the Constitution. It is impossible to ignore the place envisaged for the States in the Constitution. Reference is made to that role throughout the constitutional document. It is the people of the several States who "agreed to unite in one indissoluble Federal Commonwealth"[623]. Both in the covering clauses and in the text of the Constitution itself, the federal character of the polity thereby created is announced, and provided for, in great detail.

---

621 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7 per Kitto J.

622 Joint reasons at [51].

623 Preamble to the *Commonwealth of Australia Constitution Act* 1900 (Imp).

549 Under the Constitution, the position of the federal government is necessarily stronger than that of the States for the reasons that Dixon J explained in *Melbourne Corporation v The Commonwealth*[624]. But it would be completely contrary to the text, structure and design of the Constitution for the States to be reduced, in effect, to service agencies of the Commonwealth, by a sleight of hand deployed in the interpretation by this Court of specified legislative powers of the Federal Parliament. Specifically, this could not be done by the deployment of a near universal power to regulate the "corporations" mentioned in s 51(xx). Such an outcome would be so alien to the place envisaged for the States by the Constitution that the rational mind will reject it as lying outside the true construction of the constitutional provisions, read as a whole, as they were intended to operate in harmony with one another and consistently with a basic law that creates a federal system of government for Australia.

550 In applying the doctrine in the *Engineers Case*, this Court has repeatedly given effect to reasoning that has confined the ambit of express grants of federal legislative power so that they could not be used to control or hinder the States in the execution of their central governmental functions[625]. Once such an inhibition on the scope of federal legislative powers is acknowledged, derived from nothing more than the implied purpose of the Constitution that the States should continue to operate as effective governmental entities, similar reasoning sustains the inference that repels the expansion of a particular head of power (here, s 51(xx)) so that it would swamp a huge and undifferentiated field of State lawmaking, the continued existence of which is postulated by the constitutional language and structure. Why, for instance, bother to have State Parliaments[626], with significant federal functions to perform[627], if by dint of an interpretation of s 51(xx) of the Constitution the legislative powers of such Parliaments could effectively be reduced unilaterally by federal law to minor, or even trivial and continually disappearing functions, specifically in the laws governing industrial disputes? Relatively few important activities in contemporary Australia have no direct or indirect connection with a corporation, its employees, agents and those who trade with it.

551 In other concerns, arguably less central to the expressed structure and design of the Constitution, this Court has found implications in the Constitution to inhibit the enactment of laws deemed inconsistent with its federal structure

---

624 (1947) 74 CLR 31 at 82-83, cited in joint reasons at [195].

625 *Melbourne Corporation* (1947) 74 CLR 31. See also *Austin* (2003) 215 CLR 185.

626 eg Constitution, ss 9, 15, 25, 41, 107.

627 eg Constitution, ss 9, 41, 51(xxvii) and (xxxviii), 107, 108, 111, 123.

and design. Thus, federal laws may not be enacted that are inconsistent with the separation of the judicial power provided by Ch III of the Constitution[628]. State laws cannot be validly enacted that would be incompatible with the capacity of State courts under s 77(iii) to be invested with federal jurisdiction[629]. Neither federal nor State laws may be enacted that are inconsistent with the implication, inherent in the creation of accountable democracy in the federal and State legislatures, of representative government necessitating open discussion of matters of political and governmental concern[630].

552 If, consistently with the decision in the *Engineers Case*, such inhibitions on lawmaking may be drawn from the design and structure of the Constitution, its provisions and purposes, so may the limitations on the ambit of s 51(xx), urged by the plaintiffs in these proceedings. The test for all such implications is necessity. Here, necessity is established because, if s 51(xx) is not construed and limited as the plaintiffs submit, the ambit and operation of that paragraph is potentially distorted and blown out of all proportion.

553 Moreover, relevantly to these proceedings, the ambit and operation of s 51(xxxv), with the safeguards, restrictions and qualifications that it contains, would then be rendered nugatory or optional to the federal lawmaker. The Federal Parliament can choose whether or not to invoke par (xxxv) with its limiting dual requirements. But why should it ever have cause to do so if the majority's view in this case is correct? On the majority's approach, the Federal Parliament can always achieve the desired outcome by the simple expedient of presenting the law as one with respect to constitutional corporations. If it may thereby walk straight out of the tiresome necessities of interstateness and independent determination of disputes according to standards of fairness and reasonableness, why would it not always take that course?

554 *Division of governmental powers*: The foregoing conclusion has been reached by reference to the text and structure of the Constitution. However, there is a still further, and connected, consideration. This is the overall design of the Constitution as an instrument of government intended to distribute and limit governmental powers in Australia in specified ways. By the Constitution, such powers are to be divided between the several polities in the Commonwealth (the federal, State and Territory jurisdictions). Moreover, within each jurisdiction,

---

628 *Boilermakers Case* (1956) 94 CLR 254. See also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

629 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

630 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

most especially within the federal sphere of government, there is an express or implied division of powers, to a greater or lesser extent, between the legislatures, executive governments and courts of the nation.

555 No doubt, viewed strictly from an economic perspective, such features of the Australian constitutional design may sometimes result in inefficiencies. Doubtless, they import certain costs, delays and occasional frustrations. Yet such divisions and limitations upon governmental powers have been deliberately chosen in the Commonwealth of Australia because of the common experience of humanity that the concentration of governmental (and other) power is often inimical to the attainment of human freedom and happiness[631].

556 Defending the checks and balances of governmental powers in the Constitution is thus a central duty of this Court. Because of the potential of modern government, corporate developments[632], global forces and contemporary technology to concentrate power even more than was possible in earlier decades, the necessity to uphold the place of the States in the federation has become clearer in recent times. Just as the needs of earlier times in the history of the Commonwealth produced the *Engineers Case*, so the present age suggests a need to rediscover the essential federal character of the Australian Commonwealth[633]. In these proceedings, this consideration lends support and justification to the unanimous resistance of the States to the Commonwealth's interpretation of s 51(xx), particularly when read with s 51(xxxv).

557 *Conclusion: respecting federalism*: The States' argument can be upheld without doubting the validity of the general approach to the interpretation of the Constitution adopted by this Court in the *Engineers Case*. As countless cases since the *Engineers Case* have shown, in giving content to the particular heads of federal power, it still remains for this Court to explain the content of the *Engineers Case*, paying due regard to all other relevant heads of federal power and to the overall structure and design of the Constitution.

558 Thus, the language of s 51(xxxv) and the basic federal character of the Constitution lend support to the plaintiffs' central submission. This Court needs to give respect to the federal character of the Constitution, for it is a

---

631 cf *XYZ v Commonwealth* (2006) 80 ALJR 1036 at 1068 [147]; 227 ALR 495 at 535.

632 McCallum, "The Australian Constitution and the Shaping of our Federal and State Labour Laws", (2005) 10 *Deakin Law Review* 460 at 467-469.

633 *Forge* (2006) 229 ALR 223 at 276 [184]-[185].

liberty-enhancing feature[634]. Federalism is a system of government of special value and relevance in contemporary circumstances. It is protective of the freedom of individuals in an age when the pressures of law, economics and technology tend to pull in the opposite direction.

559 If, properly characterised, the Amending Act is one with respect to the prevention and settlement of industrial disputes necessary for the regulation of industrial relations, s 51(xx) will not sustain its constitutional validity. To be valid, the law must conform to the requirements of s 51(xxxv). And this the Amending Act fails to do.

Is the conclusion consistent with past authority?

560 *A further issue*: The Commonwealth nonetheless submitted that to read s 51(xx) as subject to the provisions of s 51(xxxv) would be inconsistent with a number of decisions of this Court in cases involving analogous questions arising under federal laws with respect to industrial relations, broadly so described. Specifically, the Commonwealth argued that it would be inconsistent with decisions sustaining such laws by reference to the federal legislative powers with respect to defence (s 51(vi)), external affairs (s 51(xxix)) and trade and commerce (s 51(i)).

561 Even if it were shown that past authority in this Court presented difficulties for the plaintiffs' arguments based on the inter-relationship between pars (xx) and (xxxv) of s 51, this would not necessarily be fatal to the plaintiffs' constitutional proposition. This is the first occasion on which the intersection of these two paragraphs of the Constitution has been explored in detailed argument before this Court by parties specifically presenting that issue as determinative of the outcome of their contest. Where a new legal proposition is advanced, involving suggested new insights into the Constitution, it is not unusual for that course to require this Court to rethink earlier case law and to apply the new doctrine consistently[635]. In proceedings such as this, where the potential of s 51(xx) to tilt the constitutional balance in such a significant way is not only postulated as an idea but actually asserted by the Commonwealth and illustrated by the Amending Act itself, it would not be surprising if this Court were obliged to reconsider earlier decisions reached in the absence of argument that sharpened

---

634 *XYZ* (2006) 80 ALJR 1036 at 1061-1062 [110]-[112], [115], 1068 [147]; 227 ALR 495 at 525-526, 535.

635 As following the decisions in the *Engineers Case* (1920) 28 CLR 129; *Boilermakers Case* (1956) 94 CLR 254; *Cole v Whitfield* (1988) 165 CLR 360; *Kable* (1996) 189 CLR 51; *Lange* (1997) 189 CLR 520; and, temporarily, *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

the resolution of the issue. Indeed, it would be surprising if the contrary were the case.

562 *The defence power*: In the joint reasons, reliance is placed upon this Court's wartime decision in *Pidoto v Victoria*[636]. Reference is made to the interpretation of that case by Gleeson CJ in *Pacific Coal*[637]. In that decision, his Honour stated that *Pidoto* denied an interpretation of s 51(xxxv) as importing a negative implication on the use of other heads of federal power to enact laws with respect to conditions of employment – in other words, laws generically answering to the description of laws with respect to industrial relations. The holding in *Pidoto* was that laws enacted under the defence power in time of war, dealing with industrial matters in ways that would not have been valid if enacted under s 51(xxxv), were nonetheless valid. The decision is one unique to the exceptional circumstances affecting the ambit of the defence power during hostilities that threaten the life of the nation.

563 In his reasons in *Pidoto*[638], Williams J referred to an earlier elaboration of the law in *Victorian Chamber of Manufactures v The Commonwealth (Women's Employment Regulations)*[639]. In that decision, his Honour had said of the defence power in this connection:

> "The paramount consideration is that the Commonwealth is undergoing the dangers of a world war, and that when a nation is in peril, applying the maxim *salus populi suprema lex*, the courts must concede to the Parliament and to the Executive which it controls a wide latitude to determine what legislation is required to protect the safety of the realm …
>
> Similar circumstances to those which in times of war enable the Parliament of Canada to encroach upon matters which in normal times are exclusively reserved to the States [sic] enlarge the operation of the defence power of the Commonwealth Parliament to enable it to legislate so as to affect rights which in normal times are within the domain reserved to the States".

564 The reference in these passages to "reserved to the States" is not a reference to the pre-*Engineers Case* doctrine of reserved State powers. Williams J would have been fully aware of the decision in the *Engineers Case*.

---

636 (1943) 68 CLR 87. See joint reasons at [227]-[228].

637 (2000) 203 CLR 346 at 359-360 [29].

638 (1943) 68 CLR 87 at 127-128.

639 (1943) 67 CLR 347 at 400-401.

His reference should therefore be understood as meaning that, in times of war, the defence power may permit the Federal Parliament to legislate on matters, and in ways, that are ordinarily forbidden as beyond federal legislative power[640], and which would in fact be beyond the scope of the defence power during peacetime[641]. Whilst, in war, the defence power is not wholly unlimited or uncontrolled[642] (being itself granted to the Federal Parliament "subject to this Constitution") it is necessarily very substantial. This is so because of the essential function and purpose of s 51(vi), derived both from its language and manifest object. So exceptional is the wartime defence power that the constitutional validity of a law made under it has been held capable of being "made to depend upon the opinion of the parliament, the government or any other person"[643].

565 In *Pidoto*, drawing on his earlier analysis, Williams J said[644]:

> "It follows from [*Victorian Chamber of Manufactures*] that the fact that there is an express power to legislate under placitum xxxv with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State does not deprive the Commonwealth Parliament of its power under placitum vi to legislate with

---

640 See *Farey v Burvett* (1916) 21 CLR 433 at 444, 456, 460, 468; *South Australia v The Commonwealth* (1942) 65 CLR 373 at 468.

641 Including cases where a court determines that the purported "emergency" is not grave enough to justify the expanded operation of the defence power, as in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

642 For example, legislation purportedly made under the defence power may still be subject to judicial review. "Even in wartime ... it must be for a court to determine the relevance of legislation to the object of defence": Zines, *The High Court and the Constitution*, 4th ed (1997) at 222, citing *Reid v Sinderberry* (1944) 68 CLR 504 at 511; *Marcus Clark & Co Ltd v The Commonwealth* (1952) 87 CLR 177 at 256.

643 Zines, *The High Court and the Constitution*, 4th ed (1997) at 221, citing the *Communist Party Case*. This position is to be contrasted with that pertaining to all other constitutional powers, as Fullagar J explained in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 258: "A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse."

644 (1943) 68 CLR 87 at 127.

> respect to intra-State disputes where that legislation can be justified as legislation capable of aiding in the prosecution of the war."[645]

566 This conclusion is inherent in the longstanding doctrine of this Court that the defence power, provided to the Federal Parliament in s 51(vi) of the Constitution, expands and contracts in its content, having regard to the needs for its engagement[646].

567 In his reasons in *Pidoto*, invoked by the majority in these proceedings[647] in support of an ambit of s 51(vi) uncontrolled by reference to s 51(xxxv), Latham CJ relied on the longstanding power of the Commonwealth to legislate with respect to the employment of its public service[648]. He put that instance forward as a supposed illustration of the inapplicability of par (xxxv) of s 51 to limit the meaning of par (vi) as a universal proposition. However, this argument was not sound. The power of the Federal Parliament to legislate with respect to the federal public service is one of the exclusive powers contained in s 52 of the Constitution, not a concurrent power expressed in s 51. No State Parliament would, accordingly, have any power to deal with industrial disputes concerning the federal public service. As well, the restriction and limitation in s 51(xxxv), appearing in another section of the Constitution, is not so obviously applicable to the ambit of a grant of power in, say, s 52(ii).

568 In any case, the regulations challenged by Mr Pidoto and other members of the Public Works Department of Victoria in *Pidoto* are also clearly distinguishable from the Amending Act challenged in this case. *Pidoto* concerned the validity of the National Security (Industrial Peace) Regulations and of particular provisions of the National Security (Supplementary) Regulations. These regulations were intimately connected with the efficient prosecution of the Second World War. They did not purport to transfer to s 51(vi) the constitutional foundation for federal legislation relating to the prevention and settlement by conciliation and arbitration of particular industrial disputes. This was clearly understood by Latham CJ, who said[649]:

---

645 See also *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488 at 509, where this Court refused to uphold the Federal Parliament's reliance on s 51(vi) to determine the wages and holiday entitlements of Victorian public servants for work unrelated to the prosecution of the war.

646 *Andrews v Howell* (1941) 65 CLR 255 at 278.

647 Joint reasons at [227].

648 Constitution, s 52.

649 (1943) 68 CLR 87 at 100.

> "The Regulations, therefore, do not deal with industrial matters generally, but only with industrial matters which in the opinion of the Court or of the Minister or of a conciliation commissioner are actual or probable sources of industrial disturbance, or in the opinion of the Court should be dealt with in the interests of national security. The Regulations do not relate to industrial matters irrespective of the possibility of industrial disputes or of relation to national security. They are, therefore, in my opinion, distinguishable in this essential particular from the regulations considered in the *Victorian Chamber of Manufactures v The Commonwealth (Industrial Lighting Regulations)*[650]. Those Regulations were not limited in any way by reference to possible industrial disturbance or to possible effect upon national security."

569 The result is that neither the decision in *Pidoto*, nor the presence of par (vi) in s 51, causes serious difficulty for the plaintiffs' central argument. By its essential nature and purpose, the defence power is a very special one, particularly in the urgencies of actual wartime. Whilst subject to the other provisions of the Constitution, in time of hostilities the defence power is given a large and exceptional reading so that it can fulfil its objective purpose in the overall constitutional design. This is the correct explanation of *Pidoto*[651]. That decision casts no doubt on the availability of the plaintiffs' arguments based on the general interaction of s 51(xx) and (xxxv), as involved in these proceedings.

570 *The external affairs power*: The Commonwealth also relied on the decision in the *Industrial Relations Act Case*[652]. That decision upheld the validity of certain provisions introduced into the *Industrial Relations Act* 1988 (Cth) by amendments enacted by the Parliament in 1993 and 1994 based on the external affairs power. That power is provided by the Constitution to the Executive Government (by s 61) and to the Parliament (by s 51(xxix))[653]. In particular, the Court, on the basis of various Conventions and Recommendations adopted by the General Conference of the International Labour Organisation, upheld amendments to the federal legislation dealing with the payment of equal remuneration for work of equal value; termination of employment; the provision of parental leave; prohibition of specified discrimination in employment; and protection of certain rights to engage in industrial action.

---

650 (1943) 67 CLR 413.

651 See also reasons of Callinan J at [797], [809].

652 (1996) 187 CLR 416.

653 (1996) 187 CLR 416 at 476.

571 Thus, it was suggested, if the grant of federal legislative power in s 51(xx) were controlled by the requirements of interstateness and procedures of independent decision-making by conciliation and arbitration as appearing in s 51(xxxv), so might be provisions relying on s 51(xxix) upon which these new sections of the Act were based. On this basis the *Industrial Relations Act Case* was cited as an authority inconsistent with the inter-relationship of other s 51 powers with s 51(xxxv) upon which the plaintiffs' central argument depended.

572 Various issues may arise in respect of the Amending Act as it affects the remaining provisions of the legislation that were generally upheld in the *Industrial Relations Act Case*. It is not necessary to decide those issues in these proceedings. For the moment, it is appropriate to concentrate on the analogical argument suggested by reference to the external affairs power in s 51 of the Constitution and the submission that the decision in the *Industrial Relations Act Case* was inconsistent with a reading of other provisions in s 51, such as s 51(xx), as subject to s 51(xxxv).

573 Because of the way the *Industrial Relations Act Case* was argued[654], the question now posed by these proceedings was not debated, still less decided. But it must be decided now. In my view, it is unnecessary in these proceedings to overrule the conclusion reached in the *Industrial Relations Act Case* based on the external affairs power. Like the defence power, although appearing in the diverse list of federal legislative powers contained in s 51, the external affairs power is special and far-reaching of its very nature and purpose. The exact scope of the power is a question still undergoing evolution[655]. In contemporary international circumstances, matters occurring externally to Australia and matters of external concern (beyond international treaties) are now so numerous, varied and potentially significant for the several legislative bodies provided by or under the Australian Constitution, that further refinement of current doctrine will be required[656]. Otherwise, the external affairs power might be used by the Federal Parliament to destroy important features of the Constitution that are essential to its text and structure[657].

---

654 See, eg, (1996) 187 CLR 416 at 459 (noting the Commonwealth's submissions). See also at 538-539.

655 *XYZ* (2006) 80 ALJR 1036 at 1062 [114]; 227 ALR 495 at 526. See also reasons of Callinan J at [797].

656 *XYZ* (2006) 80 ALJR 1036 at 1062-1063 [117]-[118]; see also at 1087-1088 [224]-[226]; 227 ALR 495 at 527, 560-561.

657 *XYZ* (2006) 80 ALJR 1036 at 1062 [115]; 227 ALR 495 at 526.

574 However that may be, it is not inconsistent with the plaintiffs' central argument, based on the operation of s 51(xxxv), that laws enacted in reliance on the external affairs power are not subject to the restrictions and limitations expressed in s 51(xxxv). By way of contrast, the legislative power granted to the Federal Parliament by s 51(xx) is quite different from that granted by s 51(xxix). The former is a power to make laws with respect to the nominated (legal) persons. The latter is a power of much greater amplitude and focus, addressed to a subject matter of general importance for the existence of the Commonwealth as an independent nation within the community of nations.

575 Like every power in s 51, the power in par (xxix) is not unlimited. Its boundaries have been stated by this Court from time to time[658]. This Court will read the language of federal legislation down where it offends the provisions of the Constitution or where it offends implications necessary to the preservation of the structure and design of the Constitution[659]. What the Court did in this regard in the *Industrial Relations Act Case* is consistent with the essential proposition advanced by the plaintiffs in these proceedings. When a grant of federal legislative power may appear broad enough to sustain propounded federal legislation, it will not be valid where it does not conform to other provisions in the Constitution or implications necessary to its operation. In such circumstances, where it is possible, the Court will read down the contested federal law so as to avoid inconsistency. Where reading down is not possible, the Court will declare the offending provision to be invalid. The *Industrial Relations Act Case* contains responses to the parties' arguments reflecting each of these outcomes.

576 I am unconvinced that the decision in that case requires rejection of the plaintiffs' argument in these proceedings based on the terms of s 51(xxxv) and the way it is to be understood in its interaction with s 51(xx) of the Constitution.

577 *The trade and commerce power*: The final line of authority propounded as an obstacle to the plaintiffs' invocation of the requirements of s 51(xxxv) is that relying on s 51(i) of the Constitution. That paragraph affords legislative power to the Federal Parliament to make laws with respect to "trade and commerce with other countries, and among the States".

---

658 *Industrial Relations Act Case* (1996) 187 CLR 416 at 517-518.

659 As in the reading down of provisions of the *Industrial Relations Act* 1988 (Cth) so that they did not apply to the "employment" of those employees at the higher levels of State government. See *Industrial Relations Act Case* (1996) 187 CLR 416 at 521.

578 Once again, the issue presented in the present proceedings was not advanced, still less considered and decided, in earlier cases concerned with the ambit of s 51(i). Specifically, it is unnecessary to overrule the recent decision of the Court concerned with that head of power, *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc*[660]. In that decision, the vessels were participating in interstate trade and commerce. The employees' conditions on the vessels formed the subject of the legal dispute. As appears from the record of the facts of the case, both vessels conformed to the requirements of interstateness. A contest arose when the industrial organisation of employees invoked the jurisdiction of the AIRC as established before the Amending Act[661]. On the face of things, in the circumstances of the particular case, there was no offence in the actual outcome of the case to the dual requirements of interstateness and procedural conformity to conciliation and arbitration provided by the head of power contained in s 51(xxxv).

579 Nevertheless, it was argued that the decision in *CSL Pacific*, and some of the remarks of the Court in explaining that decision, suggested that s 51(i) may afford, on its own, a sufficient connection between a federal law dealing with "industrial issues" and the Constitution, without the need to invoke the propounded requirements in s 51(xxxv) of the Constitution[662]. In support of this proposition, reference was also made to earlier decisions of this Court upholding the validity of federal laws with respect to consumer protection and the prohibition of secondary boycotts[663].

580 Because the present argument concerning s 51(xx) was not advanced in any of the cases in which this Court has affirmed the validity of laws providing for industrial matters in the maritime industry[664], there is no considered reasoning of this Court that rejects (or needed to reject) the inter-relationship argument now advanced by the plaintiffs. The precise way in which s 51(i) and (xxxv) potentially intersect and whether the former is subject to the restrictions and limitations of the latter, involve questions that should await proceedings in which the issue needs to be decided.

---

660 (2003) 214 CLR 397.

661 (2003) 214 CLR 397 at 405 [6]-[7].

662 See also joint reasons at [223]-[226].

663 *Trade Practices Act* 1974 (Ch), s 45D. See *Fontana* (1982) 150 CLR 169 at 185, 195, 222, but see at 187, 196, 211, 215. See also *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98.

664 *R v Wright; Ex parte Waterside Workers' Federation of Australia* (1955) 93 CLR 528; *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256; *CSL Pacific* (2003) 214 CLR 397.

581 It is notable, however, that the condition or requirement of interstateness, whilst not universal because of the reference to "trade and commerce with other countries", is specifically mentioned in s 51(i). Moreover, so far as industrial disputes related to such "trade and commerce" are concerned, there is nothing in s 51(i) that would be incompatible with a requirement that they be prevented and settled by the mandated procedures of conciliation or arbitration, as s 51(xxxv) provides.

582 I accept the submission of Victoria that it is unnecessary to reopen and reconsider decisions on s 51(i) which can be explained, and justified, without reliance on s 51(xxxv). So far as *CSL Pacific* is concerned, the arguments advanced in this case do not convince me that any of the actual holdings of the Court there require reconsideration in these proceedings[665]. When an issue is not specifically presented to a court, it is unsurprising that the court may not deal with it. In the absence of a clear issue and specific argument it should not be concluded that this Court has decided against a proposition later advanced with full argument. Just as the case books are full of decisions (and reasoning) that rest on earlier narrow views about the ambit of s 51(xx), we should not be surprised that, as attempts are made to expand the operation of that power, the larger boundaries propounded will occasionally hit against other provisions of the Constitution (such as s 51(xxxv)). The resulting intersection will necessitate new decisions which the earlier authority of this Court overlooked or was able to avoid or postpone.

583 *Conclusion: no impediment*: It follows from this reasoning that there is no impediment in the way of this Court's accepting the central submissions of the plaintiffs. In my view, the power afforded to the Federal Parliament by s 51(xx) of the Constitution must be read together with that afforded by s 51(xxxv). Where, properly analysed, the law under challenge is not a law with respect to corporations but is to be characterised as a law with respect to the prevention and settlement of industrial disputes, it must conform to the negative implication contained in the safeguard, restriction or qualification (or guarantee) stated for federal laws on that subject in par (xxxv). To the extent that the Amending Act is to be so qualified and does not conform to such requirements, it is constitutionally invalid.

Invalidity and severance

584 *Invalidity of the Amending Act*: The Amending Act explicitly seeks to alter the constitutional foundation for a great part of the federal legislation on industrial disputes. It aims to shift the constitutional underpinning of virtually

---

665 *CSL Pacific* (2003) 214 CLR 397 at 413-415 [32]-[40].

the entire federal law. It replaces the previous substantial reliance upon the power conferred on the Federal Parliament by s 51(xxxv) of the Constitution. It seeks to substitute a reliance on s 51(xx).

585 Other heads of power are invoked in the new Act, most notably the territories power (s 122). Yet as I have explained, giving effect to the Act only in so far as it applies to the territories would require this Court to read down the law so dramatically as to give effect to a result that the Parliament, in enacting a national law regulating industrial relations, could not have intended.

586 It is the shift from s 51(xxxv) to s 51(xx) that is crucial to what the Amending Act seeks to do. Moreover, the redesign of the federal law on this subject is not accidental, incidental or peripheral. It gives effect to a deliberate decision of the Executive Government of the Commonwealth, accepted by the Federal Parliament, to opt for reliance on the corporations power with the aim thereby to enlarge considerably federal legislative coverage of workplace relations, extending immediately to 85% of the Australian workforce. By inference, if the move contained in the legislation challenged in these proceedings succeeds, it would result in coercive consequences upon the rump of jurisdiction left with State industrial courts and tribunals. Such coercion is reinforced by particular provisions of the Amending Act[666].

587 It is worth observing that, for a purported law now based substantially on s 51(xx) of the Constitution, the new Act, following the Amending Act, is curiously presented. In its short title it is not described as a Corporations Act of any kind. Instead, with disarming candour, the new Act remains titled, as it was after 1996, the *Workplace Relations Act*. That title was accurate enough for the Act of 1996 which was the *Industrial Relations* Act 1988 (Cth), as substantially amended in that year (and earlier in 1993 and 1994). However, in a sense, the continuing short title of the Act, doubtless unintentionally, gives the constitutional game away. The aim of the Amending Act is, in effect, to retain the same ostensible character of the statute as before the amendments in 2005 whilst changing many of its provisions and altering the main constitutional foundation from par (xxxv) of s 51 to par (xx)[667].

588 Any doubt that this is so is laid to rest when the principal objects of the new Act are read, as re-expressed following the Amending Act[668]. There is no mention there of corporations, constitutional or otherwise. The stated objects

---

666 See, eg, ss 435, 496(1), 496(2) and 497; cf joint reasons at [253]-[262].

667 New Act, s 3.

668 New Act, s 3. See joint reasons at [7].

are, relevantly, addressed to the relations of employers and employees. The statutory objects therefore confirm the general characterisation of the new Act as one with respect to the myriad concerns relevant to the prevention and settlement of "industrial disputes" inherent in dealing comprehensively and generically with industrial relations.

589 In these circumstances, the immediate question arises as to whether it is feasible, or necessary, to dissect the particular provisions of the Act and to judge their validity following such an alteration to the constitutional underpinnings. Obviously, the new Act constitutes a major enterprise of legislative change. There are, it is true, many new provisions designed to advance the adoption of AWAs. That is a process which began with the amendments to the *Industrial Relations Act* 1988 (Cth) enacted in 1993 and 1996. In such circumstances a point is reached where the amendments incorporated by the Amending Act must be viewed as an integrated project. They are not merely the sum of their separate parts.

590 In so far as the Executive Government put its amendments to the Federal Parliament as an integrated measure designed comprehensively to change the foundation and approach of the federal industrial relations law, it is appropriate for this Court to take the resulting legislative "package" at face value, and to treat it as an integrated endeavour, intended to stand or fall in its entirety. The joint reasons uphold the amending legislation in its entirety without finding a single provision invalid. In my view, the entire Amending Act fails. It does so for the absence of a valid constitutional foundation for its vital provisions.

591 *The parties' arguments*: As the joint reasons point out[669], Victoria, which was foremost amongst the States in its reliance on the argument concerning the inter-relationship of pars (xx) and (xxxv) of s 51 of the Constitution, submitted that acceptance of its argument in this respect would result in the necessary invalidation of Pt 8, much of Pt 9 and Pt 13 of the new Act. Part 8 ("Workplace agreements") contains requirements in s 353 that such agreements must include dispute settlement procedures as contained in Pt 13. As well, Pt 9 includes provisions defined (in s 420) as "industrial action". All of these provisions depend, substantially, on the new statutory definition of "employer". They thus rely on the presence of an "employer" that is a "constitutional corporation" (see s 6(1)(a)) employing "employees" (s 5(1)). The constitutional underpinning in the Act (s 4(1), in so far as it defines "constitutional corporation") is the corporations power in s 51(xx) of the Constitution, read in isolation. The dispute settlement procedures neither follow, nor conform to, the procedures mandated by s 51(xxxv). It is this defect that, in my view, invalidates the identified Parts of the new Act.

---

669 Joint reasons at [296].

592 Whilst there is force in the Victorian attack on the particular provisions of the new Act, I accept the proposition, advanced in reply for the Commonwealth, that the limited attack by Victoria on Pts 8 and 9 of the Act, extended during oral argument to Pt 13, suggests an overly narrow conception of the circumstances in which a federal law may be characterised as one for the "prevention" of industrial disputes. I agree with the Commonwealth's submission that other parts of the new Act, as amended by the Amending Act, including Pts 7, 10, 12, 15, 16 and 23, may properly fall within the classification of being laws for the "prevention" of industrial disputes. At least that is the arguable way in which such laws would be characterised when answering the question whether they constitute laws *with respect to* the subject matter of s 51(xxxv) of the Constitution, necessitating compliance with the requirements of that paragraph if they are to be valid.

593 *The law as to severance*: Three bases might exist for approaching the challenged legislation on a piecemeal footing and invalidating only those provisions that clearly offend the constitutional requirement to read the ambit of s 51(xx) in the light of the requirements and limitations in s 51(xxxv). The three considerations include s 14 of the Act itself (which was formerly s 7A), which purports to require the reading down of invalid provisions where that is necessary to preserve others[670]. The terms of s 15A of the *Acts Interpretation Act* 1901

---

670 Section 14 of the new Act provides:

"Act not to apply so as to exceed Commonwealth power

(1) Unless the contrary intention appears, if a provision of this Act:

(a) would, apart from this section, have an invalid application; but

(b) also has at least one valid application;

it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application.

(2) Despite subsection (1), the provision is not to have a particular valid application if:

(a) apart from this section, it is clear, taking into account the provision's context and the purpose or object underlying this Act, that the provision was intended to have that valid application only if every invalid application, or a particular invalid application, of the provision had also been within the Commonwealth's legislative power; or

(Footnote continues on next page)

(Cth) enjoining an approach of severance in the interpretation of federal legislation generally, save where a contrary intention is manifested, constitutes the second basis of severance. The third is the general principle of constitutional interpretation and the normal approach encouraging the avoidance of unnecessary invalidation[671].

594 Several of the parties (and interveners) submitted that s 14 of the Act was itself invalid, effectively on the basis that it represented an attempt by the Parliament to impose on the Court a rule of construction that is properly within the province of the courts in discharging their independent function. An issue as to the validity of such a provision was raised, but not decided, in *Re Dingjan*[672]. It is unnecessary to resolve the point here. For the reasons appearing below, s 14 of the new Act, even if valid, cannot rescue isolated parts of the residue of that Act after the invalidation of the provisions wholly reliant on s 51(xx) for their validity.

595 So far as s 15A of the *Acts Interpretation Act* is concerned, there are limits upon the power of the Parliament to direct the courts, in effect, to make a new law or to choose what a remade law should be[673]. The limit is reached where, faced with a conclusion of apparent constitutional invalidity of particular provisions, a court "cannot separate the woof from the warp and manufacture a new web"[674]. From time to time, this Court has invoked other metaphors to

---

(b) the provision's operation in relation to that valid application would be different in a substantial respect from what would have been its operation in relation to that valid application if every invalid application of the provision had been within the Commonwealth's legislative power.

(3) Subsection (2) does not limit the cases where a contrary intention may be taken to appear for the purposes of subsection (1).

…"

671 See, eg, *Bank Nationalisation Case* (1948) 76 CLR 1 at 186; *R v Hughes* (2000) 202 CLR 535 at 565-567 [66]; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 662 [81].

672 (1995) 183 CLR 323 at 340-341, 348, 355, 366, 371-372. See also *Industrial Relations Act Case* (1996) 187 CLR 416 at 449-450, 503.

673 *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 485-486.

674 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 386.

explain when the Court has arrived at that limit. Thus, it has indicated a willingness to undertake amputation and excision, where necessary, but not to perform judicial "plastic surgery" upon the challenged law[675]. By inference, this is a reference to judicial excisions that would substantially alter the appearance of the law, presenting a law that looks quite different from that which was made by the Parliament.

596 The reason why this Court will not undertake such a task is ultimately based on the proper function of the Judicature established by the Constitution and on the principle of the separation of the judicial from other governmental powers. Thus, in the guise of construing a challenged federal law, the Court cannot be required to perform a feat that is, in essence, legislative and not judicial[676].

597 As to s 15A of the *Acts Interpretation Act*, the provision can save the validity of a federal law generally where the law itself indicates a standard or test that may be applied for the purpose of limiting its operation and preserving the validity of the law thus limited, so long as the outcome has not been changed so as to make it something different from the law enacted by the Parliament[677]. If the Court concludes that the challenged law "was intended to operate fully and completely according to its terms, or not at all"[678], the Court will not, under the guise of interpretation and severance, uphold what would effectively be a new and different law.

598 If the invalidated portions are relatively few and specific, surgery involving particular invalidation and reading down will be available and appropriate, as it was in the *Industrial Relations Act Case*[679]. Where, however, the resulting invalidation is substantial and would strike down key provisions of a comprehensive and integrated legislative measure, the invocation of statutory or constitutional principles of severance will be inappropriate. They will be unavailing to save the parts of the new law that are not specifically struck down as invalid for constitutional reasons.

---

675 *Bank Nationalisation Case* (1948) 76 CLR 1 at 372 per Dixon J.

676 *Pidoto* (1943) 68 CLR 87 at 109 per Latham CJ; *Bank Nationalisation Case* (1948) 76 CLR 1 at 252; *Concrete Pipes Case* (1971) 124 CLR 468 at 498 per Barwick CJ, 506 per Menzies J, 513 per Windeyer J, 520-521 per Walsh J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 485.

677 *Re Dingjan* (1995) 183 CLR 323 at 339 per Brennan J; see *R v Hughes* (2000) 202 CLR 535 at 556-557 [43].

678 *Pidoto* (1943) 68 CLR 87 at 108; *Industrial Relations Act Case* (1996) 187 CLR 416 at 502.

679 (1996) 187 CLR 416 at 561-564.

599 *Conclusion: severance unavailing*: When the foregoing well-established principles are applied to the present proceedings, they result in the invalidation of the entirety of the Amending Act.

600 The provisions which I would hold invalid are too numerous. They affect core parts of the new Act which was clearly intended to operate as an integrated whole. In presenting the Amending Act to the Parliament, the Government stated that it would provide for a "national system of workplace relations"[680]. Apart from s 51(xx) and (xxxv) the remaining heads of federal legislative power, upon which reliance is placed in the definition of "employer" in s 6(1) of the new Act, are highly specific and not such as to achieve the stated object of a new "national system".

601 The plain purpose of the legislation was to rely principally on s 51(xx) of the Constitution in the definition of "employer" in s 6(1) of the new Act. This appears on the face of that Act. It is the provision that supports the large edifice that is built upon that definition. That this is so is made completely clear by extrinsic material placed before this Court. That material discloses the object of those propounding the Amending Act to secure an immediate extension of federal coverage of workplace relations in Australia to 85% of Australian employees[681]. Moreover, the expressed object is also to persuade, or coerce, the States to refer their residual powers to make laws with respect to industrial relations to the Federal Parliament because the maintenance of separate State tribunals and laws would, in the circumstances, be too difficult and costly[682].

602 The attempt to create a "simplified national system"[683] by the enactment of the Amending Act was one substantially dependent upon reliance on s 51(xx) of the Constitution, unaffected by any impact on the content of that power of implications to be derived from s 51(xxxv). That this is so is clear from the reliance upon the definition of "employer" to whom the new "simplified national system" would attach, as a constitutional corporation. So much is plain in Pt 7 of

---

680 Australian Parliament, Explanatory Memorandum circulated with the Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) at 9.

681 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 2 November 2005 at 16-18.

682 Australian Parliament, Explanatory Memorandum circulated with the Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) at 9.

683 New Act, s 3(b).

the new Act[684]; Pt 8[685]; Pt 9[686]; Pt 10[687]; Pt 12, Div 4[688] and Sched 1, read with s 8[689]. The reliance on the definition, and hence on s 51(xx) of the Constitution, is the unifying element that permeates the whole legislative scheme.

603 If any one of the foregoing important Parts of the new Act were to fail this would, in my view, result in a substantial alteration of the legislation. By force of the Constitution, the entire Amending Act would then fail. Where, as I would hold, all of the foregoing Parts of the new Act must fail, because of their ultimate dependence on the validity of the definition of "employer" adopted in that Act, the outcome is plain.

604 It is not the function of this Court to save bits and pieces of the new law. The Commonwealth might, if it chose, proceed to submit for re-enactment its substantive amendments to federal law on industrial relations in relation to the territories where its powers, derived from s 122 of the Constitution, are extremely large and arguably unrestricted. However, were this Court to attempt to uphold those particular provisions of the new Act (and perhaps some other limited parts that could survive closer scrutiny) the outcome would be a law quite different from that propounded by the Government and enacted by the Federal Parliament.

605 In accordance with the established principles that I have identified, in the conclusions that I have reached, severance is not available.

Conclusion: the Amending Act is invalid

606 *Adhering to past decisions*: Ultimately, these proceedings present the intersection of two accepted, and basic, rules of constitutional interpretation. The first, upheld by this Court since the *Engineers Case* in 1920, holds that grants of federal legislative power are given an ample content without implied restrictions based on notions of reserved State powers or an immunity of State institutions from the effect of federal laws. The second, established at least since *Schmidt* in

---

684 Minimum pay and conditions for employees of "employers".

685 The nature and enforcement of the agreements made by "employers" with such "employees".

686 The undertaking of industrial action by "employees" of such "employers".

687 The residual making of awards in respect of such "employees".

688 The termination of employment of "employees" of "employers".

689 Regulation of employer and employee organisations registered under the new Act.

1961, but given effect many times before and since, holds that particular grants of federal legislative power that are subject to expressed safeguards, restrictions or qualifications (or guarantees protecting identifiable persons or groups), require the modification of what would otherwise be "plenary" federal powers. In this way, such restrictions and guarantees are not neutered, but continue to enliven the constitutional text.

607 To resolve the intersection of these rules, it is necessary to recognise that a national Constitution, like any legal document, must be read as a whole, not in bits and pieces. What this fundamental principle requires in the present case is the confinement of the large powers of the Federal Parliament to enact laws with respect to corporations. That confinement would preserve the constitutional prescription that federal laws with respect to the subject of industrial disputes (as provided by s 51(xxxv) of the Constitution) have to comply with the features deliberately imposed by the Constitution on the Federal Parliament for that aspect of its lawmaking. That is, such federal laws may not be enacted by direct federal legislative provisions. Rather, they must involve, by the processes of conciliation and arbitration, the intervention of independent decision-makers who hear both sides.

608 To insist on this resolution of the intersecting principles fulfils this Court's role as the guardian of the Constitution. It preserves decisions of this Court, delivered over more than a century, that have either held, or impliedly accepted, that the corporations power has to be read as subject to the industrial disputes power. The view now endorsed by the majority of this Court effectively discards a century of constitutional doctrine. It ignores the express structure of the Constitution and the language of the two heads of constitutional power in question in this case, each of equal validity and effect. I refuse to accept that our predecessors in this Court were so blind to the true meaning of the Constitution that their decisions, in such number and detail over the past hundred years, were pointless exercises in constitutional futility. Yet that is the hypothesis inherent in the decision now reached by the majority.

609 *Preserving industrial fairness*: As history has repeatedly shown, there are reasons of principle for preserving the approach of our predecessors. 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"[690], 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.

610 In this respect, it is useful to recall what was said in 1909 by Higgins J in *Huddart, Parker & Co Pty Ltd v Moorehead*, when determining whether the *Australian Industries Preservation Act* 1906 (Cth)[691] was a law "with respect to ... corporations". Despite his opposition to the doctrine of reserved powers[692], as it then existed, Higgins J issued a serious warning about the consequences that could potentially flow from an uncontrolled interpretation of the corporations power[693]. Almost a century on, the concerns expressed by Higgins J on the potential scope of s 51(xx) are just as valid, if not more so.

611 *Respecting federalism*: No one could contest the pervasive role of corporations in almost every activity of a modern society. However, the unnuanced interpretation of the corporations power now embraced by a majority of this Court, released from the previous check stated in the industrial disputes power (and other similar constitutional checks), has the potential greatly to alter the nation's federal balance. It risks a destabilising intrusion of direct federal lawmaking into areas of legislation which, since federation, have been the subjects of State laws. It does so unchecked by any express provisions in such powers or by any implied features of the Constitution derived from the federal system that lies at its very heart.

612 This Court and the Australian Commonwealth need to rediscover the federal character of the Constitution. It is a feature that tends to protect liberty and to restrain the over-concentration of power which modern government, global forces, technology, and now the modern corporation, tend to encourage[694].

---

690 *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 at 548-549 [30], citing *In re Loty and Holloway and Australian Workers' Union* [1971] AR (NSW) 95.

691 Described in the joint reasons at [70].

692 *R v Barger* (1908) 6 CLR 41 at 113 per Higgins J. See joint reasons at [83].

693 (1909) 8 CLR 330 at 409-410.

694 cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 599 [185]; *R v Hughes* (2000) 202 CLR 535 at 554-555 [38], 560-561 [53]; Sunstein, "Federalism in South Africa? Notes from the American Experience", (1993) 8 *American University Journal of International Law and Policy* 421; Kincaid, "The New Federalism

(Footnote continues on next page)

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 security[695]. 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.

617 CALLINAN J.

PART I. INTRODUCTION [618]-[621]

PART II. INTENDED OPERATION AND REACH OF THE AMENDING ACT [622]-[680]

PART III. RELEVANT CONSTITUTIONAL AND POLITICAL HISTORY [681]-[735]

Div 1: Early industrial relations tribunals [691]-[706]

Div 2: Failed attempts to gain power [707]-[735]

(a) *The Constitution Alteration (Legislative Powers) Bill 1910 (Cth) for a referendum* [709]-[715]

(b) *The Constitution Alteration (Corporations) Bill 1912 (Cth) for a referendum and the Constitution Alteration (Industrial Matters Bill 1912 (Cth) for a referendum* [716]-[723]

(c) *The Constitution Alteration (Industry and Commerce) Bill 1926 (Cth) for a referendum* [724]-[727]

(d) *The Constitution Alteration (Industrial Employment) Bill 1946 (Cth) for a referendum* [728]-[735]

PART IV. TECHNIQUES EMPLOYED IN CONSTRUING THE CONSTITUTION [736]-[773]

Div 1: Precedent [748]-[764]

Div 2: The principle of generality of language [765]-[770]

Div 3: Statement of the appropriate principles [771]-[773]

PART V. CONSTITUTIONAL IMPERATIVE OF THE FEDERAL BALANCE [774]-[797]

PART VI. THE NECESSITY TO CONSTRUE S 51 AS A WHOLE [798]-[820]

PART VII. THE REACH AND IMPACT OF THE INDUSTRIAL AFFAIRS POWER [821]-[834]

Div 1: General [821]-[822]

Div 2: Paper disputes [823]-[834]

PART VIII. THE REACH AND IMPACT OF THE CORPORATIONS POWER [835]-[897]

Div 1: General [835]-[837]

Div 2: Convention Debates [838]-[843]

Div 3: Texts [844]-[845]

Div 4: The bankruptcy and insolvency power [846]-[854]

Div 5: Previous cases [855]-[895]

Div 6: A consequence of the "object of command" test [896]-[897]

PART I. INTRODUCTION

618 The substantial issue in this case is whether the amendments, effected by the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth) ("the Amending Act") to the *Workplace Relations Act* 1996 (Cth) ("the Act"), are a valid exercise of the corporations power conferred by s 51(xx) of the Constitution[696]. The question of the validity of some of the provisions of the Act[697] has been at least latent since 1993 when the *Industrial Relations Reform Act* 1993 (Cth) was enacted, in purported reliance then upon the corporations power, but arises overtly and starkly as a result of the very extensive amendments enacted by the Amending Act. In these reasons the references to sections are to the sections in the Act in its amended, that is to say, its consolidated, current form.

---

696 Section 51(xx) provides:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> ...
>
> (xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

697 The relevant provisions introduced "enterprise agreements". The Minister for Industrial Relations, in moving that the Industrial Relations Reform Bill 1993 (Cth) be read a second time (Australia, House of Representatives, *Parliamentary Debates* (Hansard), 28 October 1993 at 2779), said:

> "Under our legislation, working conditions will increasingly be tailored to fit individual workplaces. Most importantly, the new enterprise flexibility agreements will do so without the prerequisite of a union *or an interstate dispute*." (emphasis added)

619 This is one of the most important cases with respect to the relationship between the Commonwealth and the States to come before the Court in all of the years of its existence. If the legislation is to be upheld the consequences for the future integrity of the federation as a federation, and the existence and powers of the States will be far-reaching. The Act in its present form is well beyond, and in contradiction of what was intended and expressed in the Constitution by the founders.

620 The Commonwealth concedes that there is no decision of this Court which of itself requires that the Act be held to be valid in its entirety, or even substantially so. These reasons will show there are neither persuasive dicta, sufficiently settled and consistent principles of constitutional construction, nor universally accepted constitutional theory which would compel, or even imply validity. Indeed the contrary is the case: the Act is, for the most part, beyond the power of the Commonwealth.

621 I do not suggest that the Constitution can, or should be construed in a vacuum, that is, in disregard of statements of Justices of this Court in earlier cases, and, of course, history[698]. Although the relevant history here is important and instructive, the dicta from other cases are, with a few exceptions, not. The sum of the matters which should inform the proper construction are: the techniques employed from time to time by Justices of this Court in construing the Constitution; the constitutional imperative of the maintenance of the federal balance; the fundamental canon of construction, the need to construe the Constitution as a whole; the reach, impact and meaning of the industrial affairs power conferred by s 51(xxxv) of the Constitution[699]; the reach, impact and meaning of the corporations power; and, the relationship between the two powers. Indeed all of the topics are related, and the cases to which I refer in one section of these reasons may also be relevant to another. After I deal with each

---

698 Latham CJ said in *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 521: "The Commonwealth of Australia was not born into a vacuum. It came into existence within a system of law already established."

699 Section 51(xxxv) provides:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> ...
>
> (xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

topic I will give some consideration to the submissions of Victoria which had, by agreement with the Commonwealth, already ceded some of its industrial power to the latter; to the different constitutional positions of the Territories; and, the question whether any of the Act may or should be saved. But before I turn to those matters it is necessary to set out, and make some comments about the key provisions of the Act.

PART II. INTENDED OPERATION AND REACH OF THE AMENDING ACT

622 The apparent purpose and effect of the legislation under challenge, if valid, would be to establish an essentially national, largely in substitution of a federal, system of industrial relations[700] founded upon the corporations power. Incidental reliance is placed by the Commonwealth upon the territories power in s 122, the trade and commerce power in s 51(i) and the external affairs power in s 51(xxix). For reasons which will appear, and as it is effectively accepted by the Commonwealth, if the Amending Act is not within the corporations power, the incidental reliance on any other powers is not sufficient to validate it in its entirety. The whole structure of the Act as amended is now relevantly based largely upon the premise that the corporations power is a sufficient foundation for all of it. The Act, if valid, still cannot absolutely cover employment in Australia because it is expressly designed to apply, in most of its operation, to corporate employers, these being constitutional corporations so-called, and their employees.

623 Except to the extent that ss 5(2), 6(2) and 7(2) may, as a matter of construction, incidentally do so, the Amending Act does not identify the head or heads of constitutional power upon which the Commonwealth relies for validity[701]. But the definition of a "constitutional corporation" in s 4 does provide a clear indication that the, or the principal head of power on which the defendant in enacting it relies, is the corporations power conferred by s 51(xx), despite that, in substance and in detail, the legislation is concerned with what has been, since the inception of the Commonwealth, understood to be industrial

---

700 See the principal object of the Act, set out in s 3.

701 Contrast, eg, s 6 of the *Trade Practices Act* 1974 (Cth), which confines the application of various sections to conduct in the course of or in relation to: (i) trade or commerce between Australia and places outside Australia; (ii) trade or commerce among the States; (iii) trade or commerce within a Territory, between a State and a Territory or between two Territories; or (iv) the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth. These are express references to ss 51(i) and 122 of the Constitution.

affairs. In this judgment I use the expressions "industrial affairs" and "industrial matters" interchangeably. Each is well understood in this country as the relationship between employers and employees, and disputes, pending, potential or actual, between them, matters which, if of an interstate character as developed in the cases[702], fall within the purview of s 51(xxxv) of the Constitution, as to an aspect of which, industrial agreements, I said in *Amcor Ltd v Construction, Forestry, Mining and Energy Union*[703]:

> "An industrial agreement has a number of purposes, to settle disputes, to anticipate and make provision for the resolution of future disputes, to ensure fair and just treatment of both employer and employees, and generally to promote harmony in the workplace."

Those remarks apply with equal force to the making of awards. The power to provide for each of these under s 51(xxxv) of the Constitution is a broad but not absolute one. In *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union*[704], Gleeson CJ said of it:

> "It is for Parliament to determine the structure and incidents of the system of dispute resolution (using that expression to cover prevention as well as settlement) which is appropriate to current circumstances, subject to the limitations imposed by the terms of s 51(xxxv): the available methods of dispute resolution are conciliation and arbitration; and the disputes must be of a certain kind. The Constitution confers the power to establish and maintain, and, where it is considered appropriate, alter, the system. The Parliament, in the exercise of the power, legislates to institute, vary, modify, or abrogate, the system. The nature of a particular legislative scheme set up in the exercise of the power is not to be confused with the scope of the power itself."

624 Section 14 requires that the Act be given "every valid application", if it has any invalid application. The plaintiffs argue that this provision purports to command the Court to do far more than undertake an orthodox exercise of severance, or reading down, and goes well beyond the territory charted by

---

702 See Pt VII, Div 2 of these reasons. The Index to the Commonwealth Law Reports has used from its inception various titles capable of embracing issues arising under s 51(xxxv), for example: "industrial arbitration", "conciliation and arbitration", and "industrial law".

703 (2005) 222 CLR 241 at 283 [131].

704 (2000) 203 CLR 346 at 354-355 [2].

decisions of this Court on s 15A of the *Acts Interpretation Act* 1901 (Cth)[705] or otherwise: indeed that it purports to require the Court to do the impermissible, to legislate. As will appear, this submission has some force.

625 The laws which the Amending Act is designed to abrogate, State and Territory industrial laws, are very comprehensively defined[706]:

> "***State or Territory industrial law*** means:
>
> (a) any of the following State Acts:
>
> (i) the *Industrial Relations Act 1996* of New South Wales;
>
> (ii) the *Industrial Relations Act 1999* of Queensland;
>
> (iii) the *Industrial Relations Act 1979* of Western Australia;
>
> (iv) the *Fair Work Act 1994* of South Australia;
>
> (v) the *Industrial Relations Act 1984* of Tasmania; or
>
> (b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:
>
> (i) regulating workplace relations (including industrial matters, industrial disputes and industrial action, within the ordinary meaning of those expressions);
>
> (ii) providing for the determination of terms and conditions of employment;
>
> (iii) providing for the making and enforcement of agreements determining terms and conditions of employment;

---

705 Section 15A provides:

> "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

706 The Act, s 4(1).

(iv) providing for rights and remedies connected with the termination of employment;

(v) prohibiting conduct that relates to the fact that a person either is, or is not, a member of an industrial association (as defined in section 779); or

(c) an instrument made under an Act described in paragraph (a) or (b), so far as the instrument is of a legislative character; or

(d) a law that:

(i) is a law of a State or Territory; and

(ii) is prescribed by regulations for the purposes of this paragraph."

626 Generally, the effect and operation that the provisions under challenge would, if valid, have, are not controversial. Most of these are well summarized in the submissions of the first plaintiff in action No B6 of 2006, the Australian Workers' Union. I have been assisted by that summary. References by other members of the Court to other relevant provisions and the relationship, and differences between the unamended Act and the Act relieve me of the necessity to repeat the detail of these.

627 Section 6(1) of the Act defines "employer" to mean a "constitutional corporation"[707], the Commonwealth or a Commonwealth authority[708], in each case so far as the corporation, the Commonwealth or Commonwealth authority employs or usually employs an individual. The definition in s 6(1) also includes a "person or entity" so far as the person or entity employs or usually employs, in connexion with "constitutional trade or commerce"[709], an individual as a "flight crew officer", "maritime employee" or "waterside worker"[710]. The definition

---

707 Defined by s 4(1) to mean a corporation to which s 51(xx) of the Constitution applies.

708 "Commonwealth authority" is defined by s 4(1). As well as including bodies corporate established for public purposes by or under laws of the Commonwealth, it includes bodies corporate incorporated under laws of the Commonwealth, a State or a Territory, in which the Commonwealth has a controlling interest.

709 Defined by s 4(1) to mean trade or commerce between Australia and a place outside Australia, among the States, between a State and a Territory, between two Territories, or within a Territory.

710 These terms are defined by s 4(1) and cl 1 of Sched 2.

includes bodies corporate incorporated in a Territory, so far as the body corporate employs, or usually employs, an individual, and persons or entities carrying on an activity in a Territory, so far as the person or entity employs, or usually employs, an individual in connexion with the activity carried on in that Territory.

628 The definition of "constitutional corporation"[711] effectively assumes that s 51(xx) is capable of embracing every aspect of a corporation apart from its incorporation. The Amending Act, as the joint judgment states[712], in its practical application certainly depends in large measure upon the assumption that the corporations power is capable of sustaining the legislative framework in its entirety. The procedure adopted, of dealing with the matter on demurrer, is not without its problems. The Court does not have before it any relevant sets of facts in respect of which the reach and application of the Act may be tested. It is always an advantage for a court to be able to examine any impugned legislation in its practical application. The procedure adopted here, although not without precedent[713], is, to some extent at least, in the nature of a solicitation from the Court of an advisory opinion of a kind which in other circumstances the Court has declined to give[714]. The disadvantage of the absence of relevant facts will become particularly apparent when the question arises whether any of the sections of the Act can or should be regarded as valid under placita other than placitum (xx) or otherwise. That legislation may be of high social, economic or political significance has never of itself sufficed to justify the Court's scrutiny of, and ruling upon it in hypothetical cases. During the course of argument, the Commonwealth, from time to time, suggested that some or all of the provisions in the Amending Act could be supported under heads of power other than the corporations power, but, the argument with respect to the territories power aside, the suggestions were incomplete as submissions and, for reasons which will appear, not such as to warrant any conclusive ruling upon them. In those circumstances my reasons will mainly therefore be confined to the questions whether the Act, and such sections of it, if any, as require or lend themselves to separate consideration, have been validly enacted under the corporations power.

629 An "employee" is defined by s 5(1) to mean a person employed, or usually employed, by an employer as defined by s 6(1).

---

711 Section 4(1) of the Act provides that "***constitutional corporation*** means a corporation to which paragraph 51(xx) of the Constitution applies".

712 At [10].

713 A recent example is *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416.

714 Compare: *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 267 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

630 The Act is given an extended operation by s 6(2), which provides that "employer" has its ordinary meaning if the reference is as listed in cl 3 of Sched 2. The reference to "employer" in its ordinary meaning includes a person or "entity" which is usually an employer within that meaning[715]. The provisions in relation to employees which correspond to ss 6(2) and 6(3) are ss 5(2) and 5(3).

631 "Employment" is defined by s 7(1) to reflect the meanings attributed by ss 5 and 6 to employee and employer. Clauses 2, 3 and 4 of Sched 2 indicate when the ordinary meanings of employee, employer and employment are intended.

632 Sections 16, 17 and 18 of the Act, because they seek, effectively, if not to obliterate, certainly very greatly to diminish, State industrial power over corporations and their employees, should be set out. Section 16 provides:

> "**Act excludes some State and Territory laws**
>
> (1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:
>
> (a) a State or Territory industrial law;
>
> (b) a law that applies to employment generally and deals with leave other than long service leave;
>
> (c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined in section 623);
>
> (d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;
>
> (e) a law that entitles a representative of a trade union to enter premises.
>
> Note: Subsection 4(1) defines ***applies to employment generally***.

---

715 Section 6(3).

State and Territory laws that are not excluded

(2) However, subsection (1) does not apply to a law of a State or Territory so far as:

(a) the law deals with the prevention of discrimination, the promotion of EEO or both, and is neither a State or Territory industrial law nor contained in such a law; or

(b) the law is prescribed by the regulations as a law to which subsection (1) does not apply; or

(c) the law deals with any of the matters (the ***non-excluded matters***) described in subsection (3).

(3) The non-excluded matters are as follows:

(a) superannuation;

(b) workers compensation;

(c) occupational health and safety (including entry of a representative of a trade union to premises for a purpose connected with occupational health and safety);

(d) matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers);

(e) child labour;

(f) long service leave;

(g) the observance of a public holiday, except the rate of payment of an employee for the public holiday;

(h) the method of payment of wages or salaries;

(i) the frequency of payment of wages or salaries;

(j) deductions from wages or salaries;

(k) industrial action (within the ordinary meaning of the expression) affecting essential services;

(l) attendance for service on a jury;

(m) regulation of any of the following:

(i) associations of employees;

(ii) associations of employers;

(iii) members of associations of employees or of associations of employers.

Note: Part 15 (Right of entry) sets prerequisites for a trade union representative to enter certain premises under a right given by a prescribed law of a State or Territory. The prerequisites apply even though the law deals with such entry for a purpose connected with occupational health and safety and paragraph (2)(c) says this Act is not to apply to the exclusion of a law dealing with that.

This Act excludes prescribed State and Territory laws

(4) This Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations for the purposes of this subsection.

(5) To avoid doubt, subsection (4) has effect even if the law is covered by subsection (2) (so that subsection (1) does not apply to the law). This subsection does not limit subsection (4).

Definition

(6) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it."

633 As can be seen, by express provision, discrimination is excluded, but a reservation is made of a right to exclude other matters by regulation from time to time.

634 Section 17 provides:

"**Awards, agreements and Commission orders prevail over State and Territory law etc.**

(1) An award or workplace agreement prevails over a law of a State or Territory, a State award or a State employment agreement, to the extent of any inconsistency.

(2) However, a term of an award or workplace agreement dealing with any of the following matters has effect subject to a law of a State or Territory dealing with the matter, except a law that is prescribed by

the regulations as a law to which awards and workplace agreements are not subject:

(a) occupational health and safety;

(b) workers compensation;

(c) training arrangements;

(d) a matter prescribed by the regulations for the purposes of this paragraph.

(3) An order of the Commission under Part 12 prevails over a law of a State or Territory, a State award or a State employment agreement, to the extent of any inconsistency.

Note: Part 12 is about minimum entitlements of employees."

635 Despite the breadth of ss 16 and 17, they alone do not mark out all of the intended domain of the Act:

"**18 Act may exclude State and Territory laws in other cases**

(1) Sections 16 and 17 are not a complete statement of the circumstances in which this Act and instruments made under it are intended to apply to the exclusion of, or prevail over, laws of the States and Territories or instruments made under those laws.

Note: Other provisions of this Act deal with its relationship with laws of the States and Territories. For example, see clause 87 of Schedule 6, which is about not excluding or limiting Victorian law that can operate concurrently with certain provisions of that Schedule.

(2) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it."

636 Part 2 of the Act establishes an Australian Fair Pay Commission ("the AFPC"). The principal of its functions is "wage-setting" as referred to in ss 21(a) and 22(1). The AFPC's "wage-setting powers" are conferred and prescribed by Div 2 of Pt 7 (ss 176-222), in particular to adjust the standard Federal Minimum Wage ("FMW") provided for by s 195 and s 196(1); to determine and adjust special FMWs (ss 197 and 200); to determine new Australian Pay and Classification Scales ("APCSs") (s 214); and, to adjust or revoke APCSs (ss 216 and 217).

637 Part 3 of the Act establishes an Australian Industrial Relations Commission ("the AIRC") (s 61(1)) to have the functions conferred on it by "this Act, the Registration and Accountability of Organisations Schedule or otherwise"[716]. The Registration and Accountability of Organisations Schedule is Sched 1 to the Act.

638 Section 111, which I will set out, may be contrasted with s 38(h) of the original *Commonwealth Conciliation and Arbitration Act* 1904 (Cth)[717] which empowered the Commonwealth Court of Conciliation and Arbitration:

> "to dismiss any matter or refrain from further hearing or from determining the dispute if it appears that the dispute is trivial, or that the dispute *has been dealt with, or is being dealt with, or is proper to be dealt with, by a State Industrial Authority*, or that further proceedings by the Court are not necessary or desirable in the public interest". (emphasis added)

Section 111 provides:

> "**Particular powers of Commission**
>
> (1) The Commission may do any of the following in relation to a proceeding under this Act or the Registration and Accountability of Organisations Schedule:
>
> (a) inform itself in any manner that it thinks appropriate;
>
> (b) take evidence on oath or affirmation;
>
> (c) give directions orally or in writing in the course of, or for the purposes of, procedural matters relating to the proceeding;
>
> (d) vary or revoke an order, direction or decision of the Commission;

---

716 Section 62.

717 This section in only slightly varying forms remained in the relevant Commonwealth Act from 1904 until 2005. See *Commonwealth Conciliation and Arbitration Act* 1904 (Cth), s 38(h) (1904-1947); *Commonwealth Conciliation and Arbitration Act* 1904 (Cth), s 40(d) (1947-1950); *Conciliation and Arbitration Act* 1904 (Cth), s 40(d) (1950-1956); *Conciliation and Arbitration Act* 1904 (Cth), s 41(d)(ii) (1956-1959); *Conciliation and Arbitration Act* 1904 (Cth), s 41(1)(d)(ii) (1959-1988); *Industrial Relations Act* 1988 (Cth), s 111(1)(g)(ii) (1988-1996); *Workplace Relations Act* 1996 (Cth), s 111(1)(g)(ii) (1996-2005).

(e) dismiss a matter or part of a matter on the ground:

(i) that the matter, or the part of the matter, is trivial; or

(ii) that further proceedings in relation to the matter are not necessary or desirable in the public interest;

(f) determine the proceeding in the absence of a person who has been summoned or served with a notice to appear;

(g) sit at any place;

(h) conduct the proceeding, or any part of the proceeding, in private;

(i) adjourn the proceeding to any time and place;

(j) refer any matter to an expert and accept the expert's report as evidence;

(k) direct a member of the Commission to consider a particular matter that is before the Full Bench and prepare a report for the Full Bench on that matter;

(l) allow the amendment, on any terms that it thinks appropriate, of any application or other document relating to the proceeding;

(m) correct, amend or waive any error, defect or irregularity whether in substance or form;

(n) summon before it any persons whose presence the Commission considers would assist in relation to the proceeding;

(o) compel the production before it of documents and other things for the purpose of reference to such entries or matters as relate to the proceeding;

(p) make interim decisions;

(q) make a final decision in respect of the matter to which the proceeding relates.

(2) The Commission may, in writing, authorise a person (including a member of the Commission) to take evidence on its behalf, with any limitations as the Commission directs, in relation to the

proceeding, and the person has all the powers of the Commission to secure:

(a) the attendance of witnesses; and

(b) the production of documents and things; and

(c) the taking of evidence on oath or affirmation.

(3) The following provisions do not apply to the performance of a function under Part 9:

(a) paragraph (1)(e);

(b) paragraph (1)(j);

(c) paragraph (1)(k).

(4) The following provisions do not apply to the performance of a function under Division 3, 4 or 5 of Part 12:

(a) paragraph (1)(a);

(b) paragraph (1)(e);

(c) paragraph (1)(k);

(d) paragraph (1)(p);

(e) paragraph (1)(q);

(f) subsection (2).

(5) Paragraph (1)(j) does not apply to the performance of a function under Division 4 of Part 12.

(6) If a provision of this Act specifies a time or a period in respect of any matter or thing, the Commission must not extend the time or the period specified unless this Act expressly permits the Commission to do so.

(7) If a provision of the Registration and Accountability of Organisations Schedule specifies a time or a period in respect of any matter or thing, the Commission must not extend the time or the period specified unless the Registration and Accountability of Organisations Schedule expressly permits the Commission to do so.

(8) For the purposes of paragraph (1)(d), ***order*** does not include an award or an award-related order."

639 Section 117 empowers a Full Bench of the AIRC to oust the jurisdiction of a State industrial authority. It provides:

"**State authorities may be restrained from dealing with matter that is before the Commission**

(1) If it appears to a Full Bench that a State industrial authority is dealing or is about to deal with a matter that is the subject of a proceeding before the Commission under this Act or the Registration and Accountability of Organisations Schedule, the Full Bench may make an order restraining the State industrial authority from dealing with the matter.

(2) The State industrial authority must, in accordance with the order, cease dealing or not deal, as the case may be, with the matter.

(3) An order, award, decision or determination of a State industrial authority made in contravention of the order of a Full Bench under this section is, to the extent of the contravention, void."

640 The combined effect of ss 111 and 117 in operation will be to enable the Commonwealth and its creatures under the Act arbitrarily to deal a State out of the game in industrial affairs affecting corporations, even intrastate industrial affairs of the greatest importance to the well-being, stability, harmony and commerce of a State. It should not be overlooked that it has been accepted that State industrial tribunals have had very important roles to play in industrial affairs exclusively within, and of particular significance to, a State. *Electrical Trades Union of Australia v Queensland Electricity Commission*[718] is an example of this. In 1986, electrical corporations were completely owned and controlled in Queensland by Queensland. The State of Queensland wished to effect reforms in the labour arrangements for the electrical industry. The history of industrial relations in that industry before 1986 had been a troubled one and is recorded in the reasons for decision of the Australian Conciliation and Arbitration Commission in that case[719]. Queensland enacted the *Electricity Authorities Industrial Causes Act* 1985 (Q) and the *Electricity (Continuity of Supply) Act* 1985 (Q), in order to establish a special industrial tribunal, the Electricity Authorities Industrial Causes Tribunal, and to facilitate the reform of labour

---

718 (1986) 16 IR 292.

719 (1986) 16 IR 292 at 293-298.

conditions. So as to create a classical paper dispute[720], and to outflank the new State tribunal thereby to attract the jurisdiction of the Commonwealth Commission, the Electrical Trades Union of Australia delivered a log of claims seeking to reverse or obstruct the proposed reforms, and to have reinstated employees who were dismissed for striking, under an Order in Council, after those employees defied a direction to return to work by the State tribunal[721]. A member of the Commonwealth Commission, Brown C, found that an interstate industrial dispute did exist between the generating authorities and the Electrical Trades Union of Australia, even though the industrial strife in the industry did not in reality extend beyond the borders of Queensland. That holding, of an interstate industrial dispute, was affirmed on appeal by the Full Bench of the Commission. The electrical authorities then applied under s 41(1)(d) of the *Conciliation and Arbitration Act* 1904 (Cth) as amended, which was in substance the same as s 38(h) of the original Act which I have quoted, for dismissal of the union's application for an award as sought by its log of claims, on the grounds contemplated by that section. By majority (Ludeke J and Brown C, O'Riordan DP dissenting) the Full Bench of the Australian Conciliation and Arbitration Commission granted the application, holding that, having regard to the character of the electricity industry and its essentiality to the well-being of the people and industry of Queensland, and to the state of affairs in the industry as shown by the evidence, further proceedings and pursuance of the union's log of claims were not necessary or desirable, or in the public interest[722]. In consequence, the regulation of industrial affairs in the Queensland electricity industry remained the prerogative of Queensland, and was left to the autochthonous Queensland tribunal. It is highly unlikely that in the future, as a practical matter, having regard to ss 111 and 117 of the Act, any State will be able to act to deal with local industrial matters affecting many local and essential State industries and the well-being of the people of the State, as was possible in the past, and of which this case in the Commission provides an example.

641 Part 4 deals with the Australian Industrial Registry, the functions of which may be seen in s 129.

642 Part 5 makes provision for an Employment Advocate, whose functions are set out in s 151.

643 Part 6 provides for the appointment of "workplace inspectors", whose powers are set out in s 169.

---

720 See Pt VII, Div 2 of these reasons.

721 (1986) 16 IR 292 at 293.

722 (1986) 16 IR 292 at 306.

644 Part 7 states minimum entitlements in employment, described compendiously as the Australian Fair Pay and Conditions Standard (s 171(3)).

645 Part 8 deals with workplace agreements as identified by ss 326-331. Provision is made by ss 334 and 335 for the appointment and recognition of "bargaining agents" in relation to Australian workplace agreements ("AWAs") (s 334) and some agreements (s 335). Workplace agreements come into force when they are lodged with the Employment Advocate (ss 344 and 347(1)), and cease to operate in the circumstances referred to in s 347(4)-(6) and (10).

646 A workplace agreement binds the employer, the persons whose employment is subject to the agreement, and, if the agreement is a union collective agreement (s 328), or a union greenfields agreement (s 329), the organization of employees which made the agreement: s 351.

647 The content of workplace agreements is dealt with by Div 7 (ss 352-366). Provision is made for their variation in Div 8 (ss 367-380) and termination in Div 9 (ss 381-399). Some types of conduct, relevantly "industrial action", in relation to agreements, are proscribed by Div 10 (ss 400-402). "Industrial action" is defined by s 420 of the Act to include at least all such matters as traditionally, if they could be given any interstate complexion at all, would be treated as industrial disputes fit for conciliation or arbitration by a federal Commission:

> "**Meaning of *industrial action***
>
> (1) For the purposes of this Act, ***industrial action*** means any action of the following kinds:
>
> (a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
>
> (b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;
>
> (c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
>
> (d) the lockout of employees from their employment by the employer of the employees;
>
> but does not include the following:

(e) action by employees that is authorised or agreed to by the employer of the employees;

(f) action by an employer that is authorised or agreed to by or on behalf of employees of the employer;

(g) action by an employee if:

(i) the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and

(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

Note 1: See also subsection (4), which deals with the burden of proof of the exception in subparagraph (g)(i) of this definition.

Note 2: The issue of whether action that is not industrial in character is industrial action was considered by the Commission in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Ltd*, PR946290. In that case, the Full Bench of the Commission drew a distinction between an employee who does not attend for work in support of a collective demand that the employer agree to alteration of the conditions of employment as being clearly engaged in industrial action and an employee who does not attend for work on account of illness.

(2) For the purposes of this Act:

(a) conduct is capable of constituting industrial action even if the conduct relates to part only of the duties that employees are required to perform in the course of their employment; and

(b) a reference to industrial action includes a reference to a course of conduct consisting of a series of industrial actions.

Meaning of ***lockout***

(3) For the purposes of this section, an employer ***locks out*** employees from their employment if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts (except to the extent that this would be an expansion of the ordinary meaning of that expression).

Burden of proof

(4) Whenever a person seeks to rely on subparagraph (g)(i) of the definition of ***industrial action*** in subsection (1), that person has the burden of proving that subparagraph (g)(i) applies."

648 As the joint judgment notes, the Act empowers the Minister to terminate a bargaining period, if he or she is satisfied of certain matters, including, that industrial action is threatening the health or welfare of the population, or part of it, or would cause significant damage to the Australian economy, or an important part of it[723]. These points should be made about this provision: true it is that the Minister's power is confined to the termination of a bargaining period, and that it is the AIRC which is given the jurisdiction to order that "industrial action" stop, but direct executive involvement of this kind in the affairs of non-governmental employers and employees would represent a significant departure, not only from current industrial practice, but also industrial law generally[724], except perhaps in times of war, or otherwise in implementation of the defence power.

649 Part 10 is concerned with the making and variation of awards.

650 Part 11 deals with circumstances in which the obligations of an employer under industrial instruments are transferred to another employer when the whole, or a part, of an employer's business is transmitted to another legal personality. The Part sets out the circumstances in which the transmission of obligations operates pursuant to the Act[725], and also empowers the AIRC to make orders to bind the new employers to, or exempt them from, an existing collective agreement upon transfer of a or the business[726]. Sections 595 and 596 further define the circumstances in which an existing award is, or is not to be binding upon employers and employees upon the transfer of a business from one legal personality to another.

---

723 Section 498.

724 From 1926 the Attorney-General of the Commonwealth could intervene in proceedings before the Court of Conciliation and Arbitration, but not in industrial affairs prior to the proceedings. See [701], below.

725 Sections 583-586.

726 Sections 590-592.

651 Part 12 specifies some minimum entitlements of employees[727]. The Part prescribes entitlements in respect of: (a) meal breaks[728]; (b) public holidays[729]; (c) equal remuneration for work of equal value[730]; (d) termination of employment[731], including provision for conciliation and arbitration, or judicial remedies for specified limited classes of employees for unlawful or unfair terminations; and (e) parental leave[732].

652 Part 13 prescribes a set of procedures called a "model dispute resolution process" for the resolution of disputes between employers and employees, and the procedures required to be followed in circumstances in which particular provisions of the Act require observance of them, or in circumstances in which an obligation to observe the particular process is set out in an award, a workplace agreement, or a workplace determination (s 694). The Part also prescribes a procedure by which a person may apply to the AIRC to have an alternative dispute resolution process conducted by the AIRC[733].

653 Part 14 is concerned with compliance, and contemplates the imposition of penalties and the awarding of damages.

654 Part 15 sets out the terms and conditions upon which industrial organizations may enter and conduct activities on premises occupied by employers, and further provides for the issue of permits to officials of organizations[734]. Division 5 of Pt 15 imposes controls and modifications upon any right held by an official of an industrial organization to enter upon premises controlled by a constitutional corporation or the Commonwealth, if that right is conferred by a State occupational health and safety law.

---

727 As defined in s 5.

728 Division 1.

729 Division 2.

730 Division 3.

731 Division 4.

732 Division 6.

733 Sections 699-701, ss 704-706 and ss 709-711.

734 Section 740.

655 Part 16 proscribes various types of conduct, relating to freedom of association[735], which (a) is aimed at or against a constitutional corporation; (b) adversely affects the constitutional corporation; (c) is carried out with intent to affect adversely a constitutional corporation; (d) directly affects a person in the capacity of an employee or prospective employee of, or a contractor or prospective contractor to, a constitutional corporation, or conduct carried out with intent to do so; or (e) consists of advising, encouraging or inciting a constitutional corporation to take or not to take particular action in relation to another person or to threaten to take, or not to take, particular action in relation to another person.

656 Section 793 of the Act defines a "prohibited reason" for various types of proscribed conduct.

> "**Prohibited reasons**
>
> (1) Conduct referred to in subsection 792(1) or (5) is for a ***prohibited reason*** if it is carried out because the employee, independent contractor or other person concerned:
>
> (a) is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association; or
>
> (b) is not, does not propose to become or proposes to cease to be, a member of an industrial association; or
>
> (c) in the case of a refusal to engage another person as an independent contractor – has one or more employees who are not, or do not propose to become, members of an industrial association; or
>
> (d) has not paid, or does not propose to pay, a fee (however described) to an industrial association; or

---

735 The conduct includes: coercion (s 789); false or misleading statements about membership (s 790); industrial action for reasons relating to membership (s 791); conduct by employers directed against employees, such as dismissal or offering of inducements (ss 792-794); cessation of work by employees (s 795); various conduct by industrial associations, directed against employers, employees, members, independent contractors, or persons generally (ss 796-803); discrimination by persons against employers relating to industrial instruments (s 804); and, false or misleading representations about bargaining services fees and obligations, such as whether an employee is obligated to join an industrial association (s 805).

(e) has refused or failed to join in industrial action; or

(f) in the case of an employee – has refused or failed to agree or consent to, or vote in favour of, the making of an agreement to which an industrial association of which the employee is a member would be a party; or

(g) has made, proposes to make or has at any time proposed to make an application to an industrial body for an order under an industrial law for the holding of a secret ballot; or

(h) has participated in, proposes to participate in or has at any time proposed to participate in a secret ballot ordered by an industrial body under an industrial law; or

(i) is entitled to the benefit of an industrial instrument, an order of an industrial body or the Australian Fair Pay and Conditions Standard; or

(j) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek:

(i) compliance with that law; or

(ii) the observance of a person's rights under an industrial instrument; or

(k) has participated in, proposes to participate in or has at any time proposed to participate in a proceeding under an industrial law; or

(l) has given or proposes to give evidence in a proceeding under an industrial law; or

(m) in the case of an employee, or an independent contractor, who is a member of an industrial association that is seeking better industrial conditions – is dissatisfied with his or her conditions; or

(n) in the case of an employee or an independent contractor – has absented himself or herself from work without leave if:

(i) the absence was for the purpose of carrying out duties or exercising rights as an officer of an industrial association; and

(ii) the employee or independent contractor applied for leave before absenting himself or herself and leave was unreasonably refused or withheld; or

(o) as an officer or member of an industrial association, has done, or proposes to do, an act or thing for the purpose of furthering or protecting the industrial interests of the industrial association, being an act or thing that is:

(i) lawful; and

(ii) within the limits of an authority expressly conferred on the employee, independent contractor or other person by the industrial association under its rules; or

(p) in the case of an employee or independent contractor – has not paid, has not agreed to pay, or does not propose to pay, a bargaining services fee.

(2) If:

(a) a threat is made to engage in conduct referred to in subsection 792(1) or (5); and

(b) one of the prohibited reasons in subsection (1) of this section refers to a person doing or proposing to do a particular act, or not doing or proposing not to do a particular act; and

(c) the threat is made with the intent of dissuading or preventing the person from doing the act, or coercing the person to do the act, as the case requires;

the threat is taken to have been made for that prohibited reason."

657 Part 17 creates a variety of offences in relation to: the AIRC, witnesses in Commission proceedings, non-compliance with requirements of inspectors, and misconduct with respect to ballots ordered to be conducted under the Act.

658 Part 18 provides[736] that an order cannot be made against a party to proceedings in a matter arising under the Act, to pay costs incurred by any other party to the proceedings, unless the first-mentioned party instituted the proceedings vexatiously or without reasonable cause, except in the case of a court proceedings if the court is satisfied that a party to the proceedings has, by

---

736 Section 824.

an unreasonable act or omission, caused another party to the proceedings to incur costs.

659 Part 19 is concerned with a variety of administrative matters. It gives an entitlement to a party to a contract for services that is binding on an independent contractor, to apply to the Federal Court to review the contract on the ground that the contract is unfair or that the contract is harsh[737]. The Court may make orders with respect to unfair contracts including setting aside the whole of the contract or varying it[738].

660 Part 20 is concerned with the jurisdiction of the Federal Court and the Federal Magistrates Court under the Act. The Federal Court or the Federal Magistrates Court is empowered to give an interpretation of an award[739], or of a certified agreement[740]. The jurisdiction of those courts in relation to defined matters is exclusive of the jurisdiction of any other court created by the Parliament, or any court of a State or Territory[741]. This Part also prescribes the rights of representation of parties before the courts and the AIRC[742], and rights of intervention in proceedings.

661 Part 21 deals with matters which apply only to the State of Victoria, and extends the operation of certain provisions of the Act. This is necessitated by the earlier referral of industrial matters to the Parliament of the Commonwealth by the *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic).

662 Part 22 is concerned with contract outworkers in Victoria in the textile, clothing and footwear industry, and is confined in its operation to that State.

663 Part 23 prescribes additional conditions of employment for "school-based apprentices" and trainees, in circumstances in which school-based apprentices are not covered by an award or a notional agreement preserving a State award which specifies additional conditions for school-based apprentices.

664 There are Schedules to the Act.

---

737 Section 832.

738 Section 833.

739 Section 848.

740 Section 849.

741 Section 850.

742 Section 854.

665 Schedule 1 sets out detailed regulations for the registration, control and accountability of industrial organizations.

666 Schedule 2 contains definitions additional to those in ss 4, 5, 6 and 7. Clause 2 of Sched 2 prescribes the circumstances in which a reference to "employee" in the Act has its ordinary meaning, subject to sub-ss 5(3) and (4), as distinct from the meaning given by s 5. Similarly, cl 3 of Sched 2 sets out the circumstances in which a reference to "employer" in the Act has its ordinary meaning, as distinct from the meaning set out in s 6 of the Act.

667 Schedule 4 repeats the words of the Termination of Employment Convention 1982, established at the General Conference of the International Labour Organisation, and Sched 5 the Workers with Family Responsibilities Convention 1981, established at the General Conference of the International Labour Organisation. Both of these, together with other international instruments to which the Commonwealth is a party are referred to and adopted in parts of the Act[743].

668 Schedule 6 makes provision for transitional arrangements for parties bound by federal awards, in order to deal with the position of certain employers who were bound by federal awards immediately before the Amending Act began. It preserves the effect of pre-existing awards[744] for a maximum period of five years[745] in cases in which those employers are employers (within the ordinary meaning of the term) who are not covered by the definition of "employer" in s 6(1)[746]. The Schedule also provides for the variation and revocation of awards preserved by operation of the Schedule, and the procedure for dealing with industrial disputes involving such employers.

669 Schedule 7 contains the transitional arrangements for federal agreements (certified agreements and AWAs) which existed at the commencement of the principal provisions of the Amending Act on 27 March 2006. Pre-existing certified agreements are expressed to continue to be subject to certain of the pre-Amending Act provisions which were repealed or amended[747], but are otherwise

---

743 See ss 4(1), 106, 222(1)(d), 620, 623(2), 624(2) and (3), 630(1), 635(1)(e), 637(5), 642(5), 659(1), 671(b) and 688 of the Act.

744 Clause 4.

745 Clause 6, together with cl 2, definition of "transitional period".

746 Clause 2, definition of "excluded employer".

747 Clause 2.

subject to the provisions of the amended Act. Certified agreements made with excluded employers are also continued in operation subject to a number of (repealed) provisions standing in the Act prior to its amendment[748]. AWAs existing before the amendments too are continued in force and effect, subject to a number of provisions found in the Act before the Amending Act[749], but are otherwise subject to the operation of the Act as amended. Awards made under s 170MX3 of the Act before its amendment are continued in force subject to a number of provisions found in the Act prior to amendment[750] but are also otherwise subject to the Act as amended[751]. Further, the Schedule sets out what the relationship between pre-amendment agreements and an Australian Fair Pay and Conditions Standard is to be.

670 Schedule 8 is concerned with the transitional treatment of State employment agreements and State awards. An employee and employer, as defined in ss 5 and 6, who are parties to an individual State agreement, or parties to, or bound by a collective State agreement, are deemed by the Schedule to be parties to, and bound by, a new federal instrument called a "preserved individual State agreement" or a "preserved collective State agreement"[752]. This Schedule prescribes the operative effect of each of those new federal instruments, and the terms of them, together with the means by which such agreements may be varied, enforced or terminated.

671 The same Schedule provides for the creation of a new federal industrial instrument called a "notional agreement preserving State awards"[753], which is taken to apply to all employees in a single business or part of a single business, and their employer (as defined in ss 5 and 6), in circumstances in which the terms and conditions of employment of one or more employees were not determined under a State employment agreement, and were determined in whole or in part under a State award, immediately before the commencement of the principal provisions of the Amending Act on 27 March 2006. The Schedule further provides for the parties bound by such a notional agreement, the terms, effect and operation thereof, and the manner of varying, enforcing and terminating such notional agreements.

---

748 Clause 13.

749 Clause 17.

750 Clause 23.

751 Clause 24.

752 Clauses 3 and 10.

753 Clause 31.

672 Schedule 9 prescribes the rules for the transmission of the obligations of employers in cases in which a business has been transferred from one person to another in circumstances in which the employer's obligations arise from a transitional industrial instrument[754]. The operative effect of each kind of transitional industrial instrument, and the powers of the AIRC in relation to such transmissions, are prescribed by this Schedule.

673 Schedule 10 provides for the transitional registration of an existing State-registered association[755] under the Act, and prescribes certain of the rights and obligations of transitionally registered associations of employees. Transitional registration can be cancelled by the Federal Court[756] or the AIRC[757] or a Registrar[758]. Registration under the Schedule of a transitionally registered association ends when registration is cancelled, or when the association becomes an organization under the Act, or on the third anniversary of 27 March 2006.

674 So far, I have referred only in passing to the objects of the Act, which deserved more attention than they received in argument. I now set them out[759]:

> "**Principal object**
>
> The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:
>
> (a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and
>
> (b) establishing and maintaining a simplified national system of workplace relations; and

---

754 Clauses 2 and 3.

755 Clause 1 contains a definition of "State-registered association".

756 Clause 5(1).

757 Clause 5(5).

758 Clause 5(6). Section 4(1) defines "Registrar" as an Industrial Registrar or a Deputy Industrial Registrar.

759 Section 3.

(c) providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act; and

(d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and

(e) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances; and

(f) ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of:

(i) employee entitlements; and

(ii) the rights and obligations of employers and employees, and their organisations; and

(g) ensuring that awards provide minimum safety net entitlements for award-reliant employees which are consistent with Australian Fair Pay Commission decisions and which avoid creating disincentives to bargain at the workplace level; and

(h) supporting harmonious and productive workplace relations by providing flexible mechanisms for the voluntary settlement of disputes; and

(i) balancing the right to take industrial action for the purposes of collective bargaining at the workplace level with the need to protect the public interest and appropriately deal with illegitimate and unprotected industrial action; and

(j) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and

(k) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and

(l) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and

(m) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and

(n) assisting in giving effect to Australia's international obligations in relation to labour standards."

675 It can be seen from those objects that the whole purpose of the Amending Act is not just to affect, but is to govern completely, all aspects of the relationship between employers and employees, without any attempt to connect, even by the narrowest of threads, those objects with some implementation of the corporations power. The opening words are that the principal object is "to provide a framework for cooperative workplace relations" and thereafter there is not to be found any reference of any kind in the section to corporations or the corporations power. Stated objects of legislation are not to be put aside lightly. They may be relevant in two particular respects: in influencing, subject to other clear indications to the contrary in the legislation in question, the construction of all sections of it upon which they can bear; and, by providing a clear insight into the true, substantial, or actual nature and character of the legislation in question, and of the power to which the legislators are in reality looking, and need to look, in enacting it. In a passage unaffected by the fact of their dissent, Gleeson CJ and Kirby J said in the recent case of *McKinnon v Secretary, Department of Treasury*[760] that judgments about the meaning and effect of legislation have to be made "not ... in a normative vacuum [but] in the context of, and for the purposes of, [the stated object of the Act]"[761]. Their Honours added that the objects clause there was the "premise" from which the construction of the legislation should begin[762]. It is of significance that the objects provision in this case is entirely bereft of any reference, not only to corporations but also to the financial or trading activities of corporations. This rather suggests that the drafters and the legislators may have found it difficult, in the objects provision, to make the connexion that the Commonwealth now seeks to make between the corporations power and the Amending Act. I do not overlook the definitions sections which are said to supply the necessary constitutional connexion. I simply observe that having regard to the fact that the Act cannot, on any view, constitutionally cover all aspects of the national economy, there is disconformity between the language of universality in the objects, and the constitutional reality of less than that.

---

760 (2006) 80 ALJR 1549; 229 ALR 187.

761 (2006) 80 ALJR 1549 at 1551 [5]; 229 ALR 187 at 189.

762 (2006) 80 ALJR 1549 at 1551-1552 [5]; 229 ALR 187 at 189.

676 It has been said more than once that an enactment may be concerned with more than one subject[763]. So much can be readily accepted. It has also been said that the Commonwealth Parliament may attempt, but fail, to enact legislation under one head of power, yet still achieve constitutional validity in the courts under some other, apparently previously overlooked, power[764]: that in effect it may score a bullseye by aiming at a different target altogether (the "accidental bullseye" proposition). It has also been held[765], indeed the joint judgment in this case so states[766], that there is no constitutional proscription upon the achievement indirectly of what could not be done directly (the proposition of "indirect result")[767]. Claims however of accidental bullseyes and indirect results are not merely unconvincing. They have this further unsatisfactory aspect. When the Commonwealth comes to this Court, to contend validity on either of those bases, it asks the Court to do what the legislature was itself unwilling or unable to do: to strip-mine the Constitution to try to discover in it, or extend, for the Commonwealth some (any one will do) supportive head of power, express or

---

763 *Victoria v The Commonwealth* ("the *Payroll Tax Case*") (1971) 122 CLR 353 at 400; *Seamen's Union of Australia v Utah Development Co* (1978) 144 CLR 120 at 154; *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 192-194; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 261; *Re F; Ex parte F* (1986) 161 CLR 376 at 387; *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 656; *Leask v The Commonwealth* (1996) 187 CLR 579 at 621.

764 See, eg, *Murphyores Incorporated Pty Ltd v The Commonwealth* (1976) 136 CLR 1; *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555.

765 *Pidoto v Victoria* (1943) 68 CLR 87 at 101 per Latham CJ; *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 359-360 [29] per Gleeson CJ. The opposite was submitted by Sir Maurice Byers QC in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 53 (*arguendo*).

766 At [227]-[228].

767 Contrast the early case of *Bird v Holbrook* (1828) 4 Bing 628 at 645 [130 ER 911 at 917] per Burrough J:

> "The Plaintiff was only a trespasser: if the Defendant had been present, he would not have been authorised even in taking him into custody, and no man can do indirectly that which he is forbidden to do directly."

implied[768]. The absence of any reference in the objects provision to corporations, and the making of the connexion by distributive definition only, suggests that this is the process that the Commonwealth is inviting the Court to undertake here if all else were to fail. At the very least invocation of these propositions is a cause for pause, and provokes scepticism and close scrutiny, on grounds of improbability, uncertainty, or possible lack of candour on the part of the legislature.

677 In my opinion the jurisprudence of this Court has not been enhanced by the application of the doctrine of indirect operation. Two examples, on dicta from both of which the Commonwealth relied, suffice to make the point. The first is *Murphyores Incorporated Pty Ltd v The Commonwealth*[769]. There, the Commonwealth wished to assert control of the environment of Fraser Island in Queensland. It initiated an inquiry under s 11(2) of the *Environment Protection (Impact of Proposals) Act* 1974 (Cth) and s 112 of the *Customs Act* 1901 (Cth) into the environmental aspects of a decision by the Minister for Minerals and Energy whether to approve the exploitation of concentrates of zircon and rutile to be extracted from the sands of the island. Before the companies that held the mineral rights lawfully granted by the State could export the concentrates, they needed the written consent of the Minister for Minerals and Energy. The Minister declined to grant a permit until the completion of the inquiry which he had initiated. The companies sought an injunction in this Court to restrain the Commissioners from proceeding with the inquiry. They argued that the relevant regulations were not concerned with the anterior operations of mining and processing, and that to take into account the incidents of these was to have regard to extraneous matters: that the question whether processed materials should be allowed to be exported did not have any environmental aspect. They further argued that the exercise of a power for purposes extraneous to it was bad, in substance, an argument that the Commonwealth was doing indirectly, seeking to control an internal State environmental matter, over which it had no constitutional power, by the device of reliance upon constitutional powers that it might have.

678 The principal judgment refusing the injunction was given by Stephen J, with whom Barwick CJ, McTiernan J and Jacobs J agreed, Mason J writing an extensive judgment to a similar effect. All members of the Court were of the view that the legislation and the institution of the inquiry under it were a valid

---

768 In *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 676-677, Evatt and McTiernan JJ said that s 15A of the *Acts Interpretation Act* 1901 (Cth), which provides that every Commonwealth Act is intended to be within power, "cannot be applied so as to perform [a] feat which is in essence legislative not judicial".

769 (1976) 136 CLR 1.

exercise of the trade and commerce power. Stephen J accepted[770] that the control of the plaintiffs' mining operations and of their effect upon the local environment was "essentially a matter for the State". Notwithstanding that undoubted truth, his Honour went on to hold that, because the power to control exports could be directed to ends such as trade embargoes or boycotts, and defence, it could also be used to protect local species of flora or fauna[771]. His Honour was of the opinion that the only limit upon the considerations to which the responsible Minister could have regard was an absence of bona fides in granting or refusing a permit to export, that is, in the sense of reliance upon, for example, corrupt, entirely personal or whimsical considerations[772]. His Honour held that because the power over exports was absolute, even the slightest of connexions with that end, of export, justified the interference that the Commonwealth's legislation and conduct involved. Giving the word "export" as much generality as one may, one still cannot rationally find somewhere in it the words or concept of a State or local "environment". On the reasoning of the Court, if a commodity of any kind, grown, mined, manufactured or processed anywhere in Australia is exported, the federal government would have large powers of control over the conditions of any aspect of its production. Even the *Engineers' Case*[773] or the most extended application of it, and the "generality doctrine"[774] cannot be authority for that.

679 The other example, *The Tasmanian Dam Case*[775], also involved the intrusion by the Commonwealth, by legislation and not acquisition on just terms, this time under the asserted head of the external affairs power, upon three, to adopt the language of Stephen J in *Murphyores*, "essential functions of a State", the supply of hydro-electric power to its residents, the environment of a local area of a State, and the use of State land as the State wished. This Court upheld the constitutional validity of that intrusion, thereby allowing the Commonwealth to achieve, by very indirect means, the use, I would say misuse, of the external affairs power, by reliance upon an international arrangement of a kind, and

---

770 See (1976) 136 CLR 1 at 9.

771 (1976) 136 CLR 1 at 13-14.

772 (1976) 136 CLR 1 at 12.

773 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

774 See Pt IV, Div 2 of these reasons.

775 *The Commonwealth v Tasmania* (1983) 158 CLR 1.

having an impact which I do not believe the founders would have countenanced, and for which the Constitution, either textually or otherwise, does not provide[776].

680 The Act here requires for its validity at least in part the application of the doctrine of indirect operation[777]. For that reason, the capacity for intrusiveness upon essential State functions that its application has, the Act deserves sceptical and close scrutiny.

PART III. RELEVANT CONSTITUTIONAL AND POLITICAL HISTORY

681 I turn now to relevant history.

682 No one in this case suggests that the *Engineers' Case* should be overruled, and indeed it must be accepted that the principles which it states, subject to some qualifications that I will only mention now, but refer to more extensively later, are still binding. The qualifications are those to be found in *Melbourne Corporation v The Commonwealth*[778] and, very recently, *Austin v The Commonwealth*[779]. Both of those cases suggest a realization on the part of the Court that the *Engineers' Case* went too far in favour of the Commonwealth, and that any unqualified application of it had the capacity to reduce unacceptably the constitutional status and role of the States. The *Engineers' Case* is part of the relevant history, but, as an examination of it will show, stands for little to assist in this case.

683 Judges now acknowledge that the history of the making of the Constitution, especially the most reliable account of it, the statements made in

---

776 In argument ([2006] HCATrans 215 at 1502-1514) it was suggested that perhaps too little time passed between argument and decisions in *The Tasmanian Dam Case.* In the *Engineers' Case* oral argument finished on 2 August 1920 and judgment was delivered four weeks later.

777 By contrast, s 96 of the Constitution, for example, does legitimately constitutionally enable the Commonwealth to achieve ends indirectly and without offence to other provisions and rights. It provides:

> "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

778 (1947) 74 CLR 31.

779 (2003) 215 CLR 185.

the Constitutional Convention Debates[780], is highly relevant to an understanding of it. In *Cole v Whitfield* the Court said this[781]:

> "Reference to the history ... may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged."

684 It seems to me that the distinction which the makers of that statement sought to make, between subjective intention, and the meaning of the language used, the subject of it, and the nature and objective of the movement towards federation in constitutional discourse, is in truth a distinction without a difference. In particular, "the subject to which that language was directed" can only be the subject identified by the speakers about it, and unless they were being disingenuous, their stated subjective intentions and the subject of their language were one and the same.

685 In his paper, "The Constitutional Commission or The Inescapable Politics of Constitutional Change"[782], Professor Davis[783] did not doubt that a knowledge of a history of a Constitution was essential for its understanding and interpretation[784]:

> "A constitution, it is often said, is what the judges say it is. In its proper context, this is unquestionably true. But it is equally true that it is

---

780 Being the record of the Constitutional Conference in Melbourne in 1890, the Constitutional Convention in Sydney in 1891, the Constitutional Convention in Adelaide in 1897, which had later sessions in Sydney in 1897, and the Constitutional Convention in Melbourne in 1898.

781 (1988) 165 CLR 360 at 385 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

782 Davis, *The Constitutional Commission or The Inescapable Politics of Constitutional Change*, (1987).

783 Professor Rufus Davis, then Emeritus Professor of Politics at Monash University and Barrister-at-Law at the Victorian Bar.

784 Davis, *The Constitutional Commission or The Inescapable Politics of Constitutional Change*, (1987) at 31-32.

> more than this. Like any institution, a constitution is first and foremost its history. It is the memories and the experience of all those who have ever lived by it, and of all those who continue to live by it. It is the written commentaries upon it, the judicial pronouncements, the learned discussions, the controversies, the public inquiries, the parliamentary debates and the referenda polemics."

686 In *XYZ v Commonwealth*[785], a case concerning the external affairs power, Heydon J and I said the following, which is unaffected by the fact that our decision was a dissenting one[786]:

> "These inquiries seem pointless unless, in general, the meaning of an expression in the *Constitution* like 'external affairs' comprises the meanings which skilled lawyers and other informed observers of the federation period would have attributed to it, and, where the expression was subject to 'dynamism'[787], the meanings which those observers would reasonably have considered it might bear in future. What individual participants in the Convention debates said it was intended to mean, or meant, either during those debates or later, is no doubt immaterial, save to the extent that their linguistic usages are the primary sources from which a conclusion about the meaning of the words in question can be drawn. Further, no doubt the mere fact that a particular instance of the expression 'external affairs' was not foreseen, or could not have been foreseen, in 1900, does not conclusively indicate that the instance in question could not now fall within it[788]. But, subject to considerations of those kinds, it might be asked whether it is not legitimate to seek to measure the ambit of the power by reference to the meaning which, in 1900, that expression bore or might reasonably have been envisaged as bearing in the future."

687 The two quoted passages from the cases state the bare minimum of the utility of the Convention Debates[789]. True it is that the Constitution does not contain any equivalent of s 15AA of the *Acts Interpretation Act* 1901 (Cth),

---

785 (2006) 80 ALJR 1036; 227 ALR 495.

786 (2006) 80 ALJR 1036 at 1070 [153]; 227 ALR 495 at 537.

787 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 496 [23] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

788 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 482 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

789 See also *Singh v The Commonwealth* (2004) 222 CLR 322 at 424-425 [295] per Callinan J.

which insists upon the preference for a purposive construction if it is available, or an equivalent of s 15AB of that Act which permits courts to refer to such extraneous materials as second reading speeches and explanatory memoranda, but there is reason why a similar approach should be adopted in construing the Constitution[790], particularly when its history is so well and extensively laid out in the Debates, and in circumstances in which it can reasonably be inferred that what was said in debate was either clearly adopted or could be seen to reflect, not invariably but usually ultimately, a substantially consensual approach. Furthermore, the speeches and comments made in debate can be seen to have generally been made sincerely and constructively, and not upon the basis of politics and divisions.

688 Although there were some differing views expressed by McHugh J and me in *Woods v Multi-Sport Holdings Pty Ltd*[791], as to the use of extraneous materials, they related to some matters and facts only. Neither of us doubted that recourse could be had to relevant indisputable history[792]. The record of the proceedings of the Conventions is indisputable history as are the repeated relevant referenda and their failure, to which I will later refer.

689 In *Plaintiff S157/2002 v The Commonwealth*[793] I pointed out that Sir Robert Menzies, an experienced politician as well as a constitutional lawyer, said in his memoir *Afternoon Light*[794] that constitutional law in a federal system is "a unique mixture of history, statutory interpretation, and some political philosophy". Part, indeed an essential, if not the most illuminating, aspect of the history of the Constitution is the language of the founders in the Convention Debates with respect to the provisions which they debated at great length, at

---

790 An analogy may be made with *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304-305 per Gibbs CJ, 310-311 per Stephen J, 320 per Mason and Wilson JJ, 334 per Aickin J (dissenting), in which a statute was construed purposively without any direction to that effect from the *Acts Interpretation Act* 1901 (Cth).

791 (2002) 208 CLR 460 at 478-481 [64]-[70] per McHugh J, 513-515 [168]-[169] per Callinan J.

792 See (2002) 208 CLR 460 at 480 [67] per McHugh J (citing Dixon J in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 196), 511-512 [165] per Callinan J.

793 (2003) 211 CLR 476 at 514-515 [108]; later cited in *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 37 [12] per Gleeson CJ, Gummow and Hayne JJ.

794 Menzies, *Afternoon Light*, (1967) at 320.

much greater length it may be said, than the authors of the United States Constitution, but with the advantage of a sound knowledge of that Constitution and how it had operated and been construed for more than 100 years.

690 And if two other things are clear from the Convention Debates they are that any federal power in relation to industrial affairs was to be confined to those of an interstate character, and that the former colonies were to retain power over internal industrial disputes. As appears from those sections of the Debates and the clear recollection of Mr Higgins as an enthusiastic participant in them, of their course and language, not long afterwards, to which I will refer, industrial matters and how power with respect to them was to be divided, were very much on the minds of the founders.

Div 1: Early industrial relations tribunals

691 Right from the beginning of the Debates and federation itself, industrial affairs were regarded as unique and quite separate affairs from others. Accordingly, the early federal parliaments were quick to exercise federal industrial power. And the power that they exercised was the power that they well understood was limited by the language and intent of the industrial affairs power to interstate disputes. Everything legislated thereafter until 1993 proceeded on that basis.

692 The Commonwealth Court of Conciliation and Arbitration was established under the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth), enacted pursuant to s 51(xxxv) of the Constitution. That Act conferred on the Conciliation and Arbitration Court both judicial and arbitral powers.

693 In moving that the Conciliation and Arbitration Bill 1904 (Cth) be read a second time, the Minister for External Affairs, Mr Deakin, said this[795]:

> "The object of the measure has been stated to be, so far as its attainment may be possible, the establishment of industrial peace. The discussion upon the Bill ... has been concentrated upon the possibility or impossibility of achieving this task by legislative means."

Later he said[796]:

---

795 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 March 1904 at 763.

796 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 March 1904 at 764.

> "What is sought to be done, therefore, is not, as is popularly supposed and currently stated, to endeavour to declare in an Act of Parliament what wages shall be paid or what conditions shall be observed in any particular trade. That is obviously and transparently impossible. What is sought to be done is to create a tribunal which, having the confidence of the public, and possessing all the knowledge that can be obtained in relation to any matter that may be brought before it, shall have authority to pronounce judgment between the disputants. It is not to pronounce judgment, be it observed, according to the bidding of the statute which creates it. On the contrary, the Court is to be launched upon its work with a larger and more general charter than that of any other Court in the world. ... The Court, when it comes to consider any propositions submitted to it, by way of complaint, either on the part of employer or employé, will look to no section of an Act which bids it fix such and such hours, wages, or conditions. What it will do will be to take evidence of the general conditions already obtaining in the trade in question. It will build upon facts as it finds them; it will take the experience which has wrought out the customs and conditions of employment. It will take these as existing, and endeavour to shape them in accordance with its own conceptions of equity and good conscience, based upon an examination of the facts."

694 Mr Deakin spoke of a long-term goal[797]:

> "Our object is to see that, where other circumstances are equal, one and all shall pay the same and that a fair rate of wage for the same services; that competition, which is the life-blood of trade, shall not drain the life-blood of men, may not be pushed to that extreme, and that the advantage of the employer on the one side shall not be gained over the employer on the other, at the expense of the men, women, and children whom he employs. Equality of treatment in each business is the first end which is sought to be attained."

695 Section 12(1) of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth), as a measure of the importance that the Parliament attached to maintenance of industrial peace, required the President of the Court to be a High Court Justice. The first President was O'Connor J (1905-1907). He was succeeded by Higgins J (1907-1920), and then Powers J (1921-1926). By 1926 there were two Deputy Presidents, Sir John Quick and Mr (Noel) Webb. In 1926 the Court's nexus with the High Court was broken, following legislative

---

797 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 March 1904 at 765.

reform[798]; a new Chief Judge was appointed to replace the President, and two additional judges were appointed.

696 Interestingly, O'Connor J and Higgins J, as they were to become, had disagreed during the Convention Debates in Melbourne, 1898, about whether placitum (xxxv) should be included in the Australian Constitution at all. Mr O'Connor was opposed to its inclusion. Mr Higgins was in favour[799]:

> "Mr O'CONNOR: It must not ... be assumed that those of us who oppose the placing of this power in the Federal Constitution are any less sympathetic with those troubles and disasters, which affect not only the workers but the whole community. We base our opposition to the insertion of this clause in the Federal Constitution upon this ground only – that the matter is a matter not for federal control but for state control.
>
> Mr HIGGINS: How could you deal with a shearing strike or a shipping strike in that way? How could that be a matter for state control?
>
> Mr O'CONNOR: I would point out to the honorable member that, after all, when you come to deal with these cases so as to settle them, you must settle the dispute between the original parties. You don't get rid of the dispute between the original parties by settling the extension and the indirect effects of the dispute; you must settle the dispute itself. Now, the dispute occurs in one state, and the dispute generally depends on the terms of a contract or on the terms of employment, so that, however widespread the consequences of that one dispute may be, in order to arrive at a settlement of a strike you must settle the dispute. Therefore you have to deal with a matter arising in a particular state subject to local conditions, and referring to a contract made by parties living in that state. It is a matter, therefore, which really, except in regard to its consequences, the Federal Commonwealth has no concern with. ...
>
> If this power to legislate is given at all, the next step in legislation must be, if it is to be effective, to grant compulsory powers, and you have to regard this matter as if the power was to be exercised in that way. Honorable members cannot deny that it can be exercised in that way, and the probabilities are that it will be exercised in that way.

---

798 *Commonwealth Conciliation and Arbitration Act* 1926 (Cth), s 6.

799 *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 27 January 1898 at 199-201.

Mr HIGGINS: If the Federal Parliament is wise, will it not refuse to do an unwise thing?

Mr BARTON: Are we not to assume, if we grant this power, that it will be fully exercised?

Mr O'CONNOR: I would ask the honorable member (Mr Higgins) is he in favour of some form of compulsion?

Mr HIGGINS: I am not in favour of anything at present but of leaving the thing to the Federal Parliament.

Mr O'CONNOR: The honorable member, however, has given some attention to the subject, as he has to all subjects of a social character, and I would ask him what is his own opinion? If the honorable member is afraid to disclose his opinion to me – –

Mr HIGGINS: I am not afraid of disclosing anything to you, but I want to make no false issue, but to leave the thing absolutely to the Federal Parliament.

Mr O'CONNOR: The honorable member is mistaken in saying that this is a false issue. We must consider how the power is likely to be used.

Mr HIGGINS: Will you trust the Federal Parliament?

Mr O'CONNOR: I will trust the Federal Parliament when it gets a power of this kind to do what it considers to be effective, and the only way in which it can deal effectively with this matter is to make the power in some way compulsory. I will trust the Federal Parliament with any matter which is a matter of federal concern. The best way of proving that this is not a matter of federal concern is to inquire how it is likely to operate if the power is to be exercised in the way in which it is certainly likely to be exercised.

Mr ISAACS: Surely that is not a correct principle to go upon? Before giving a man a vote would you inquire how he is likely to use it?

Mr O'CONNOR: That is not an analogy.

Mr ISAACS: It is very like one.

Mr O'CONNOR: When you are dealing with a power of this kind, the very best way to discover whether it is a federal power is to consider how it may be exercised."

697 Mr Higgins reiterated that he had favoured a broader power than s 51(xxxv) came to provide, as his later speech in the House of Representatives in 1903, as the Member for Northern Melbourne, reveals[800]:

> "My first proposal at Adelaide was to insert the words 'industrial disputes extending beyond the limits of any one State.' Those words read in conjunction with the words in the early part of the section would have amounted to a provision as follows:–
>
> > 'The Parliament shall have power to make laws for the peace, order, and good government of the Commonwealth with respect to industrial disputes extending beyond the limits of any one State.'
>
> If those words had been adopted they would have permitted of any kind of legislation with regard to industrial disputes of a widespread character. ...
>
> *Throughout the whole of the Convention debates, I felt that labour legislation should be exclusively vested in the Commonwealth Parliament. Unfortunately, members had come to the Convention with their minds prejudiced in favour of certain theories which they had derived from the antiquated Constitution of the United States.*
>
> ...
>
> There was a general belief in the Convention that factory legislation should be left to the States[,] Parliaments. It was utterly impossible to overcome that feeling." (emphasis added)

I interpolate that it is not for an unelected institution such as a court, even this one, to cast aside as irrelevant the overwhelming sentiment which found explicit expression in the Constitution of a very strict division between federal and State industrial power, whether corporations were involved or not. Mr Higgins continued[801]:

> "Therefore, I had to see how the Commonwealth Parliament could, to some extent, obtain control over industrial disputes. Personally, I have always felt that Australia is ripe for a unity of a much higher character than it has obtained. I think that if members had not gone to the Convention with their judgments prejudiced in favor [sic] of the sanctity

---

800 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 12 August 1903 at 3467.

801 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 12 August 1903 at 3467.

> of the United States Constitution, we should have obtained a much better charter of government than that which we did. However, the fact remains that we have, in our Constitution, words the ambit of which I cannot foresee, and the power of which cannot at present be gauged."

698 It was Higgins J, as President of the Court of Conciliation and Arbitration, who handed down the "Harvester judgment" in 1907 – *Ex parte H V McKay*[802]. In that case he used the expression, "minimum wage"[803]. His Honour's determination of the "minimum wage" there was not, however, enforced[804], because a constitutional challenge to the Act in question, the *Excise Tariff* 1906 (Cth), was successful, by majority (Griffith CJ, Barton and O'Connor JJ, Isaacs and Higgins JJ dissenting)[805]. The former reasoned that specific constitutional powers could not be allowed to override others, or to undermine the Constitution generally, and specifically, that the taxation power could not be used for industrial purposes, that is, to achieve an indirect result. I do not think that the reasoning of Griffith CJ, speaking for the majority, depends wholly upon the doctrine of implied immunities or reserved or continued powers. To construe the Constitution as a whole, and with particular regard to the distinct powers conferred by each of the placita of s 51, as his Honour did, is not merely to do that. Griffith CJ said this[806]:

> "It follows from what has been said that the power of taxation is subject to some limits. On the other hand, so long as the prescribed limits are not transgressed, the Parliament may select the persons or the things in respect of which the exercise of the power is to operate. It is contended for the Commonwealth that this power of selection is only limited by the express words of placitum ii and sec 88, and that the discrimination or selection may be made to depend upon any other condition whatever, including conditions relating to personal conduct, or the regulation of domestic industrial conditions. The defendants contend, on the other hand, that the limitation of the power of selection is to be found, not only in the express words of sec 51, placitum ii, and sec 88, but also in other parts of the Constitution, so that the grant of the power of taxation, which, as already said, is an independent power, must be so construed as to be not

---

802 (1907) 2 CAR 1.

803 (1907) 2 CAR 1 at 4.

804 See Higgins, "A New Province for Law and Order: Industrial Peace through Minimum Wage and Arbitration", (1915) 29 *Harvard Law Review* 13 at 15.

805 *R v Barger*; *The Commonwealth v McKay* (1908) 6 CLR 41.

806 (1908) 6 CLR 41 at 71-72.

> inconsistent with the other provisions of that instrument. If this latter contention be rejected, it would follow that the power of taxation is an overriding power, which would enable the Parliament to invade any region of legislation, although it is impliedly forbidden to enter it, and this by the simple process of making liability to the taxation depend upon matters within those regions. In this connection I will read a passage from the judgment of this Court in *Peterswald v Bartley*[807]: – 'In construing a Constitution like this it is necessary to have regard to its general provisions as well as to particular sections, and to ascertain from its whole purview whether the power to deal with such matters was intended to be withdrawn from the States, and conferred upon the Commonwealth. The Constitution contains no provisions for enabling the Commonwealth Parliament to interfere with the private or internal affairs of the States, or to restrict the power of the States to regulate the carrying on of any businesses or trades within their boundaries, or even, if they think fit, to prohibit them altogether. That is a very important matter to be borne in mind in considering whether this particular provision ought to be construed so as to interfere with the States' powers in that respect. If the majority of the Supreme Court were right, the Constitution will have given to the Commonwealth, and withdrawn from the States, the power to regulate their internal affairs in connection with nearly all trades and businesses carried on in the States. Such a construction is altogether contrary to the spirit of the Constitution, and will not be accepted by this Court unless the plain words of its provisions compel us to do so."

Griffith CJ then drew[808] an analogy with an excess of power on the part of a local authority the powers of which were defined by statute[809].

699 Years later, Higgins J wrote about the Court of Conciliation and Arbitration in an article in the *Harvard Law Review*, "A New Province for Law and Order: Industrial Peace through Minimum Wage and Arbitration"[810]. The "new province" was "relations between employers and employees"[811]. He explained the constitutional and statutory background of the Court of

---

807 (1904) 1 CLR 497 at 507.

808 (1908) 6 CLR 41 at 75-76.

809 See *Rossi v Edinburgh Corporation* [1905] AC 21 at 25 per Earl of Halsbury LC.

810 (1915) 29 *Harvard Law Review* 13.

811 (1915) 29 *Harvard Law Review* 13 at 13.

Conciliation and Arbitration, and referred to the exceptional nature of the limited power conferred upon the Commonwealth with respect to industrial affairs[812]:

> "Following the example of the United States Constitution, the [Australian] Constitution left all residuary powers of legislation to the States; and the theory generally held at the time of our constitutional convention was that each State should be left to deal with it own labour conditions as it thought best. But an exception was made, after several discussions, in favour of labour disputes which pass beyond State boundaries and cannot be effectually dealt with by the laws of any one or more States. Just as bushfires run through the artificial State lines, just as the rabbits ignore them in pursuit of food, so do, frequently, industrial disputes.
>
> In pursuance of this power, an Act was passed December 15, 1904, constituting a Court for Conciliation, and where conciliation is found impracticable, arbitration. The arbitration is compulsory in the sense that an award, if made, binds the parties. The Act makes a strike or a lockout an offence if the dispute is within the ambit of the Act – if the dispute is one that extends beyond the limits of one State. In other words, the process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lockout. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interest of the public."

700 Higgins J concluded with a summation of the matters which had exercised the minds of the founders in settling upon the language of s 51(xxxv) that they did[813]:

> "It will be asked, however, what is the net result of the Court of Conciliation? Have strikes ceased in Australia? The answer must be that they have not. There have been numerous strikes in Australia, as elsewhere. But since the Act came into operation there has been no strike extending 'beyond the limits of any one State.' Those who are old enough to recall the terrible shearers' strike and seamen's strike of the 'nineties,' with their attendant losses and privations, turbulence and violence, will realize how much ground has been gained. The strikes which still occur are strikes within a single State, and disputes within a single State are outside the jurisdiction of the Court."

---

812 (1915) 29 *Harvard Law Review* 13 at 13-14.

813 (1915) 29 *Harvard Law Review* 13 at 37-38.

701 An amending Act[814] reconstituted the Court of Conciliation and Arbitration in 1926, and inserted a new s 18B, which provided for intervention, by the Commonwealth Attorney-General, "in the public interest in any proceeding before the Court in which the question of standard hours of work in any industry or of the basic wage is in dispute, in relation to either of those questions"[815]. Conciliation Commissioners were also provided for in the 1926 amending legislation[816].

702 The changes in 1926 were intended to be temporary only: the government had proposed in that year that there be a new placitum (xl), to enable the Commonwealth Parliament to legislate for and regarding "authorities with such powers as the Parliament confers on them with respect to the regulation and determination of terms and conditions of industrial employment and of rights and duties of employers and employees with respect to industrial matters and things".

703 Speaking only a day after the Prime Minister, Mr Bruce, had moved that the Constitution Alteration (Industry and Commerce) Bill 1926 (Cth) be read a second time[817], Mr Latham, subsequently Chief Justice of this Court, said in moving that the Conciliation and Arbitration Bill 1926 (Cth) be read a second time[818]:

> "It must be remembered that no single State is able to deal effectively with an interstate dispute, even when the dispute is made interstate merely by the service of a printed claim. If we wish to secure industrial peace through the medium of the law, there must be some means of dealing with these disputes on a federal basis. Therefore the Government is of opinion that it is necessary to continue the Commonwealth Arbitration Court, and to make certain improvements to it.
>
> ... I wish to make it perfectly plain at the outset that [the Bill] is designed to deal only with the period intervening between the 30th June and the time when the proposed constitutional amendments have been voted on by the people. *The Government is of opinion that our present constitutional*

---

814 *Commonwealth Conciliation and Arbitration Act* 1926 (Cth).

815 Section 18B(1).

816 Section 18C.

817 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 May 1926 at 2159.

818 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 21 May 1926 at 2232-2233.

> *powers are not sufficient to enable it to deal satisfactorily with the industrial situation, and it does not propose to introduce an elaborate and carefully worked out scheme for the settlement of disputes upon the basis of our present limited powers.* If our powers are extended it will become possible to introduce an improved scheme providing for a common rule, and for other means of settling industrial disputes than those provided under the Arbitration Act. I do not wish to be misunderstood on this point. If the proposed constitutional amendments are approved by the people it will not be necessary for parties to bring themselves to the stage of a formal dispute, for it will be possible to establish authorities which will have power to regulate terms and conditions of industrial employment, irrespective of the existence of a dispute. It will also be possible to preserve the existing Arbitration Court, to extend and improve its powers, and to add other means of determining industrial conditions. This measure is not a full treatment of the subject, and it does not pretend to be such. In the circumstances, there would be no object in the Government seeking to walk delicately between the various decisions of the High Court in order to see how far it might go under its existing power. The proper thing to do is to face the whole problem, and to ask the people for whatever additional powers are necessary to enable it to deal effectively with industrial matters." (emphasis added)

704 Mr Latham explained that Justices of this Court, essentially for practical reasons, would no longer be Presidents or judges of the Conciliation and Arbitration Court[819]:

> "It is not proposed to appoint High Court judges to the Arbitration Court. That court will be entirely separate from the High Court. The provision that the President of the Arbitration Court must be a High Court judge will be repealed. There are various reasons which render it advisable to have the two jurisdictions entirely distinct from each other. Serious inconvenience of a practical nature now arises from time to time, because it is necessary to enlist the services of the President of the Arbitration Court to constitute a full bench of the High Court. Again, the President of the Arbitration Court, as a judge of the High Court, has on very many occasions to pronounce upon the validity of a procedure that he has adopted as President."

705 Further changes were made to the Court, including in 1947 to enlarge the role of the Conciliation Commissioners. Then came the *Boilermakers' Case*[820],

---

819 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 21 May 1926 at 2234.

820 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

in which the High Court declared the creation of the Conciliation and Arbitration Court to be unconstitutional, because it was empowered to exercise both arbitral and judicial functions. The Commonwealth Parliament accordingly created two separate bodies, the Commonwealth Conciliation and Arbitration Commission (later the Australian Conciliation and Arbitration Commission, and today the Australian Industrial Relations Commission), to exercise powers pursuant to s 51(xxxv) of the Constitution, and the Commonwealth Industrial Court (later the Industrial Division of the Federal Court and the Industrial Relations Court, today the Federal Court), to exercise federal judicial power.

706 Enough appears to demonstrate that the founders never intended the Constitution to confer any intrastate industrial power upon the Commonwealth despite that some of the delegates might have wished it otherwise. The contrary sentiment was too strong. Subsequent legislators well understood that constitutionally too therefore they could not do so. I am not prepared to ignore that sentiment or the expression of it which s 51(xxxv) manifests. What also is apparent is that none of the lawyers, politicians and judges to whom I have referred even remotely contemplated intervention by the Commonwealth into industrial affairs, other than by enactments under s 51(xxxv). The whole tenor of the Convention Debates about industrial affairs was that they could be divided into two categories only, intrastate and interstate. No one suggested that the debate, so far as corporations were concerned, was an arid one, because the industrial affairs of these were already within the Commonwealth's grasp under the corporations power.

Div 2: Failed attempts to gain power

707 The point that I have just made is reinforced by the repeated failure of the referenda to enlarge industrial power.

708 Part of the history, as I have shown, of s 51 that the Commonwealth has had to accept, and had generally accepted until 1993, is that it has no general industrial power, other than the power found in s 51(xxxv). It has long, from 1910[821] at least, been understood by the Parliament that it could only exercise general, effectively almost exclusive, legislative powers, and with respect to corporations as well, for industrial affairs, if the Constitution were amended. To effect these amendments the Parliament sought changes on four occasions by referenda, in, respectively, 1911, 1913, 1926 and 1946. The speeches in Parliament regarding the Bills for these are more even than the polemics of referenda of which Professor Davis wrote, and to whose writings I earlier

---

821 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 October 1910 at 4703-4704, quoted below.

referred[822]. They are revelatory of the understanding of lawyers and legislators of the limited reach and application of the Constitution in its unamended form, in pursuance of not only the industrial affairs power, but also the corporations power.

(a) The Constitution Alteration (Legislative Powers) Bill 1910 (Cth) for a referendum

709 This Bill was for a referendum for amendments to ss 51(xx) and (xxxv) of the Constitution, so that the Commonwealth Parliament could legislate with respect to:

> "(xx) Corporations, including –
>
> (a) the creation, dissolution, regulation, and control of corporations;
>
> (b) corporations formed under the law of a State (except any corporation formed solely for religious, charitable, scientific or artistic purposes, and not for the acquisition of gain by the corporation or its members), including their dissolution, regulation and control; and
>
> (c) foreign corporations, including their regulation and control.
>
> ...
>
> (xxxv) Industrial matters, including employment and the wages and conditions of employment and also including the prevention and settlement of industrial disputes."

710 The Acting Prime Minister and Attorney-General, Mr Hughes, adopting a narrow and simplistic textualist approach to the Constitution, in disregard of the founders' clearly expressed intentions, somewhat petulantly said this of the current s 51(xx) in the second reading speech for the Bill for the referendum[823]:

> "I come now to corporations. *Here again we find our powers shorn by the High Court interpretations of the Constitution*. We thought that we had power with regard to making laws regulating corporations, because

---

822 Davis, *The Constitutional Commission or The Inescapable Politics of Constitutional Change*, (1987) at 32.

823 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 October 1910 at 4703-4704 (emphasis added).

paragraph xx of section 51 of the Constitution says that we can make laws with respect to –

> 'Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.'

Upon that assumption the Anti-Trust Act was passed, sections 5 and 8 of which were drafted with a view to dealing, in what was hoped would prove effective fashion, with monopolies, and to prevent the people of this country from being entirely at the mercy of persons who control the means whereby we live. It was found, however, in the Huddart-Parker case, that we had no such power, that paragraph xx did not mean what it said, and that practically the only power we have is the power to deal with corporations before they commence operations. Once they have commenced operations we can do nothing whatever with them. The absurdity of this position becomes clearer when we look more closely into the judgment. We have power to prohibit corporations from engaging in any business at all, but we have no power to direct their operations when once they are launched in any business. We can apparently say to any corporation about to start, 'You shall not do anything,' but directly it starts it may do anything it pleases for all that we can do to it. Practically, then, we have the shadow of a power; the reality is taken from us. We thought that paragraph xx gave us complete power, and we had reason for that opinion, for the power which that paragraph purports to give was novel, and did not exist in any other Federal Constitution. It was put into the Constitution to give us, as it was thought, an added power. But it gives us nothing, or nothing of value."

711 Much of what Mr Hughes then said[824] of the approach of this Court to s 51(xxxv) has now been falsified by subsequent decisions of this Court and the legal fiction of paper disputes[825]. Significantly however, he did not suggest that the industrial affairs of corporations could be regulated other than under the express industrial affairs power:

> "Now, what is our power with regard to industrial matters? The High Court has put a narrow and technical meaning on the term 'industrial disputes,' and has decided that our power does not extend to the making of laws respecting collective bargaining or industrial agreements. We cannot place the sanction of the law over that most excellent and effective means of promoting and maintaining industrial peace – the industrial agreement.

---

824 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 October 1910 at 4709.

825 See Pt VII, Div 2 of these reasons.

> Again, in the Woodworkers' case it was held that arbitration was of a judicial character, and the Commonwealth law must not be inconsistent with the State law; that is to say, that the decision of a Wages Board in New South Wales or Victoria could not be interfered with by us. That is the apotheosis of absurdity. In the Jumbunna case there was, as I have said, an indication by the Court that industrial agreements are, to a certain extent, *ultra vires*. In the Broken Hill case, industrial disputes were defined in a way indicating limitations on the Commonwealth power, and in the Boot Trade case it was held that the common-rule provisions of our Act were *ultra vires*.
>
> The net result is, as Mr Justice Higgins has pointed out, that the Arbitration Court is hampered at every turn, and can do little or nothing."

712 Because of his prominent, indeed perhaps decisive role in the establishment of the federation, the words of Mr Deakin, who was by then the Leader of the Opposition are relevant[826]:

> "*The Attorney-General last night passed with a gay bound over all those gulfs surrounding the real question at issue, which is the distribution of powers between the Federal and local Governments*. He relied upon the presentation of a number of subjects to honorable members as capable of being best dealt with by the National Parliament, and in an absolute manner. The honorable gentleman won the applause of his party by putting before the House the argument that in achieving this programme, and for this purpose, the short and direct route was to give this Parliament, of which we are members, the power to magnify its office and opportunities, so as to enable us *to achieve the nationalization of monopolies, taxation, and other objects which he set out*. The honourable gentleman put before us the objects to be attained, and, so far as absolute silence could, he diverted our attention from what we should be sacrificing in our Federal Constitution, now based *upon a fairly natural and healthy balance of powers* in order to achieve these immediate ends. ... The relation of Governments to Governments to the man in the street appears a much less practical matter than the ends sought to be achieved according to his immediate programme. The real question in this House is not whether this industrial legislation supported by our honorable friends opposite is necessary. It is not even a question whether there should be a greater control over trusts and monopolies. On many, if not all, of these questions, honorable members on this side are prepared to take a progressive view. But these are not the questions immediately at issue.

---

826 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 October 1910 at 4806-4807 (emphasis added).

> *The question is whether we are going to endeavour to achieve these ends by a great alteration of the national machinery which will be permanent – unless the people alter it back again – an alteration in the national machinery and character of our Constitution which will continue to be operative long after the immediate and particular object of the change has been accomplished*." (emphasis added)

Mr Deakin added[827]:

> "The strongest criticism that I have to offer of these Bills is that, judged by the standard of the highest Federalism – the complete development of local governing bodies – they fail – they proceed much too far in an opposite direction. They unduly centralize, and unduly discourage local development."

713 Another Member who spoke against the Bill was the Member for Bendigo, Sir John Quick. I refer to his speech because of his role in the Conventions[828] and for his co-authorship of the magisterial *Annotated Constitution of the Australian Commonwealth*. He said[829]:

> "Speaking as a Federalist, I think I can say that if these amendments are carried, they will mark the beginning of the end of the Commonwealth of Australia as a union of States. They will mark the beginning of the destruction and the degradation of the Australian States as political units and partners in a scheme for the government of the Australian people. It is regrettable to witness so many honorable members who support these amendments either wholly or partially, marching recklessly and joyously to the dismemberment of the Commonwealth. That is what it means, in my opinion. Disguise it as we may, pretend as much as we may that these amendments are merely intended to meet a specific case – to provide for matters as to which the State Legislatures have either neglected their work or have imperfectly performed their duty – there can be no doubt that if

---

827 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 October 1910 at 4810.

828 Quick was an early advocate of federation and was the second of 10 Victorian delegates to the Convention Debates. He was knighted on 1 January 1901 for his outstanding contribution to federation. In that year, Sir Robert Garran and he published *The Annotated Constitution of the Australian Commonwealth*, a "monumental tome". See Serle (ed), *Australian Dictionary of Biography*, vol 11 (1988) at 316.

829 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 October 1910 at 4924-4925.

they are engrafted upon the Constitution they will deal a staggering blow to the State Legislatures and Governments."

714 Sir John was anxious to emphasize that the Commonwealth Parliament was neither the only parliament with legislative responsibilities, nor the only means of ensuring accountability to electors. He was equally anxious to emphasize the role of the people in a democracy in which there are several polities[830]:

> "At any rate, if it be true, as alleged by some here in Australia, and by some in America, that the State Legislatures have omitted to exercise their powers in certain matters, and have neglected to carry out great or important reforms, whose fault is it? Who is responsible for that neglect or remissness? It is the fault of the electors, the people of the State who have the management of their own affairs, the choice of their own representatives, and the control of their constitutional government. Surely they can control their own local constitutional development without resorting to an outside power such as the Federal Parliament to assist them in wresting liberal concessions within their domains? It is a reflection upon their intelligence as a Democracy to say that they want to appeal to the Federal Parliament to grant redress of local grievances."

Sir John, in saying this of the proposed enlargement of the corporations power, indicated his understanding of the reach of the power as it was then, and in my opinion, is, and should now be regarded[831]:

> "By this [proposal] it is intended to confer on the Federal Parliament a general power to deal with corporations, including their creation, regulation, control, and dissolution. There is apparently no limit to the class of corporations which are to be dealt with, except corporations formed solely for religious, charitable, scientific, or artistic purposes, and not for the acquisition of gain. ... Under that power there might be a special code of the most penal, harassing, and destructive character, for the purpose, not merely of facilitating the existence of and regulating corporate bodies, but of gradually destroying them, and, if necessary for party purposes, crushing them out of existence. ... Why is it proposed to secure Federal power to deal with corporations that may be of a purely local or domestic character? Why is it necessary to *extend* the Federal power in this direction? How is labour or capital or any one to gain by

---

830 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 October 1910 at 4930.

831 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 October 1910 at 4933.

> this grant of power to the Federal Parliament to tinker and interfere with every form of corporate enterprise throughout the Commonwealth, with the exception of charitable or artistic corporations? *This is a straining of Federal authority* justified neither by any circumstances of Australian history, nor by any public requirement." (emphasis added)

And Sir John had this to say of the proposed enlargement of s 51(xxxv)[832]:

> "There was a time when the Labour party used to be strong advocates of the settlement of industrial disputes by arbitration. That, indeed, was a great popular battle cry, and was the foundation of the Arbitration Act of New South Wales as well as other arbitration measures. We succeeded in inserting that provision in the Federal Constitution, conferring upon the Commonwealth Parliament power to settle industrial disputes by arbitration where those disputes extend beyond the limits of any one State. Those words of limitation were used for Federal reasons. At that time it was obvious that the various State Parliaments with one exception were moving in the direction of establishing State tribunals for the settlement of disputes by arbitration. ... [Section 51(xxxv)] was certainly limited by the words, 'extending beyond the limits of a State' in the same way and for the same reason that the commerce power was limited to commerce among the States. Those words of qualification were in accordance with the Federal principles of the Constitution. It was thought that if we went further, and invaded the State domain, we should excite resentment and opposition on the part of the State Governments and Parliaments, which were then important factors in the Federal movement. It was felt that, in such circumstances, they would have opposed the Constitution as being not of a purely Federal character, since it invaded the State domain in industrial matters; just as they would have opposed the Constitution had it invaded the State domain in commercial matters."

715 The Bill was passed[833] and the proposal for which it provided was put to the voters in a referendum on 26 April 1911. The proposal was rejected. Only

---

832 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 October 1910 at 4933-4934.

833 No amendments were made to the proposed s 51(xx), however the proposed s 51(xxxv) which was eventually put to the people was this:

> "Labour and employment, including –
>
> (a) The wages and conditions of labour and employment in any trade industry or calling; and

(Footnote continues on next page)

Western Australia voted in favour, and overall the percentage of affirmative votes was 39.42 per cent.

(b) The Constitution Alteration (Corporations) Bill 1912 (Cth) for a referendum and the Constitution Alteration (Industrial Matters) Bill 1912 (Cth) for a referendum

716 These Bills proposed similar amendments to ss 51(xx) and (xxxv) of the Constitution to those proposed in 1911. The suggested amendment of placitum (xxxv), however, was even more prescriptive, that the Commonwealth Parliament be allowed to legislate with respect to:

> "Labour, employment, and unemployment, including –
>
> (a) the terms and conditions of labour and employment in any trade, industry, or calling;
>
> (b) the rights and obligations of employers and employees;
>
> (c) the maintenance of industrial peace; and
>
> (d) the settlement of industrial disputes."

717 The Attorney-General, Mr Hughes now filling that office, in moving that the Constitution Alteration (Corporations) Bill 1912 (Cth) be read a second time, exhorted the Parliament and the people to affirm the proposals because they would provide a satisfactory vehicle for nationalization, and expressed his dislike of the States as polities and their parliaments[834]:

> "[I]s the Commonwealth to be denied a power which is now exercised in every civilized country, by every municipality in the municipalization of public utilities? *The tendency of the age is towards nationalization where public welfare is involved*. For example, it is suggested in Germany to nationalize the iron and coal mines. Supposing it was suggested that the Commonwealth should have power to make its own rails, or to nationalize any industry for its own purpose, is it to be suggested that this is a power which the National Government ought not to be trusted with – that nationalization is some new or revolutionary proposal? What are the facts? Every day there are suggestions that the State Parliament of

---

> (b) the prevention and settlement of industrial disputes, including disputes in relation to employment on or about railways the property of any State."

834 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 November 1912 at 5634-5636.

Victoria, or the State Parliament of New South Wales, should launch out in some new direction of State activity. Is the National Parliament not to have a power that is freely entrusted to all Parliaments?

We are asking for these powers in order that the Parliament may protect the people. *There is no one power that we ask for that the States have not got,* and there is no one power that we are asking for that Canada has not got. ...

There is no question here of unification. There is no question of State rights. *'State rights' indeed is a mere tribal cry. It has been used to bolster up every privilege and every wrong*. It was the cause of civil war in America[835]. It is now the slogan of reactionaries and plutocrats. This is not a question of State rights at all. It is not even a question of Commonwealth rights. It is a question of whether the people or the trusts shall rule. It is a question of whether the Government of this country shall be in the hands of irresponsible coteries who decline to give information; who treat the duly appointed representatives of this country with contumely and contempt; who defy the Courts of this country. It is not a question of State rights; it is a question which goes to the very root of Democracy." (emphasis added)

718 The Member for Angas, Mr Glynn[836], said this in reply[837]:

"[The Attorney-General] seeks by the corporation power to get special power over corporations, apart from the creation, dissolution, and winding up. In the High Court, Mr Justice Higgins pointed out that if such a power existed, it would enable us to make special differentiation in our laws in

---

835 This was rebutted in later debate. Sir John Quick said that the American Civil War "arose from no imperfections in the Federal system of government, but out of a domestic question, namely, the question of slavery": Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 November 1912 at 5723.

836 P M Glynn was a lawyer, having studied at the Middle Temple in London and been called to the Irish Bar in April 1879. He came to Australia in 1880. In 1883 he was admitted as a practitioner in the Supreme Court of South Australia. He was junior Member for Light in the South Australian House of Assembly, and later the Member for North Adelaide. He was elected as one of the 10 South Australian delegates to the Convention Debates, and was elected Member for Angas in 1901. See Nairn and Serle (eds), *Australian Dictionary of Biography*, vol 9 (1983) at 30-31.

837 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 19 November 1912 at 5643.

> case of companies – to pass special laws in relation to some matters not within our competence in relation to ordinary persons. For instance, if a millionaire on one side of the street carried on operations which were detrimental to the public, he could not be controlled to the same extent as could two men or twenty men carrying on similar operations on the other side of the street. What we ought to aim at in all our laws is to bring all within their scope, whether companies or persons. ... If this proposition is accepted by the people as proposed, we shall have not only power to frame a general companies law applying throughout Australia, placing companies in the same position as citizens, and enabling us to create a juristic person who can do throughout Australia what can be done by any individual, but we shall have power to pass exceptional laws in regard to corporations that we cannot pass with regard to their competitors who are private individuals."

719 And the Member for Parramatta, Mr Joseph Cook[838], pointed out that the Attorney-General doubtless had in mind to exercise the additional power sought, if granted, to the fullest[839]:

> "We cannot approve of a proposal to tear up the Constitution, and throw it into the cauldron, without knowing exactly how it is going to come out. As to many of these matters, we have all along expressed our intention to deal with them in some reasonable and business-like way. We say that we do not desire to make an ordinary, reasonable, beneficial corporation the football of party politics, as our honorable friends opposite desire to make it. The power they are asking for would enable them to deal with all sorts of innocent and beneficial combinations; it would enable them to deal with butter factories, than which I can conceive of no more reasonable form of combination from the point of view of the man on the land. The Government wish to be able to deal with all sorts of combinations, and to declare them monopolies whether the facts fit the

---

838 Later Sir Joseph Cook, Prime Minister of Australia from June 1913 to September 1914. Sir Joseph was a trade unionist and began his public life with the Labor Party. He was elected Member for Hartley in the Legislative Assembly of New South Wales, in June 1891. He served as postmaster-general, then secretary for mines and agriculture, in the Reid government. He was elected Member for Parramatta in 1901. In 1908 he became leader of the Free Trade Party, and in 1913 leader of the Liberal Party, following the resignation of Alfred Deakin. He was Prime Minister soon after. See Nairn and Serle (eds), *Australian Dictionary of Biography*, vol 8 (1981) at 96-99.

839 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 December 1912 at 6290.

case or not. We say that we cannot follow them in the rabid, unreasoning course which they insist upon taking.

There are some further statements of the Attorney-General to which I should like to refer if time permitted of my doing so. There is a question which I wish to ask in this connexion: The Attorney-General told us the other day, as he did a number of times before, that he does not know the extent of the powers he is asking for, what they will include, or what they will not include. Moreover, he says –

> 'We come forward without a scheme or plan of any cut-and-dried character. There is no such plan.'

The honorable gentleman has no plan defining the limitations of the power he seeks. He tells us very plainly that he does not propose to limit the power he desires to take. He will take the lot. He says, further, that he does not know what he is going to do with it when he gets it. He says, in another place, that he does not know whether he is proposing to take too much or enough power, and there is no plan in his mind in asking for these powers. He is asking the people of Australia to put these proposals into the melting-pot, and how they will come out, and what powers they will confer upon the Government, he says plainly that he does not know."

720 Mr Hughes said in moving that the Constitution Alteration (Industrial Matters) Bill 1912 (Cth) be read a second time[840]:

> "[The proposal] gives the Commonwealth power to make laws in respect to labour, employment, and unemployment. It declares that included in that power, whatever it is, the Commonwealth has authority to make laws in respect to 'the terms and conditions of labour and employment in any trade, industry, or calling.' What those words precisely connote it is not easy to say. But I think that they include power to make laws in respect to the conditions of employment of all persons engaged in any manual trade; in any industry, such as, for instance, shop assistants and, say, persons engaged in clerical occupations. They do not enable the Commonwealth to make laws in respect to persons engaged in the learned professions; I think it clear they are excluded. Subject to this, the proposal empowers the Commonwealth to make laws in respect to the terms and conditions of labour and employment of all persons, whether engaged in any trade, industry, or calling. It gives power, further, to deal with the rights and obligations of employers and employés. That, for example, will enable this Parliament to pass a Workmen's Compensation Act to provide for

---

840 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 November 1912 at 5685.

> insurance against accidents, against injuries received in the course of employment; in short, to make such a Bill applicable to the whole country, as was lately passed here applicable to the Commonwealth Public Service. With regard to paragraph (c) [scil, (c) and (d)], 'the maintenance of industrial peace and the settlement of industrial disputes,' those powers will enable us to make such laws as will create a Conciliation and Arbitration Court clothed with power to deal with industrial disputes when they arise; and to take such action as may be necessary to prevent them from arising."

Mr Hughes was prepared, however, to permit State industrial tribunals to continue to function, although his attitude to them was paternalistic[841]:

> "We are asking for power to deal with all disputes and all industrial conditions, for the preservation of industrial peace, but it by no means follows that we intend to supersede State tribunals when these are able and willing to deal with industrial matters within their jurisdiction. What we wish to do is not to supersede State tribunals. We wish to supplement them. Our object is to set up machinery which will insure fair industrial conditions for all citizens in Australia. If these are secured by State tribunals, good; if they are not, there ought to exist some tribunal by which these can be secured. It is for this purpose that we require greater powers."

721 In reply, Mr Deakin said this[842]:

> "The proposals now before us cover all labour. What insignificant fraction of Australia is not labouring? There is no section of Australia that is not deeply and profoundly affected by labour, its conditions, and opportunities; but labour, employment, and even unemployment – another additional field which apparently is to be dealt with from a distinct point of view – are all covered by these proposals.
>
> ...
>
> In addition, power is proposed to be taken to legislate in regard to 'the terms and conditions of labour and employment in any trade, industry, or calling.' Nothing is omitted from these wide spheres. No one will be left outside the scope of this power, except, perhaps, a small professional

---

841 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 November 1912 at 5687.

842 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 5 December 1912 at 6509-6510.

> section of the community. It is further proposed to take power to legislate in respect to 'the rights and obligations of employers and employés.' Who in this community is not either an employer or an employé? Indirectly, at all events, many are both. Absolute power to legislate in that regard also is sought to be conferred by this amendment. Then, again, the proposed amendment makes provision to legislate for 'the maintenance of industrial peace,' which, nowadays, involves apparently as much bellicose preparation – more or less legal – as does the preparation for war in civilized countries intent on maintaining that which they call 'peace' by an exhibition of armed power which it would be unsafe for any other country to challenge.
>
> Finally, we have the proposal to give power to legislate for the settlement of industrial disputes. That comes last on the list. It is treated as if it were the least. Yet, within that one provision, there is not only ample room, and verge enough for the whole of the powers we now possess under the existing Constitution, but room for very much more. That one simple sub-clause extends far beyond, and will have far greater effect than the whole of the endowment in this regard which the Commonwealth at present enjoys. ... I hope the whole community will appreciate the fact that this is not merely a proposed extension of our domain, not merely a substitution for the old power, but contains entirely new departures, the whole proposal covering effectively all the field that it is possible to cover by legislative power relating to labour and employment."

722 Sir John Quick reiterated his insistence on the maintenance of the federation and the federal principle[843]:

> "I would insist upon the condition that in no case should any change be made in the Constitution unless it is in harmony with the Federal principle of that Constitution. I agree with the Attorney-General that the amending power contained in the constitutional instrument is an integral and vital power, and should be brought into use under proper conditions. I do not regard the Constitution as sacrosanct and beyond the reach of amendment when necessary. But our Constitution is not merely a legal document – it is an instrument of government which contains what I may describe as the very home and citadel of our national life."

Sir John asked[844]:

---

843 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 November 1912 at 5723.

844 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 November 1912 at 5725.

> "What concern, for instance, has the State of New South Wales in the internal shopkeeping arrangements of the State of Victoria? There is no community of interest whatever. The State of Victoria has a perfect right to make its own shopkeeping arrangements relating to the hours of opening and closing, and the conditions of labour."

723 The Bills were enacted[845] and put to the Australian voters in a referendum on 31 May 1913. The proposals were rejected. They were accepted in Queensland, Western Australia and South Australia, and achieved a national vote of 49.33 per cent.

(c) The Constitution Alteration (Industry and Commerce) Bill 1926 (Cth) for a referendum

724 The next attempt to obtain the relevant power was the subject of a Bill for a referendum in 1926. This Bill included proposals that the Commonwealth be empowered to legislate with respect to:

> "(xx) Corporations, including –
>
> (a) the creation, regulation, control and dissolution of corporations;
>
> (b) the regulation, control and dissolution of corporations formed under the law of a State; and
>
> (c) the regulation and control of foreign corporations;

---

845 The proposed s 51(xxxv) which was eventually put to the people included provision for strikes and lockouts. It was as follows:

> "Labour, and employment, and unemployment, including –
>
> (a) the terms and conditions of labour and employment in any trade, industry, occupation, or calling;
>
> (b) the rights and obligations of employers and employees;
>
> (c) strikes and lockouts;
>
> (d) the maintenance of industrial peace; and
>
> (e) the settlement of industrial disputes."

> but not including municipal or governmental corporations, or any corporation formed solely for religious, charitable, scientific or artistic purposes, or any corporation not formed for the acquisition of gain by the corporation or its members.
>
> ...
>
> (xl) *Establishing authorities with such powers as the Parliament confers on them with respect to the regulation and determination of terms and conditions of industrial employment and of rights and duties of employers and employees with respect to industrial matters and things*." (emphasis added)

725 The Prime Minister and Minister for External Affairs, Mr Bruce, said in moving that the Bill be read a second time[846]:

> "The bill relates to a proposed amendment of the Constitution, and deals with matters falling under the heading of industry and commerce. Those matters cover industrial relations generally, the regulation and determination of the terms and conditions of industrial employment, and the vesting of state authorities with powers for the regulation of trusts and combines in relation to trade unions and associations of employers and employees. In introducing this measure I appeal to honorable members to recognize that this is in no sense a party question, but one which fundamentally affects the present position of Australia, and the future happiness and prosperity of our people. ... We all recognize that in modern society, especially in a young country like this, unless industry and commerce progress, development is retarded, to the prejudice not only of the people of to-day, but also of generations to come. ... There is to-day no more vital need than to find some way by which our industry and commerce may progress smoothly, and better relations may be established between all sections of the community, so that we may have industrial peace, progressive development, and an enhanced degree of happiness among the people. This measure is designed to accomplish those ends."

Mr Bruce said this of the proposed placitum (xl)[847]:

---

846 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 May 1926 at 2159-2160.

847 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 May 1926 at 2164.

> "[It] will give power to the Commonwealth Parliament not to determine all questions relating to industrial employment, but to create the authorities to determine them.
>
> ...
>
> It will, subject to the explanation I have just given, be an absolute power, as wide as any one can desire. I wish to stress an aspect of the question on which there may be a divergence of opinion. There are sound reasons for proposing that Parliament shall have the power to create authorities, but not the power to decide industrial questions itself, and I wish to state those reasons frankly and fully. If full power to determine industrial questions were given to this Parliament it would have to deal with many complicated industrial problems in an atmosphere of political contention. It would be required to legislate with regard to hours of employment, the basic wage, and other vital industrial questions, and the determination of such questions by the contending parties in a political arena would be most undesirable. Furthermore, the Parliament would spend almost the whole of its time in dealing with industrial questions. It would have to pass factory acts applicable to the whole of Australia, and acts for the protection of the workers in dangerous industries, for the safeguarding of machinery in factories, for imposing conditions of apprenticeship, for fixing the closing hours of shops, and the like. All such ramifications of the industrial problem should be left to the State Parliaments, because this Parliament could deal with them only to the exclusion of all the great national tasks that it should undertake."

726 There seems to have been little parliamentary opposition to these proposals on this occasion. The Leader of the Opposition, Mr Charlton, said that "[w]e all realize how necessary it is for the Commonwealth Parliament to have greater powers than it now possesses"[848]. After the Bill was enacted and the question put to the Australian voters, the proposed amendments were, on 4 September 1926, rejected. Only New South Wales and Queensland were in favour, and the national negative vote was 55 per cent or so.

727 Contrary to the fears expressed by the Prime Minister for the future happiness and prosperity of Australia if the referendum were to fail, as it did, the nation has thrived, and who is to say whether its residents have been more or less happy in the 80 years that have elapsed since the failure.

---

848 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 9 June 1926 at 2850.

(d) The Constitution Alteration (Industrial Employment) Bill 1946 (Cth) for a referendum

728 Another attempt to enlarge the Commonwealth's powers was made in 1946. The Bill for the referendum this time, proposed a new s 51(xxxivA), which would empower the Commonwealth to legislate with respect to:

> "Terms and conditions of employment in industry, but not so as to authorize any form of industrial conscription".

729 Dr Evatt, the Attorney-General and Minister for External Affairs, said this in moving that the Bill be read a second time[849]:

> "The object of this bill is to alter the Constitution so that this Parliament will be able, like the legislature of every State in Australia, to regulate, either directly or indirectly, the terms and conditions of employment in industry. ...
>
> During the war years, the industrialization of Australia has made unprecedented strides. Old industries expanded, new industries were set up. Australia became for the first time an exporter of secondary products. A major problem of the peace will be to maintain and even increase this high level of industrial production. Our hopes of providing full employment depend on it. So do our hopes of attracting and maintaining a larger population.
>
> ...
>
> What will be the position when the defence power has shrunk to its normal peace-time scope? Under the present constitutional powers of the Commonwealth in time of peace, this Parliament has no direct power to regulate terms and conditions of industrial employment in general. Under section 51(xxxv) it can maintain, and, of course, modify and improve, the existing machinery for conciliation and arbitration – but only in relation to disputes, and interstate disputes at that. It could perhaps directly regulate the terms and conditions of employment of those engaged in interstate commerce – that is, if they could effectively be isolated and defined as a distinct class. But that is all. It is not enough.
>
> The new power which the bill proposes to give to this Parliament will not in any way abrogate or curtail the existing industrial powers given by section 51(xxxv). The new power, however, will supplement the

---

849 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 651-652.

> present conciliation and arbitration power in two vital respects. First, as I have already said, the existing powers of industrial regulation are indirect. It is an extraordinary anomaly that although this Parliament has exclusive authority over such matters as customs and excise, it cannot take direct responsibility for regulating wages and hours and industrial conditions, which are in actual practice linked inseparably with tariff questions. The problem of ensuring that employees shall get their proper share of the benefits of a protective tariff system has always existed in Australia. The bill would enable this Parliament to deal with it effectively. ...
>
> Secondly, it is another extraordinary fact that only through processes originating in industrial disputes can there be any fixation under Commonwealth authority, in time of peace, of wages, hours and conditions of employment. The bill would enable Australia to lay aside the confused and technical system of regulating industrial relations in which the present Constitution has resulted."

730 Despite the shadow that the recently ended Second World War still cast and to which the Attorney-General referred, the proposals were rejected, albeit narrowly, on 28 September 1946. New South Wales, Victoria and Western Australia were in favour as were 50.3 per cent of voters, but, by reason of a failure of an affirmative vote in a majority of the States as required by s 128, the proposals failed.

731 The history of the referenda cannot be ignored[850]. Kirby J said this in *Durham Holdings Pty Ltd v New South Wales*[851]:

> "Nevertheless, the rejection by the electors of the Commonwealth (including those in New South Wales) of a proposed amendment to the federal Constitution, which would have prevented or invalidated legislation such as the amending legislation adopted by the New South Wales Parliament in 1990, suggests a reason for special caution when this Court is invited, but twelve years later, effectively to impose on the Constitution of the State a requirement which the electors, given the chance, declined to adopt."

732 What happened in the referenda to which I have referred is particularly compelling because of the repetitiveness and ingenuity of the attempts made by the Commonwealth to gain the power which in this case it now says it has always

---

850 As Gleeson CJ, Gummow, Hayne and Heydon JJ said in *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 570 [66]: "constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources."

851 (2001) 205 CLR 399 at 428 [65].

had. The Court should not disregard that history. The people have too often rejected an extension of power to do what the Act seeks to do for that. To ignore the history would be, not only to treat s 128 of the Constitution as irrelevant, but *also* for the Court to subvert democratic federalism for which the structure and text of the Constitution provide. As I observed in *Sweedman v Transport Accident Commission*[852], constitutions, State and federal are not the property of governments of the day.

733 I confess that I would be greatly discomfited if I were compelled to ignore the referenda, and the will of the people as expressed in them, but I think that there are good legal reasons why I may not do so. The joint judgment would allow no weight, or indeed even relevance to the repeated failure of the referenda[853]. I cannot accept that there is any difference of substance between the powers sought and the powers now claimed to be possessed. It is no answer to say that the powers were not exercised because of a want of "political will"[854]. If the statute books for the Commonwealth show one thing, it is that there has, from the first session of the new Parliament, been a determination constantly to test the outer limits of federal power. The joint reasons attach too little weight to the intelligence and common sense of voters in a referendum. I am not prepared to regard the people as uninformed. To the extent that the joint reasons suggest the contrary, or that the failure of most referenda in some way justifies the taking by this Court of an activist expansive or different view of the meaning of the Constitution from that which prompted Parliament's attempt to change it, I am unable to agree with them.

734 In summary I would regard the speeches for the referenda, the referenda and their results as relevant to the proper construction of the Constitution for these reasons.

735 The speeches in Parliament for the Bills for them, having regard particularly to the experience, eminence, legal qualifications and knowledge of the speakers, throw much light on the founders' intentions and the understanding of the meaning of the Constitution of informed, legally qualified, politically astute, responsible people. The meaning of the words of the Constitution may not change following, and as a result of the failure of a referendum, but it is a distortion of reality to treat the failure as other than reinforcing the received meaning of the words which prompted the attempt to change or enlarge them. Equally, a successful referendum may provide relevant evidence of received

---

852 (2006) 80 ALJR 646 at 663 [94]; 224 ALR 625 at 645.

853 At [131]-[135].

854 [2006] HCATrans 215 at 525.

meaning immediately before the vote in it. But in addition, unlike in the failed referenda considered in this case, a successful referendum would also indicate the people's discontent with that received meaning. True it is that the construction of the Constitution is a matter ultimately for the Court, aided by qualified advocates presenting arguments to it, but even this Court should not be blind to the inescapable fact that the people do have, by virtue of s 128, a special and unique constitutional role to approve or veto a change. That, they can only do if they have an understanding of what is sought to be changed. For my own part I do not think it legally radical in the special constitutional setting of s 128, to attribute to the people the same understanding of meaning and of power as their elected representatives who legislated for the referenda to effect the changes, and as the failed referenda show, to be content with them. It is no answer as the Commonwealth submissions implied, that s 128 raises a high hurdle for constitutional change. So it does, and intentionally so. If Parliament cannot persuade the people to change, it is not for this Court to treat the people's will as irrelevant by making the change for them. Every one of the 36 proposals which have failed at a referendum has been accompanied by dire warnings of doom to the Commonwealth and the people, yet the nation prospers and grows.

PART IV. TECHNIQUES EMPLOYED IN CONSTRUING THE CONSTITUTION

736 In this part of my reasons I search for consistency of interpretation of the Constitution by the Justices of this Court but cannot find it because it does not exist. Accordingly I will state the principles that I think should govern it.

737 The truth is that there has been little sustained unanimity on the part of the 46 Justices who have constituted this Court during its 103 years of existence as to how the Constitution should be interpreted: whether strictly textually[855], by

---

855 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ("the *Engineers' Case*") (1920) 28 CLR 129 at 149-150 per Knox CJ, Isaacs, Rich and Starke JJ (rejection of doctrines of reserved State powers and implied intergovernmental immunities); *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 66 per Rich J (Constitution "expressly provides for the continued existence of the States"); *Victoria v The Commonwealth* ("the *Payroll Tax Case*") (1971) 122 CLR 353 at 372 per Barwick CJ (*Melbourne Corporation* principle not out of implication but because States are not mentioned in the "topics of legislation allotted to the Commonwealth"); *Attorney-General (Commonwealth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 17 per Barwick CJ (look to text rather than "slogans", "political catch-cries" or "vague and imprecise expressions of political philosophy").

reference to history[856], purposively[857], as an exercise in "originalism"[858], flexibly, according to a particular judge's perceptions of contemporary

---

856 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1105-1109 per Griffith CJ, Barton and O'Connor JJ (reference "in detail to the historical facts which supply the answers to the inquiry"); *Cole v Whitfield* (1988) 165 CLR 360 at 385, 391 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ (reference to history for "the subject to which that language was directed and the nature and objectives of the movement towards federation", clear objective of free trade area); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 274 per Brennan, Deane and Toohey JJ (an objective of federation was a free trade area); *Sue v Hill* (1999) 199 CLR 462 at 571-572 [290]-[291] per Callinan J (evolutionary theory of Australian sovereignty unsupported by history); *Luton v Lessels* (2002) 210 CLR 333 at 366-368 [98]-[103] per Kirby J (history of taxation laws); *XYZ v Commonwealth* (2006) 80 ALJR 1036 at 1069-1070 [153], 1071-1074 [157]-[173] per Callinan and Heydon JJ; 227 ALR 495 at 536-537, 538-543 (history of external affairs and extradition); *Forge v Australian Securities and Investments Commission* (2006) 229 ALR 223 at 295-299 [256]-[267] per Heydon J (history of acting judges).

857 *D'Emden v Pedder* (1904) 1 CLR 91 at 109-111 per Griffith CJ, Barton and O'Connor JJ (Commonwealth and States intended as sovereign within own ambits of authority); *The Municipal Council of Sydney v The Commonwealth* ("the *Municipal Rates Case*") (1904) 1 CLR 208 at 239-240 per O'Connor J (reasoning from "the very nature of the Constitution, and the relation of States and Commonwealth"); *Attorney-General of NSW v Collector of Customs for NSW* ("the *Steel Rails Case*") (1908) 5 CLR 818 at 833 per Griffith CJ (rule of implied intergovernmental immunities "a rule of construction founded upon necessity"); *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 681-682 per Dixon J (implications may be made so as not to "defeat the intention of" the Constitution); *South Australia v The Commonwealth* (1942) 65 CLR 373 at 442 per Starke J (maintenance of the States an "object of the Constitution"); *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488 at 515 per Starke J (maintenance of the States, and of the Commonwealth, as "object[s] of the Constitution"); *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 503 per Mason CJ, Brennan, Deane and Gaudron JJ (looks to the "purpose of s 81").

858 *Deakin v Webb* (1904) 1 CLR 585 at 616 per Griffith CJ, Barton and O'Connor JJ ("intended by the framers ... that like provisions should receive like interpretation"); *Attorney-General (Vict); Ex rel Black v The Commonwealth* ("the *DOGS Case*") (1981) 146 CLR 559 at 614-615 per Mason J ("a constitutional prohibition must be applied in accordance with the meaning which it had in 1900"); *Singh v The Commonwealth* (2004) 222 CLR 322 at 422-433 [288]-[317] per Callinan J (founders did not intend the aliens power to apply to people such as the

(Footnote continues on next page)

conditions[859], contextually[860], by searching for implications emerging from the text and structure[861], or, as a combination[862] of one or more of these[863]. Each of

---

plaintiff); *Ruhani v Director of Police* (2005) 222 CLR 489 at 571-572 [281], 573-575 [286]-[289] per Callinan and Heydon JJ (founders did not intend to "transmogrify an appeal into an exercise of original jurisdiction").

859 *Victoria v The Commonwealth* ("the *Payroll Tax Case*") (1971) 122 CLR 353 at 395-397 per Windeyer J (waxing of Commonwealth, waning of States); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 185-186 per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ (emergence of Australia as an independent nation); *Street v Queensland Bar Association* (1989) 168 CLR 461 at 537-538 per Dawson J (connotation and denotation); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 552-554 [43]-[49] per McHugh J (words so general "that the makers of the Constitution intended that they should apply to whatever facts and circumstances succeeding generations thought they covered"); *Sue v Hill* (1999) 199 CLR 462 at 496 [78] per Gleeson CJ, Gummow and Hayne JJ (the Constitution "speaks to the present and its interpretation takes account of and moves with these developments"); *Eastman v The Queen* (2000) 203 CLR 1 at 49-51 [154]-[156] per McHugh J (Constitution "to be infused with the *current* understanding of those concepts and purposes" (original emphasis)); *Brownlee v The Queen* (2001) 207 CLR 278 at 314 [105] per Kirby J ("text of the Constitution must be given meaning as its words are perceived by succeeding generations of Australians, reflected in this Court"); *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 86-87 [77]-[78] per Kirby J ("serious mistake" to look to framers' intent); *Singh v The Commonwealth* (2004) 222 CLR 322 at 385 [160] per Gummow, Hayne and Heydon JJ ("constitutional expressions may have a different operation fifty or 100 years after Federation").

860 *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368 per O'Connor J (broad interpretation "unless there is something in the context"); *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 415-416 per Higgins J ("forbidden" area of intrastate trade and commerce "narrowed" by other placita); *Ffrost v Stevenson* (1937) 58 CLR 528 at 566 per Dixon J (s 122 may "impl[y] that none of the other powers ... authorize[s] the government or control of territories"); *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 184 per Latham CJ (s 51(xx) limited by s 51(xiii)); *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371-372 per Dixon CJ, 373 per Fullagar J, 373 per Kitto J, 373 per Taylor J, 377 per Windeyer J (s 51 limited by s 51(xxxi)); *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 284-286 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ (s 51 limited by s 51(xiii)); *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 288 per Gaudron J (relationship between s 122 and other provisions "can only be determined by having regard to the Constitution as a whole"); *Luton v Lessels* (2002) 210 CLR 333 at 354-355 [56]-[58] per

(Footnote continues on next page)

the approaches has had its proponents at times but none has universally prevailed[864].

738 No doubt each judge has been convinced of his or her correctness of approach, even descending on occasions to unedifying accusations of "heresy"[865]

Gaudron and Hayne JJ (ss 53-55, 81-83 show that every tax is to go into the Consolidated Revenue Fund, but not every sum going in is a tax).

861 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 60 per Latham CJ, 70 per Starke J, 78-79 per Dixon J, 99 per Williams J (Constitution does not empower the Commonwealth to control or hinder State governmental functions); *R v Kirby; Ex parte Boilermakers' Society of Australia* ("the *Boilermakers' Case*") (1956) 94 CLR 254 at 267-278 per Dixon CJ, McTiernan, Fullagar and Kitto JJ (separation of powers); *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 205-206 per Gibbs CJ, 217 per Mason J, 222 per Wilson J, 233 per Brennan J, 248 per Deane J (Commonwealth laws not to discriminate against the States); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50 per Brennan J, 72-73 per Deane and Toohey JJ, 94-95 per Gaudron J (freedom of political communication); *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138-141 per Mason CJ, 149 per Brennan J, 168 per Deane and Toohey JJ, 215 per Gaudron J, 231-233 per McHugh J (freedom of political communication); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ (freedom of political communication as a defence to defamation); *Austin v The Commonwealth* (2003) 215 CLR 185 at 217 [24] per Gleeson CJ, 249 [124] per Gaudron, Gummow and Hayne JJ, 281-282 [223]-[224] per McHugh J, 301 [281] per Kirby J (affirmation of *Melbourne Corporation* principle).

862 See, eg, *New South Wales v The Commonwealth* (*The Incorporation Case*) (1990) 169 CLR 482 at 498-503 per Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ.

863 It is difficult to know which interpretative technique Murphy J used when he spoke of the "implication of freedom in our Constitution" in *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369 at 388.

864 *Brownlee v The Queen* (2001) 207 CLR 278 at 314-315 [107] per Kirby J.

865 See, eg, *Victoria v The Commonwealth* ("the *Payroll Tax Case*") (1971) 122 CLR 353 at 396 per Windeyer J; *R v Lambert; Ex parte Plummer* (1980) 146 CLR 447 at 470 per Murphy J; Meagher and Gummow, "Sir Owen Dixon's Heresy", (1980) 54 *Australian Law Journal* 25; *Tasmania v The Commonwealth* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 147 per Mason J; *Gould v Brown* (1998) 193 CLR

(Footnote continues on next page)

on the part of predecessors or colleagues, no matter how learned and experienced they may have been. Sir Garfield Barwick in retirement even descended to saying, for publication, that the reasoning of the Court in *Cole v Whitfield*[866] was "laughable" and "terrible tosh"[867]. Equally, Justices of this Court on occasions appear to have discouraged the adoption of settled universal principles of constitutional construction. Sir Garfield, for example, on the one hand spoke of the *Engineers' Case* as if it were an eleventh commandment[868], but on the other, in *R v Joske; Ex parte Australian Building Construction Employees & Builders' Labourers' Federation*[869] expressed a wish to overturn the *Boilermakers' Case*[870]. The truth is ultimately that if a judge have a subjective preference for a particular interpretative approach, somewhere a dictum to support it can usually be found. The reality is that no judge can claim to stride the high ground of exclusive interpretative orthodoxy. In *SGH Ltd v Federal Commissioner of Taxation*[871], Gummow J said this:

> "Questions of construction of the Constitution are not to be answered by the adoption and application of any particular, all-embracing and revelatory theory or doctrine of interpretation. Nor are they answered by the resolution of a perceived conflict between rival theories, with the

---

346 at 427 [132] per McHugh J; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589 [63] per McHugh J.

866 (1988) 165 CLR 360.

867 New South Wales Bar Association, "Bar News Interviews Sir Garfield Barwick GCMG", *Bar News*, (Summer 1989) 9 at 17.

868 See "Retirement of Chief Justice Sir Garfield Barwick", (1984) 148 CLR v at x:

> "I think all of us who work in constitutional work, whether it be at the Bar or on the Bench, or in academia, need to be very wary that the triumph of the *Engineers' Case* is never tarnished and that we maintain stoutly that motion, that the function of the Court is to give to the words their full and fair meaning and leave the Constitution which places the residue of the states to work itself out."

and Exodus 20:3-17.

869 (1974) 130 CLR 87 at 90.

870 (1956) 94 CLR 254.

871 (2002) 210 CLR 51 at 75 [41].

> placing of the victorious theory upon a high ground occupied by the modern, the enlightened and the elect."

Statements about how the Constitution is not to be construed do not however promote ultimate goals of certainty and consistency. It must be accepted that the Constitution was intended to be an enduring instrument, but that does not mean that, without more, a judge may give it an operation that might appear to the judge to be convenient, or even better adapted, to his or her own perception of changing contemporary values[872]. To do that is to run two risks: of judicial misapprehension of contemporary values[873]; and, to write s 128 out of the Constitution[874]. What Mason J said of the common law in *State Government Insurance Commission v Trigwell*[875] is of relevance to constitutional law also:

> "I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. *The court is neither a legislature nor a law reform agency*. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform

---

872 cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 552-554 [43]-[49] per McHugh J.

873 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 298-299 [252] per Callinan J.

874 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 592-593 [68]-[69] per McHugh J.

875 (1979) 142 CLR 617 at 633.

agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature." (emphasis added)

739 Most judges of this Court over its century of existence would claim to have adhered faithfully to the doctrine of precedent, and to have abstained from usurpation of the legislature. Close examination will show that that claim cannot always be made out.

740 The case which marked the most dramatic change in the interpretation of the Constitution in the first two decades of the Court, and cast aside as wrong its federalist doctrine of 15 or so years, is the *Engineers' Case*, upon which one of the Justices (Powers J) did not sit, and in which Gavan Duffy J dissented. The reasoning in it is less than satisfactory. The joint judgment of Knox CJ, Isaacs, Rich and Starke JJ was delivered by Isaacs J. It contains some less than detached language[876]. As Professor Sawer wrote of the latter[877]: "[He] was given to rhetoric and repetition, and here [in the *Engineers' Case*] he gave these habits full rein."

741 The particular appeal that the Justices in the majority claimed to make there to justify their reasoning was to textualism[878]. In citing[879] Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors*[880] they expressly rejected any regard to the policy of the Constitution, but they did accept that it should be construed in the same way as an Act of Parliament. To disregard entirely a, or perhaps the, fundamental "policy" of the Constitution, federalism, and the careful division of power that it involves, is to disregard, or is at least to attach little weight to, the object which, beyond all doubt, the framers intended, the people who voted in favour of federation adopted, and the Imperial Parliament implemented by enacting the *Commonwealth of Australia Constitution Act* 1900 (Imp) (63 & 64 Vict c 12). To disregard, or treat lightly, this manifest fundamental "policy" of the Constitution would certainly represent a departure from current orthodox purposive techniques of statutory interpretation[881],

---

876 See, eg, (1920) 28 CLR 129 at 145.

877 Sawer, *Australian Federalism in the Courts*, (1967) at 130.

878 (1920) 28 CLR 129 at 141-142.

879 (1920) 28 CLR 129 at 142-143.

880 [1913] AC 107 at 118.

881 See *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304-305 per Gibbs CJ, 310-311 per Stephen J, 320 per Mason and Wilson JJ, 334 per Aickin J; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 374-375 [41] per Brennan CJ, 384

(Footnote continues on next page)

especially when the text, as is the case with constitutions in general, is expressed in some instances, in other than absolute language. A constitution, it may also be accepted, is not identical to a statute, but this Court has generally tended, insofar as the sometimes less than explicit language of the Constitution permits, to claim to employ most of the usual and ordinary techniques of statutory interpretation in construing it[882].

742 The *Engineers' Case* overruled *D'Emden v Pedder*[883]. Those who constituted the Court when the earlier case was decided were, for the most part, closer in time, circumstances and knowledge to the Constitution, and their substantial contribution to it, than the Justices who comprised the Court in the *Engineers' Case*. In *D'Emden v Pedder* Griffith CJ found an implication in the Constitution of non-interference of the respective polities with one another by necessity[884]. The joint judgment in the *Engineers' Case* criticized that interpretation as depending upon an implication formed on the "vague, individual

---

[78] per McHugh, Gummow, Kirby and Hayne JJ. Recent examples of purposive reasoning in the context of statutory interpretation include *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 261 [25] per McHugh, Gummow, Hayne and Heydon JJ, 278-280 [88]-[92] per Kirby J; *R v Lavender* (2005) 222 CLR 67 at 85 [48]-[49] per Gleeson CJ, McHugh, Gummow and Hayne JJ, 106 [121] per Kirby J, 111 [139] per Callinan J, 113 [148] per Heydon J. See also *Acts Interpretation Act* 1901 (Cth), s 15AA; *Interpretation Act* 1987 (NSW), s 33; *Interpretation of Legislation Act* 1984 (Vic), s 35(a); *Acts Interpretation Act* 1915 (SA), s 22; *Acts Interpretation Act* 1954 (Q), s 14A; *Interpretation Act* 1984 (WA), s 18; *Acts Interpretation Act* 1931 (Tas), s 8A.

882 See Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 25 [2.2]:

> "In the Australian common law tradition there are two general approaches to the interpretation of legislation; the literal approach and the purposive approach."

and at 51 [2.28]:

> "There has long been a controversy as to whether implying words into the text of legislation can be a legitimate interpretive technique. If it is permissible, there is also an issue as to the circumstances in which that can be done. ... [Those circumstances are usually when] the text does not give effect to the underlying purpose or object of the legislation."

883 (1904) 1 CLR 91.

884 (1904) 1 CLR 91 at 110.

conception of the spirit of the compact"[885]. I interpolate that it is difficult to reconcile this criticism with the inference by this Court of an implication of freedom of political speech drawn by this Court many years later in *Lange v Australian Broadcasting Corporation*[886], not from the spirit of the compact, but from the "structure"[887] of the Constitution and on the basis of the judges' perceptions of contemporary society and conditions[888].

743 There are references in the joint judgment in the *Engineers' Case* to the desirability, in the interpretation of the Constitution, of adherence to the ordinary, or the "golden", or the "universal" rules of construction of statutes[889]. One such rule, to which lip service only seems to have been paid, and it may be observed, not only in that case by the Commonwealth, but also in some subsequent cases, is the necessity to read an Act of Parliament, and by analogy, a constitution[890], as a whole, a matter of particular relevance to this case as I have already said.

744 There are other aspects of the *Engineers' Case* which are not convincing. When Griffith CJ in *D'Emden v Pedder* referred to a constitutional implication arising out of necessity, he was taking account of the Constitution as a whole, and the way in which it contemplated the distribution of powers between the States and the Commonwealth. His Honour was clearly speaking in legal terms. In the *Engineers' Case* the views of Griffith CJ on that necessity are misrepresented in the joint judgment by its characterization as only a "political", and not a "legal" necessity[891].

---

885 (1920) 28 CLR 129 at 145.

886 (1997) 189 CLR 520.

887 (1997) 189 CLR 520 at 566-567 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ. In the passage cited there is a reference to "text" as well as "structure" but the relevant language of the text is not identified.

888 (1997) 189 CLR 520 at 570-571, citing McHugh J in *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 264.

889 (1920) 28 CLR 129 at 148-150.

890 In the *Engineers' Case* (1920) 28 CLR 129 at 151 the joint judgment acknowledges that the ordinary meaning of the terms employed in one place may be restricted by terms used elsewhere: "that is pure legal construction", but the judges, having made that statement, do not appear to have applied it.

891 (1920) 28 CLR 129 at 151.

745 The only dissentient in the case, Gavan Duffy J, on the other hand persuasively said this[892]:

> "But in my opinion sec 51 does not determine the persons who may be bound by the legislation which it authorizes. The words 'for the peace, order, and good government' have constantly been adopted in the Constitutions of self-governing British colonies where the power to legislate is general, and where they are used to describe the content of that power. It is not easy to give them a meaning in sec 51, which deals with enumerated powers; it is enough to say that they seem to delimit the subject matter of legislation, not to enumerate the persons whom the legislation shall bind."

746 But even the majority in the *Engineers' Case* accepted that the Commonwealth Parliament is one which possesses only "enumerated or selected legislative powers"[893], a proposition which cannot be doubted. And it is difficult to regard some observations made by Isaacs J, only five years after the *Engineers' Case*, as anything other than an expression of some repentance or revisionism of it. His Honour spoke in *Pirrie v McFarlane*[894] of:

> "the natural and fundamental principle that, where by the one Constitution separate and exclusive governmental powers have been allotted to two distinct organisms, neither is intended, in the absence of distinct provision to the contrary, to destroy or weaken the *capacity* or *functions* expressly conferred on the other. Such attempted destruction or weakening is prima facie outside the respective grants of power." (original emphasis)

747 Neither the reasoning nor the result in the *Engineers' Case* assists the Commonwealth here. Furthermore, it is a case which does not deserve the reverence which has been accorded to it. Despite the subsequent emergence of other candidates for the dubious honour, the joint judgment remains, as Professor Sawer said, "one of the worst written and organized in Australian judicial history"[895]. What I derive from the cases to which I refer in this section of my reasons is that there are no particular lodestars for Australian constitutional construction but that there should be. This section of my reasons and what follows serve to emphasize that this is so, and further, that there is no reason why

---

892 (1920) 28 CLR 129 at 174.

893 (1920) 28 CLR 129 at 150, cited in *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 47 per Latham CJ.

894 (1925) 36 CLR 170 at 191.

895 Sawer, *Australian Federalism in the Courts*, (1967) at 130.

I should not seek to propound them, even departing, if so minded, from previous decisions of the Court, a matter with which I will now deal.

Div 1: Precedent

748 There has often been discussion in this Court about the liberty of a Justice to depart either from settled or current doctrine of the High Court, as a final court, on a point of constitutional interpretation. Isaacs J was the first Justice of this Court to declare his freedom to do so. In *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia*[896] his Honour said this:

> "The oath of a Justice of this Court is 'to do right to all manner of people *according to law*.' Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right." (emphasis of Isaacs J)

749 It is not surprising that his Honour should state his position so emphatically. How otherwise could the radical shift in constitutional interpretation effected by the *Engineers' Case*, of which his Honour could well have been the chief proponent, have occurred?

750 In his Storrs Lectures, delivered in 1921, and published as *The Nature of the Judicial Process*, Benjamin Cardozo, then a Judge of the New York Court of Appeals, gave much thought to the role of a judge in a common law court and of allegiance to precedent. In his first lecture, "The Method of Philosophy" he said this[897]:

> "[T]he work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. It is a process of search, comparison, and little more. Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court,

---

896 (1913) 17 CLR 261 at 278. See also at 288 per Higgins J.

897 Cardozo, *The Nature of the Judicial Process*, (1921) at 20-21.

> worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge."

751 This was not however an invitation to depart from precedent at whim. At the conclusion of his third lecture, "The Method of Sociology"[898], the judge said:

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains." (footnote omitted)

752 Barwick CJ in his Lionel Cohen Lecture, given at the Hebrew University of Jerusalem in 1969, set out his views on the proper use of precedent and some peculiar difficulties encountered by Australian courts at that time. Referring to the passage of Isaacs J, which I have cited in this section of my reasons, his Honour, who was ready to disparage different views from his[899], made the following observation[900]:

> "We have been through a period when the virtues (and they are no doubt virtues) of stability and predictability in the law have been paramount considerations in the decision of cases, and particularly in the consideration of earlier decisions. Today many are not so enamoured of the perpetuation of error or of inappropriateness to current times of old decisions, and favour their review in proper cases by final courts of appeal."

753 Barwick CJ curially repeated this view of the earlier statement of Isaacs J some eight years later in *Queensland v The Commonwealth*[901]. He affirmed that

---

898 Cardozo, *The Nature of the Judicial Process*, (1921) at 141.

899 See [738], above, particularly fn 867.

900 Barwick, "Precedent in the Southern Hemisphere", (1970) 5 *Israel Law Review* 1 at 21.

901 (1977) 139 CLR 585 at 593-594.

the paramount duty of the Court is to the maintenance of the Constitution, and not of strict adherence to precedent[902]:

> "[I]t is fundamental to the work of this Court and to its function of determining, so far as it rests on judicial decision, the law of Australia appropriate to the times, that it should not be bound in point of precedent but only in point of conviction by its prior decisions. In the case of the Constitution, it is the duty, in my opinion, of each Justice, paying due regard to the opinions of other Justices past and present, to decide what in truth the Constitution provides. The area of constitutional law is pre-eminently an area where the paramount consideration is the maintenance of the Constitution itself. Of course, the fact that a particular construction has long been accepted is a potent factor for consideration: but it has not hitherto been accepted as effective to prevent the members of the Court from departing from an earlier interpretation if convinced that it does not truly represent the Constitution. There is no need to refer to the instances in which the Court has departed from earlier decisions upon the Constitution, some of long standing. The Constitution may be rigid but that does not imply or require rigidity on the part of the Court in adherence to prior decisions. No doubt to depart from them is a grave matter and a heavy responsibility. But convinced of their error, the duty to express what is the proper construction is paramount."

754 That view seems to have won the somewhat guarded support of the Court in *Lange*[903]:

> "Errors in constitutional interpretation are not remediable by the legislature[904], and the Court's approach to constitutional matters is not necessarily the same as in matters concerning the common law or statutes."

755 It takes a high degree of self-assurance to denounce the opinions of earlier judges as "error". But the statement of Barwick CJ that I have quoted also, regrettably in my opinion, appears to arrogate to the Court, rather than the people voting in a referendum, the right to alter, "correct" as the Court would have it, an earlier, even oft-repeated, apparently settled constitutional interpretation.

---

902 (1977) 139 CLR 585 at 593. See also at 602-603 per Stephen J, 610 per Murphy J, 620-631 per Aickin J.

903 (1997) 189 CLR 520 at 554 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

904 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 630; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 588.

756 Other cases have emphasized that the primary duty of a Justice of the High Court is to apply the language of the Constitution rather than other judicial decisions about it. For example recently, in *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)*[905], Kirby J said:

> "There is no express foundation in the Constitution (or, so far as it would help, any legislation) to support such an impediment to argument. Indeed, the text of the Constitution is inconsistent with the requirement. This Court is the ultimate guardian of the judicial power of the Commonwealth[906]. It derives its existence and functions from the Constitution and owes its duty to it. If the Constitution requires a result in a relevant contested matter, no rule of practice of the Court can impede that outcome. Judges of this Court have repeatedly stated that constitutional doctrine stands on a different basis to other holdings, so far as the requirements of the law of precedent are concerned[907]. In part, this is because the Constitution is itself the source of legal authority and thus is placed apart. In part, it is because of a recognition (affirmed by history) that different generations read the Constitution in different ways according to the perceptions of different times[908]. The duty of the Justices to the Constitution is individual. No group or number of them can impede the discharge of that duty by one or a minority of them."

757 Other examples of recognition of such a duty are *Victoria v The Commonwealth* ("the *Payroll Tax Case*")[909], *Buck v Bavone*[910], *Stevens v Head*[911],

---

905 (2004) 220 CLR 388 at 452-453 [179].

906 Constitution, s 71.

907 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 277-279; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 592-594; *Stevens v Head* (1993) 176 CLR 433 at 461-462; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566; *Coleman v Power* (2004) (2004) 220 CLR 1 at 109 [289], 112-113 [298], 114 [301] per Callinan J.

908 *Victoria v The Commonwealth* ("the *Payroll Tax Case*") (1971) 122 CLR 353 at 395-397.

909 (1971) 122 CLR 353 at 378 per Barwick CJ.

910 (1976) 135 CLR 110 at 137 per Murphy J.

911 (1993) 176 CLR 433 at 461-462 per Deane J.

Cheng v The Queen[912], *Brownlee v The Queen*[913], *Ruhani v Director of Police*[914] and *XYZ v Commonwealth*[915].

758 In the fourth of his Storrs Lectures, "Adherence to Precedent", Cardozo J appeared to acknowledge that a similar rule applied in the United States[916]:

> "In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him. ... The situation would, however, be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings. In such circumstances there is nothing to do except to stand by the errors of our brethren of the week before, whether we relish them or not. But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. *We have had to do this sometimes in the field of constitutional law*." (emphasis added; footnote omitted)

759 The two justifications selected for a departure from settled authority, "sense of justice" and "social welfare", are less likely to warrant a departure from accepted doctrine in constitutional cases in this country, in which the absence of a constitutional bill of rights means that it is for legislatures rather than the courts to identify and make provision for these, especially the latter. More basal considerations such as "ascertainment of founders' intent" and "maintenance of the federation established by the Constitution" are, in my opinion, safer yardsticks, and more in keeping with the proper role of a Justice of this Court.

---

912 (2000) 203 CLR 248 at 324-325 [227] per Kirby J.

913 (2001) 207 CLR 278 at 312-315 [100]-[108] per Kirby J.

914 (2005) 222 CLR 489 at 551 [196]-[197] per Kirby J.

915 (2006) 80 ALJR 1036 at 1055 [77] per Kirby J, 1082 [204]-[205] per Callinan and Heydon JJ; 227 ALR 495 at 517, 553-554.

916 Cardozo, *The Nature of the Judicial Process*, (1921) at 149-150.

760 None of this of course is licence to a Justice of the High Court to decide a matter without due regard for, and deference to, the earlier authority of the Court. Whilst it has been accepted that the Court is not necessarily bound by its previous decisions regarding the interpretation of the Constitution, it has also been emphasized that it is only with extreme caution that the Court should exercise its power to overrule or reconsider them[917]. Judgments of this Court, for example of Gibbs J, reveal a great deference to earlier cases relevant to the subsequent question before the Court. In *Queensland v The Commonwealth*[918] his Honour considered himself bound by constitutional precedent, although in his view a previous case had been wrongly decided. After citing the passage in the judgment of Isaacs J in *Australian Agricultural Co*, referred to earlier, his Honour said[919]:

> "But like most generalizations, this statement can be misleading. No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court."

761 Gibbs J did not entirely shy away however from the responsibility of declaring earlier constitutional decisions to be incorrect. In *The Commonwealth v Hospital Contribution Fund*[920], Gibbs CJ said:

---

917 See, eg, *Hughes and Vale Pty Ltd v State of New South Wales* (1953) 87 CLR 49 at 102 per Kitto J; *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475 at 501 per Mason J; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 per Gibbs J, 602-603 per Stephen J, 620 per Aickin J; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18 at 38-39 per McHugh J; *McGinty v Western Australia* (1996) 186 CLR 140 at 235 per McHugh J.

918 (1977) 139 CLR 585.

919 (1977) 139 CLR 585 at 599 per Gibbs J.

920 (1982) 150 CLR 49 at 55-56.

> "The question then arises whether we should reconsider these decisions [*Kotsis v Kotsis*[921] and *Knight v Knight*[922]], and refuse to follow them if we disagree with them. Clearly we have power to take that course. This Court has always claimed the power to overrule its own decisions, and has exercised that power in a number of cases of great constitutional importance. But it is a power to be exercised with restraint, and only 'after the most careful scrutiny of the precedent authority in question and after a full consideration of what may be the consequences of doing so': *Queensland v The Commonwealth*[923] per Stephen J. The authorities that have considered the circumstances in which this Court will reconsider an earlier decision of its own were fully discussed in the judgment of Aickin J in *Queensland v The Commonwealth*[924]."

After giving due consideration to the reasoning in *Knight v Knight* and *Kotsis v Kotsis* his Honour concluded that they had been incorrectly decided and proceeded to overrule them, as did a majority of the Court.

762 It is clear therefore that there is more room for a Justice of this Court to move, and to depart from authority, whether recent or venerable, in constitutional cases than in the private law. It could hardly be otherwise. No doubt careful deference should be paid to the doctrines of the Court as and when they can be identified and can be seen to be consistent, but it is not right for a judge to seek refuge in those doctrines to avoid the undertaking of an independent analysis, informed by the past, of the Constitution.

763 In *Singh v The Commonwealth*[925] McHugh J and I dissented on the constitutional question whether a person born in Australia and qualified for citizenship under the *Australian Citizenship Act* 1948 (Cth) could be deemed an alien for the purposes of s 51(xix) of the Constitution. Recently *Koroitamana v Commonwealth*[926] raised a similar point for determination. In that case I accepted[927] that on its facts *Koroitamana* was not distinguishable. I therefore

---

921 (1970) 122 CLR 69.

922 (1971) 122 CLR 114.

923 (1977) 139 CLR 585 at 602.

924 (1977) 139 CLR 585 at 620-630.

925 (2004) 222 CLR 322.

926 (2006) 80 ALJR 1146; 227 ALR 406.

927 (2006) 80 ALJR 1146 at 1160 [86]; 227 ALR 406 at 424.

joined in the orders proposed by the majority, notwithstanding my conviction that the reasoning of McHugh J and myself in *Singh* was correct. That does not mean however that I should retreat from what I said in *Singh* in relation to the Convention Debates[928]:

> "The defendants object to the reception of [speeches and resolutions of the Federal Coventions]. The objection should be dismissed. There is no doubt that the common law and the founders' understanding of it heavily informed the language of the *Constitution*. So too of course did history and contemporary perceptions of mischiefs[929] to be dealt with and objectives to be attained. The Court is not only, in my opinion, entitled, but also obliged, to have regard to the Convention Debates when, as is often the case, recourse to them is relevant and informative[930]. The debates are certainly relevant and informative here.
>
> ...
>
> There are compelling reasons why recourse to the debates is permissible and will usually be helpful. Courts and judges may speak of the changing meaning of language but in practice substantive linguistic change occurs very slowly, particularly in legal phraseology. When change does occur, it generally tends to relate to popular culture rather than to the expression of fundamental ideas, philosophies, principles and legal concepts. Judges should in my opinion be especially vigilant to recognise and eschew what is in substance a constitutional change under a false rubric of a perceived change in the meaning of a word, or an expression used in the *Constitution*. That power, to effect a Constitutional change, resides exclusively in the Australian people pursuant to s 128 of the *Constitution* and is not to be usurped by either the courts or the Parliament. In any event, I am not by any means persuaded that an actual change in the meaning of a word or a phrase, if and when it occurs, can justify a departure from its meaning at the time of Federation. The constitutional conservatism of the Australian people reflected in the

---

928 (2004) 222 CLR 322 at 423-425 [293]-[295].

929 Mischief in the legal sense, for example problems to be solved and hardships to be ameliorated.

930 There is probably no legal significance in the anomaly that s 15AB of the *Acts Interpretation Act 1901* (Cth) would allow recourse to explanatory memoranda and second reading speeches, yet the defendants' submissions would deny it to the foundational constitutional materials.

> failure of so many referenda[931] cannot justify a supposed antidote of judicial 'progressivism'. This is not to say that adherence to nineteenth century meanings which have become archaic will always be obligatory. But it is to say that instruments, including constitutional ones are still basically to be construed by reference to the intentions of their makers objectively ascertained. Examination of the circumstances which formed the background to the making of the *Constitution* assists in this examination. In my opinion Convention materials showing what the founders deliberately discarded may be especially illuminating in the same way as evidence of what parties to a contract deliberately excluded negates the implication of a term of a contract to the effect of what was excluded[932]."

764 This case is a unique one. There are neither firm authority, nor even compelling dicta, which require me to hold for the Commonwealth in it. The point of this section of my reasons is this: even if those of a different mind could, or do, point to past decisions or dicta of this Court which in their opinion might appear to compel a different conclusion from mine[933], there is a clear line of thinking of members of the Court that departures may legitimately and conscientiously be made. In my view they are not merely permissible, but obligatory when the issue is, as here, as significant as the continuing role and integrity of the States. The Commonwealth has conceded that no other case governs this one. That must mean that not even that monument to the demolition of State power, the *Engineers' Case*, does so. If, however, I am wrong about that, the cases to which I have referred in this section of my reasons would provide precedents entitling me to depart from it.

Div 2: The principle of generality of language

765 It has been said in various cases that constitutional provisions, especially those conferring powers, should be read "with all the generality which the words used admit"[934], a statement of a positive obligation somewhat more expansive

---

931 Since 1901, 44 proposals have been put to the Australian people and only eight have succeeded: see Blackshield and Williams, *Australian Constitutional Law and Theory*, 3rd ed (2002) at 1301.

932 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 346 per Mason J.

933 I would note that the joint reasons have approved the *dissent* of Gaudron J in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346.

934 See, eg, *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226; *New South Wales v The*

(Footnote continues on next page)

than the negative injunction, not to read constitutional provisions "in any narrow or pedantic manner"[935]. Each of these requirements, indeed something less than them, would still exceed the ambit of the power allowed to democratically elected bodies exercising defined powers such as those of local authorities to make ordinances and by-laws[936]. As Gibbs CJ said in *R v Toohey; Ex parte Northern Land Council*[937], in relation to the laws (regulations) made by the executive of a self-governing territory, the Northern Territory, under legislation enacted by the Parliament of the Territory:

> "One thing that is clearly settled by numerous cases is that a power expressed in terms such as those of s 165 of the *Planning Act* does not enable the Governor-General in Council or Governor in Council to make regulations 'which go outside the field of operation which the Act marks out for itself': *Morton v Union Steamship Co of New Zealand Ltd*[938]."

766 The regulations of subordinates and the exercise of power by public bodies are carefully scrutinized by the courts to prevent excess or abuse of power. Such a body must act both reasonably and in good faith[939]. No one has proposed that the same sort of scrutiny should be unqualifiedly employed in the

---

Commonwealth ("the *Seas and Submerged Lands Case*") (1975) 135 CLR 337 at 470-471; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 127-128; *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501 at 528; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

935 See, eg, *James v The Commonwealth* (1936) 55 CLR 1 at 43; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 490; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 223-224.

936 In *Baxter v Ah Way* (1909) 8 CLR 626 at 643, Isaacs J saw and used an analogy between powers conferred on the Commonwealth by the Constitution and powers conferred on subordinate authorities to make regulations and by-laws by enactments.

937 (1981) 151 CLR 170 at 187.

938 (1951) 83 CLR 402 at 410.

939 *Westminster Corporation v London and North Western Railway* [1905] AC 426 at 430.

examination of Commonwealth powers under s 51 of the Constitution[940]. That does not mean, however, particularly in relation to a federation such as Australia, that interpretative rigour is not called for in a constitutional case in which the Commonwealth Parliament has enacted legislation with a real tendency to affect traditional State activities.

767 On any view, in any event, neither the positive nor the negative injunction about generality is an unqualified principle of constitutional interpretation. The source of both propositions is almost certainly O'Connor J in *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association*[941], in which his Honour was still careful to make clear, a matter of which sight has at times been lost, that generality must make way to context and other limiting provisions in the Constitution:

> "[W]here it becomes a question of construing words used in conferring a power of that kind on the Commonwealth Parliament, it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.
>
> For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose."

768 It is of particular importance to note his Honour's reference to the necessity to give effect to the "object and purpose" of each expression in the Constitution, another matter neglected from time to time by this Court, and of some significance to this case. In *Strickland v Rocla Concrete Pipes Ltd*[942] the Court treated the decision in *Huddart, Parker & Co Pty Ltd v Moorehead*[943] as if every word and line of it were infected by a virus, the doctrine of reserved State

---

940 In *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 356, Dawson J said that a "test of reasonable proportionality", which "has been found useful in determining the validity of delegated legislation", may be used for "purposive" powers only.

941 (1908) 6 CLR 309 at 367-368. This case is cited in *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225-226.

942 (1971) 124 CLR 468.

943 (1909) 8 CLR 330.

powers. This passage from the judgment of O'Connor J in that case reveals no such infection, rather, simply a respect for federalism[944]:

> "Where [the Constitution] confers a power in terms equally capable of a wide and of a restricted meaning, that meaning will be adopted which will best give effect to the system of distribution of powers between State and Commonwealth which the Constitution has adopted, and which is most in harmony with the general scheme of its structure."

It is difficult to avoid the impression that in preferring, as it so often has, central power to State power, this Court has regarded its constitutional role as no different from the role of an umpire of a cricket match, who, by the rules of that game, is obliged to give the batsman, at the expense of the bowler, the "benefit of the doubt". I am neither bound nor prepared to take that stance.

769 I elsewhere explain why there are other strong reasons for the construction of s 51(xviii) of the Constitution which I think correct. At this point it is sufficient to say that the submission of the Australian Workers' Union is also partly correct:

> "[I]t is one thing to say that terms such as 'patents of inventions and designs', 'postal, telegraphic, telephonic, and other like services', 'corporations', or 'marriage' should be construed with all the generality that their words admit, lest the Constitution become some sort of nineteenth century fossilized relic. It is quite another, however, to say that the most general connection between a head of power and a law will be deemed sufficient."

The submission is correct in singling out some powers for an obviously more expansive operation than others. Patents and inventions are powers in point. So too is defence. In its terms, that is in text, placitum (v) dealing with "postal, telegraphic, telephonic, and other like services" is a very far-reaching power without any need for judicial addition to it. I am however unable to accept that the Constitution is in danger of becoming a fossilized relic of the nineteenth century. Intimations of that danger have accompanied and been falsified by every one of the many failed referenda conducted since federation, as well as, among other things, cooperation between the Commonwealth and the States when power is lacking but action truly necessary[945].

---

944 (1909) 8 CLR 330 at 369.

945 A good example is the *Corporations Act* 2001 (Cth), the incorporation provisions of which rely on the reference power conferred by s 51(xxxvii) of the Constitution. That reference was made necessary, if there were to be a uniform Commonwealth law, by the decision of the Court in *New South Wales v The Commonwealth* (*The*

(Footnote continues on next page)

770 The generality doctrine is subject to another restraint or limitation, curiously enough, not by reason of anything stated in terms in the Constitution, but by reason of an only recently unearthed implication, of freedom of political speech[946]. In *Coleman v Power*[947] and *APLA Ltd v Legal Services Commissioner (NSW)*[948], McHugh J would have applied that implication to strike down State legislation. It could have, as a constitutional implication, the same operation upon relevant legislation of the Commonwealth enacted apparently otherwise validly under s 51. The generality doctrine may be carried only so far. It cannot be used in such a way as to defeat two of the most elementary principles of construction of all instruments and legislation: that effect must be given to the intention, the objects and purposes of the document, and that it must be read and construed as a whole.

Div 3: Statement of the appropriate principles

771 The cases and matters to which I have referred show that over 103 years the Justices of this Court have not adopted clear and consistent canons for the construction of the Constitution. Accusations of heresy have provoked counter-accusations of heresy. As Liddell Hart said in *Why don't we learn from history?*, if a person criticize an idea as "heresy" or take a particular criticism as a general depreciation, that person effectively abandons "the spirit of objective enquiry"[949]. The same can be said of an assertion, unsupported by considered reasoning, that another's construction according to well-accepted canons of construction is an "ill-conceived attempt"[950]. The doctrine of *stare decisis* has sometimes been applied, and at other times it has been disregarded. Judges have emphasized the need to read the Constitution as a complete document and contextually, but yet, for the expansion of Commonwealth power, have been prepared to view a section or a placitum of s 51 monocularly.

Incorporation Case) (1990) 169 CLR 482. Simarly, after the decision of the Court in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, each State enacted a *Federal Courts (State Jurisdiction) Act* 1999, the validity of which was upheld in *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 and *Re Macks; Ex parte Saint* (2000) 204 CLR 158.

946 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

947 (2004) 220 CLR 1 at 53-54 [101]-[106].

948 (2005) 79 ALJR 1620; 219 ALR 403.

949 Liddell Hart, *Why don't we learn from history?*, (1944) at 11.

950 *New South Wales v The Commonwealth* (*The Incorporation Case*) (1990) 169 CLR 482 at 504 per Deane J. See also Pt VI of these reasons.

772 The principles by which I am guided in this case are these. The Constitution should be construed in the light of its history. It should be construed purposively. The founders' intentions and understandings, to the extent that they can be seen to be generally consensual, are relevant[951]. The evidence to be found in the Debates is valuable. The referenda, the results of them, and what was said by informed, legally qualified and knowledgeable legislators in relation to the Bills for them, are relevant in the way, and for the purposes that I have stated. The Constitution should not be construed to enable the Court to supplant the people's voice under s 128 of it. The Constitution should not in general be read as if it were intended to confer powers in duplicate. "Originalism" so-called, is no less a proper interpretative tool than any other, and will often be an appropriate one. It is useful here. The doctrines of indirect result and accidental bullseye are unlikely ones and when applied have the capacity to lead to eccentric, unforeseen, improbable and unconvincing results. The former has the further potential of encouraging an absence of candour in the legislative process. They should not be applied here. The generality doctrine may be invoked sparingly only, and cannot extend to all placita of s 51 in all circumstances. The Constitution requires that an enactment be characterized by its true nature and substance for the purpose of assessing its validity[952]. Sight should never be lost of the verity that the Constitution is a constitution for a federation, and that it provides for a federal balance, a topic to which I go next. It may be in any event subject to constitutional implications, and the maintenance of the federal balance is a powerful one of these, more powerful than, for example, the implication of freedom of political speech, not a word concerning which, unlike the repeated references to the States, appears in the Constitution.

---

951 Scalia J recently posed this question, extra-judicially (Response to comments on his Sir John Young Oration, "Mullahs of the West; Judges as Authoritative Expositors of the Natural Law?", (2005) at 21):

> "Would anyone vote for a constitution which said 'Those general norms set forth in this document ... do not refer to the people's current understanding of what is embraced by those terms, but rather shall bear the meaning assigned, from time to time, by unelected and life tenured committees of lawyers.'"

952 Barwick CJ said in *Victoria v The Commonwealth* ("the *Payroll Tax Case*") (1971) 122 CLR 353 at 372:

> "[A] law of the Commonwealth which *in substance* takes a State or its powers or functions of government as its subject matter is invalid because it cannot be supported upon any granted legislative power. If the subject matter of the law is *in substance* the States or their powers or functions of government, there is no room, in my opinion, for holding it to be at the same time and in the same respects a law upon one of the enumerated topics in s 51." (emphasis added)

773 Application of these principles here produces the result that the challenge to the Act succeeds.

PART V. CONSTITUTIONAL IMPERATIVE OF THE FEDERAL BALANCE

774 I turn then to the question of the distribution of powers, in other words, the federal balance. The Cambridge divine William Ralph Inge wrote[953]: "Democracy is a form of government which may be rationally defended, not as being good, but as being less bad than any other." Sir Winston Churchill observed[954]: "[I]t has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time".

775 It may equally perhaps be argued that despite their faults, federations are the least undemocratic of all forms of government. The framers of the Constitution and the people who endorsed it by a popular vote could not have been unaware of the problems, and the frustrations, to which the division of powers in a federation may give rise[955]. Nor would they have been ignorant of the aversion that those who exercise power generally have to any sharing of it. The legislation which is in question here, if valid, would subvert the Constitution and the delicate distribution or balancing of powers which it contemplates. To say that the powers are distributed, or that they are carefully balanced, is not to suggest that they ever were, or are now, in a state of static equilibrium. In both specific and general areas, the powers of the Commonwealth obviously tend to be much larger than, or are exclusive of, those of the States. There is nothing static about the defence power (s 51(vi)) in times of national peril, or at all times, the taxation power (s 51(ii)), as to which governments and parliaments consistently exercise much ingenuity, or, as these reasons elsewhere note, the intellectual property power (s 51(xviii)), the immigration and emigration power (s 51xxvii)), or, in particular, the grants power (s 96) which legitimately all allow to the Commonwealth much room to move.

776 The "generality doctrine" cannot be used to expand the powers of the Commonwealth in disregard of the distribution of constitutional power for which

---

953 Inge, *Outspoken Essays*, (1919) at 5. Inge (1860-1954) was a professor of divinity at Cambridge.

954 United Kingdom, House of Commons, *Parliamentary Debates* (Hansard), 11 November 1947 at 207.

955 It is not beyond controversy whether highly centralized or command economies function more efficiently than those in which control is dispersed.

the Constitution provides, and which careful reading of it as a whole requires. The generality doctrine should only be invoked and applied to provisions which by their terms, and in the light of other language in the Constitution, can be seen to require an expansive meaning.

777 Let me make clear what I mean by the "federal balance" before I continue. It is, essentially, a sharing of power, even of power which the Commonwealth can monopolize under a specific constitutional grant if and when it chooses to do so, and can successfully invoke s 109 of the Constitution, and the exercise of different powers of varying importance by each of the Commonwealth and the States, but not so that, relevantly for present purposes, the essential functions and institutions of the States, for example, internal law and order, their judiciaries, and their Executives are obstructed, impeded, diminished, or curtailed. Even when the Commonwealth does have the relevant power, the exercise of it may be unconstitutional. There is good reason why, in drawing the boundaries, this Court should have regard to the matters that I deal with in this section of my reasons.

778 The text, indeed the whole structure, of the Constitution clearly mandates the co-existence of the Commonwealth and the States. Whilst Griffith CJ well understood that it was the Court's duty to construe the Constitution as a constitution for a nation and not some assemblage of minor organizations, he never lost sight of the fact that it was a "compact"[956] for a federation. He and other founders also understood from their knowledge of the Constitution and history of the United States that a federation of robust components was not antithetical to nationhood. The Commonwealth is the creature of the Constitution[957]. Its powers are specific and enumerated[958]. All not so specified and enumerated are powers of the States. Those that they possessed at the establishment of the Commonwealth "continue"[959]. It is only in certain circumstances that the Commonwealth may act exclusively[960], and in others the

---

956 *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employés Association* (1906) 4 CLR 488 at 534 per Griffith CJ, Barton and O'Connor JJ. See also *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1104-1105.

957 Preamble and covering cl 6.

958 See, eg, ss 51, 52, 61-70, 71-73, 76-78, 96, 105A, 121-123.

959 Section 107.

960 See, eg, ss 52, 69, 90, 111, 114 and 115.

States enjoy what is in truth an immunity[961], despite the distaste of the majority in the *Engineers' Case* for that concept.

779 There is nothing in the text or the structure of the Constitution to suggest that the Commonwealth's powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society. This Court too is a creature of the Constitution. Its powers are defined in Ch III, and legislation made under it. The Court goes beyond power if it reshape the federation[962]. By doing that it also subverts the sacred and exclusive role of the people to do so under s 128.

780 The joint judgment states that reliance on notions of comity is apt to invoke presuppositions about allocation of legislative power between the integers of the federation that are not easily distinguished from the reserved powers doctrine[963]. The whole Constitution is founded upon notions of comity, comity between the States which replaced the former colonies, comity between the Commonwealth as a polity and each of the States as a polity, and comity between the Imperial power, the Commonwealth and the States. It is inevitable in a federation that the allocation of legislative power will have to be considered from time to time. Federations compel comity, that is to say, mutual respect and deference in allocated areas.

781 There are statements in the joint judgment[964], impliedly at least, disparaging, not only of the expression, "the federal balance", but also of the very concept of it. In my respectful opinion they fail to pay due regard to our predecessors on this Court who never doubted the importance of that concept. Starke J, who had joined in the joint reasons in the *Engineers' Case*, made clear in subsequent cases that the Court's reliance upon textualism in the *Engineers' Case* is qualified by the existence and need to maintain the federal balance. In *South Australia v The Commonwealth*[965] he said:

---

961 See, eg, ss 91, 100, 104 and 114.

962 One, but not the only, definition of "judicial activism" is "using judicial power for a purpose *other than that for which it was granted*" (emphasis added): Heydon, "Judicial Activism and the Death of the Rule of Law", (2003) 23 *Australian Bar Review* 110 at 113.

963 At [94].

964 At [183], [189]-[196].

965 (1942) 65 CLR 373 at 442.

> "The government of Australia is a dual system based upon a separation of organs and of powers. The maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers. Therefore it is beyond the power of either to abolish or destroy the other. *The limited grant of powers to the Commonwealth* cannot be exercised for ends inconsistent with the separate existence and self-government of the States, *nor for ends inconsistent with its limited grants*". (emphasis added)

Later, in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria*[966], Starke J said this:

> "The maintenance of the States and their powers, as I have said before, is as much the object of the Constitution as the maintenance of the Commonwealth and its powers. It is inconsistent with the Federal system set up by the Constitution that the Commonwealth should enact legislation compelling the States, as such, to take or to refrain from taking any action, or to expend their revenues, in manner prescribed by the Commonwealth."

Starke J repeated these two passages in *Melbourne Corporation v The Commonwealth*[967] in support of the proposition that "[t]he *federal character* of the Australian Constitution carries implications of its own" (emphasis added).

782 The issue in *Melbourne Corporation* was whether s 48 of the *Banking Act* 1945 (Cth), which prevented banks from conducting any banking business for a State or a State authority, including a local government authority, except with the consent in writing of the Commonwealth Treasurer, was a valid constitutional enactment. Rich J said this[968]:

> "There is no general implication in the framework of the Commonwealth Constitution that the Commonwealth is restricted from exercising its defined constitutional powers to their fullest extent by a supposed reservation to the States of an undefined field of reserved powers beyond the scope of Commonwealth interference. But this is always subject to the provisions of the Commonwealth Constitution itself. That Constitution expressly provides for the continued existence of the States. Any action on the part of the Commonwealth, in purported exercise of its constitutional powers, which would prevent a State from continuing to exist and function as such is necessarily invalid because inconsistent with

---

966 (1942) 66 CLR 488 at 515.

967 (1947) 74 CLR 31 at 70.

968 (1947) 74 CLR 31 at 66.

> the express provisions of the Constitution, and it is to be noted that all the powers conferred by s 51 are conferred 'subject to this Constitution.'"

It is significant that his Honour was stressing that more than mere existence was involved: rather that the States were entitled to function as polities with real powers, authorities and a constitutional role.

783 The fears of Dixon J were of encroachments upon State constitutional powers. The States are not, as he said, to be hindered by the Commonwealth in the exercise of their powers. His Honour put it this way[969]:

> "[My] reservation relates to the use of federal legislative power to make, not a general law which governs all alike who come within the area of its operation whether they are subjects of the Crown or the agents of the Crown in right of a State, but a law which discriminates against States, or a law which places a particular disability or burden upon an operation or activity of a State, and *more especially upon the execution of its constitutional powers*. In support of such a use of power the *Engineers' Case* has nothing to say." (emphasis added; footnote omitted)

Later his Honour said[970]:

> "The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities. Among them it distributes powers of governing the country. The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them. The Constitution on this footing proceeds to distribute the power between State and Commonwealth and to provide for their inter-relation, tasks performed with reference to the legislative powers chiefly by ss 51, 52, 107, 108 and 109."

And Williams J said[971]:

> "[T]he Parliament of the Commonwealth is only authorized by s 51 to make laws with respect to the enumerated subjects (1) for the peace, order

---

969 (1947) 74 CLR 31 at 78-79.

970 (1947) 74 CLR 31 at 82.

971 (1947) 74 CLR 31 at 99.

> and good government of the Commonwealth, and (2) subject to the Constitution, and *there arises from the very nature of the federal compact, which contemplates two independent political organisms, each supreme within its own sphere,* existing side by side and exerting divided authority over the same persons and in the same territory, a necessary implication that neither the Commonwealth nor the States may exercise their respective constitutional powers for the purpose of affecting the capacity of the other to perform its essential governmental functions." (emphasis added)

784 The emphatic reservations stated by Dixon J, with respect to Commonwealth laws that are discriminatory or impose a special burden upon the States, have not attracted the support of all other judges. Barwick CJ and Windeyer J expressed disagreement with them in the *Payroll Tax Case*[972], but neither denied, nor could they, that the Constitution insists upon the co-existence of State and Commonwealth power. There is discernable however in statements elsewhere by Windeyer J an unabashed preference for the Commonwealth and Commonwealth power to State power[973].

785 The joint reasons also cite the words of Windeyer J in the *Payroll Tax Case*[974] in denigration of the States as polities:

> "The Colonies which in 1901 became States in the new Commonwealth were not before then sovereign bodies in any strict legal sense; and certainly the Constitution did not make them so. They were self-governing colonies which, when the Commonwealth came into existence as a new Dominion of the Crown, lost some of their former powers and gained no new powers. They became components of a federation, the Commonwealth of Australia. It became a nation. Its nationhood was in the course of time to be consolidated in war, by economic and commercial integration, by the unifying influence of federal law, by the decline of dependence upon British naval and military power and by a recognition and acceptance of external interests and obligations. With these developments the position of the Commonwealth, the federal government, has waxed; and that of the States has waned. In law that is a result of the paramount position of the Commonwealth Parliament in matters of concurrent power. And this legal supremacy has been reinforced in fact by financial dominance. That the Commonwealth would, as time went on,

---

972 (1971) 122 CLR 353 at 373 per Barwick CJ, 403 per Windeyer J.

973 See, eg, *Bonser v La Macchia* (1969) 122 CLR 177 at 222-224; *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 26-27.

974 (1971) 122 CLR 353 at 395-396.

> enter progressively, directly or indirectly, into fields that had formerly been occupied by the States, was from an early date seen as likely to occur. This was greatly aided after the decision in the *Engineers' Case*, which diverted the flow of constitutional law into new channels." (footnote omitted)

I do not, with respect, regard all of his Honour's statement there as helpful for several reasons. To say that the colonies were not before federation "sovereign bodies" in any strict legal sense leads nowhere. As the history of very infrequent sovereign intervention in colonial affairs discussed in *Attorney-General (WA) v Marquet*[975] shows, intervention by the Imperial Parliament or the Executive practically never occurred after separation of the respective colonies. The *Colonial Laws Validity Act* 1865 (Imp) conferred very extensive powers to legislate upon the colonies which they vigorously exercised[976]. Relevantly for present purposes, they legislated in all necessary detail for and in respect of companies[977]. Nor does it lead anywhere to say, as Windeyer J did, and the majority has approved, that the Constitution did not make the States sovereign bodies. What is of real relevance, however they may be described, was that they are, and were, polities with popularly elected governments exercising extensive powers with the capacity to affect the rights, obligations and property of people, including one of the most important powers of all, to establish and maintain Supreme Courts with the same powers as the ancient courts at Westminster and their successors. The States may not have gained any new powers at federation, but federation affirmed and enlarged them as substantial and permanent polities of a kind quite different from mere colonies. Windeyer J argues that it was seen from an early date that it was likely that the Commonwealth would "enter progressively ... [and] indirectly, into fields that had formerly been occupied by the States" and that this process was accelerated by the *Engineers' Case*. His Honour does not mention by whom or when this was foreseen as likely to occur, and whether the "fields" were fields delineated exclusively by s 51 or otherwise. It is important to keep in mind the three distinct types of powers exercised in a federation: exclusive Commonwealth power, concurrent federal and State power, and exclusive State power.

786 Gibbs J, in the *Payroll Tax Case*, spoke in the same vein as Dixon J in *Melbourne Corporation*, and, when he was Chief Justice, in the later case of

---

975 (2003) 217 CLR 545 at 562 [36]-[38].

976 See, eg, the grants of leases over areas of land considered in *Wik Peoples v Queensland* (1996) 187 CLR 1; *Western Australia v Ward* (2002) 213 CLR 1.

977 *Companies Act* 1874 (NSW); *The Companies Statute* 1864 (Vic); *The Companies Act* 1864 (SA); *The Companies Act* 1863 (Q); *The Companies Act* 1893 (WA); *The Companies Act* 1869 (Tas).

Queensland Electricity Commission v The Commonwealth[978]. In the former he said[979]:

> "It is unnecessary to discuss fully the subject of the implied limitations on the power of the Commonwealth to make laws binding on the States. Such matters as the extent of the Commonwealth power to affect the prerogative, or whether the Commonwealth can compel the States to make appropriations of money in satisfaction of liabilities imposed on them, or can impair or affect the Constitution of a State, do not fall for consideration. Still less is it necessary to discuss the implications that may be made as to the immunity of the Commonwealth from action by the States. In my respectful opinion, the view of Sir Owen Dixon, that a Commonwealth law is bad if it discriminates against States, in the sense that it imposes some special burden or disability upon them, so that it may be described as a law aimed at their restriction or control, should be accepted. With all respect, however, I am not disposed to agree that a law which is not discriminatory in this sense is necessarily valid if made within one of the enumerated powers of the Commonwealth. A general law of the Commonwealth which would prevent a State from continuing to exist and function as such would in my opinion be invalid. It is true that in many cases a law which offended in this way would prove to be discriminatory, and I am conscious of the imprecision of the test so far as it applies to general and non-discriminatory laws. The further formulations of the test by Rich and Starke JJ in the *Melbourne Corporation Case*[980] are not free from difficulty. To say that what the Constitution impliedly forbids is a law which would prevent the States from performing the normal and essential functions of government or impede them in doing so is to draw a distinction between essential and inessential functions of government which is inappropriate to modern conditions and has probably never been valid (cf per Windeyer J in *Ex parte Professional Engineers' Association*[981]). To inquire whether a law curtails or interferes in a substantial manner with the exercise of constitutional power by the States leads only to the further question what is the constitutional power of the States that is protected. For the purposes of the present case it is, however, unnecessary to attempt to resolve these difficulties because the pay-roll tax in its present form would not be invalid on any view of the question."

---

978 (1985) 159 CLR 192 at 205-206.

979 (1971) 122 CLR 353 at 424-425.

980 (1947) 74 CLR 31.

981 (1959) 107 CLR 208 at 274-276.

In *Queensland Electricity Commission*, Gibbs CJ said[982]:

> "It is now clear in principle, and established by authority, that the powers granted by s 51 of the Constitution are subject to certain limitations derived from the federal nature of the Constitution. The purpose of the Constitution was to establish a Federation. 'The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities': *Melbourne Corporation v The Commonwealth*[983]. The fundamental purpose of the Constitution, and its 'very frame' (*Melbourne Corporation v The Commonwealth*[984]), reveal an intention that the power of the Commonwealth to affect the States by its legislation must be subject to some limitation. The judgments in *Melbourne Corporation v The Commonwealth* were fully examined in *Victoria v The Commonwealth*[985] and the majority of the Court in the latter case (Menzies, Windeyer and Walsh JJ and myself) held that what was decided in the earlier case was that although s 48 of the *Banking Act* 1945 (Cth) was, or might be, a law with respect to banking within s 51(xiii) of the Constitution, it was invalid because it exceeded the limits on the law-making power of the Commonwealth which must be implied in the Constitution. It was recognized that it is not easy to formulate exhaustively and authoritatively the limitations that must be implied, and, indeed, it is undesirable to attempt to do so in the abstract. It is clear, however, that there are two distinct rules, each based on the same principle, but dealing separately with general and discriminatory laws. A general law, made within an enumerated power of the Commonwealth, will be invalid if it would prevent a State from continuing to exist and function as such. Clearly the Act is not a law of that description and it is unnecessary to consider further that aspect of the principle. A Commonwealth law will also be invalid if it discriminates against the States in the sense that it imposes some special burden or disability on them."

787 Mason J, Wilson J and Deane J also approved the reasoning of Dixon J[986]. Dawson J saw discrimination and the imposition of a special burden as two

---

982 (1985) 159 CLR 192 at 205-206.

983 (1947) 74 CLR 31 at 82.

984 (1947) 74 CLR 31 at 83.

985 (1971) 122 CLR 353.

986 (1985) 159 CLR 192 at 217 per Mason J, 222 per Wilson J, 248 per Deane J.

examples of the broader restraint on the Commonwealth's power, that it cannot impair the States' ability "to function effectually as independent units"[987]. I would respectfully agree that "to function" in a real sense a polity must be able to function in a substantial and independent way. Erosion of its capacity to do so is unlikely to occur otherwise than by a series of steps, some, as here, dramatic and obvious, others small and incremental. The Court needs to be vigilant in respect of both kinds. It should ensure that the functions of the States are not reduced to trivial or subservient ones by a judicial process that makes them little more than facades of power.

788 The force of the reasoning of Dixon J was recently acknowledged in this Court in *Austin v The Commonwealth*[988]. Gleeson CJ, after referring to *Melbourne Corporation* and *Queensland Electricity Commission*, concluded[989]:

> "It was the disabling effect on State authority that was the essence of the invalidity in those cases. It is the impairment of constitutional status, and interference with capacity to function as a government, rather than the imposition of a financial burden, that is at the heart of the matter, although there may be cases where the imposition of a financial burden has a broader significance."

789 Gaudron, Gummow and Hayne JJ thought[990] (Kirby J agreeing[991]) in *Austin* that the two reservations of Dixon J were not independent of one another:

> "[The] differential treatment was said, without more, to attract the *Melbourne Corporation* doctrine; the like was treated as the unalike and thereby the States were burdened in a 'special way'. That would appear to give 'discrimination' a standing on its own which in this field of discourse it does not have.
>
> There is, in our view, but one limitation, though the apparent expression of it varies with the form of the legislation under consideration. The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as 'special burden' and 'curtailment' of 'capacity' of the States 'to function as

---

987 (1985) 159 CLR 192 at 260.

988 (2003) 215 CLR 185.

989 (2003) 215 CLR 185 at 217 [24].

990 (2003) 215 CLR 185 at 249 [123]-[124].

991 (2003) 215 CLR 185 at 301 [281].

governments'. These criteria are to be applied by consideration not only of the form but also 'the substance and actual operation' of the federal law[992]. Further, this inquiry inevitably turns upon matters of evaluation and degree and of 'constitutional facts' which are not readily established by objective methods in curial proceedings."

790 McHugh J disagreed[993]:

"I am unable to agree with that part of the reasons of the joint judgment[994] that the *Melbourne Corporation* principle involves only 'one limitation, though the apparent expression of it varies with the form of the legislation under consideration'. With respect, since *Queensland Electricity Commission* it has been settled doctrine that there are two rules arising from the necessary constitutional implication. It is true that the joint judgment of six members of this Court, including myself, in *Re Australian Education Union; Ex parte Victoria*[995] said that it was unnecessary in that case to decide whether 'there are two implied limitations, two elements or branches of one limitation, or simply one limitation'. But that statement provides no basis for rejecting the statement of Mason J in *Queensland Electricity Commission*[996] that 'the principle is now well established and that it consists of two elements'. Nor does it provide any basis for rejecting the statement of Gibbs CJ in the same case[997] that 'it is clear, however, that there are two distinct rules, each based on the same principle, but dealing separately with general and discriminatory laws'.

Perhaps nothing of substance turns on the difference between holding that there are two rules and holding that there is one limitation that must be applied by reference to 'such criteria as "special burden" and "curtailment" of "capacity" of the States "to function as governments"'[998].

---

992 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 240; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 249-250; *Industrial Relations Act Case* (1996) 187 CLR 416 at 500.

993 (2003) 215 CLR 185 at 281-282 [223]-[224].

994 Reasons of Gaudron, Gummow and Hayne JJ at 249 [124].

995 (1995) 184 CLR 188 at 227 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

996 (1985) 159 CLR 192 at 217.

997 (1985) 159 CLR 192 at 206.

998 Reasons of Gaudron, Gummow and Hayne JJ at 249 [124].

> If there is a difference in content or application, it may lead to unforeseen problems in an area that is vague and difficult to apply. If there are no differences, no advantage is to be gained by jettisoning the formulation of Mason J in *Queensland Electricity Commission*."

791 Regardless of the differences between the two sets of reasons, and regardless whether the two concerns of Dixon J in *Melbourne Corporation* should be seen as really being the one, each of the Justices clearly subscribed to the concept of a real division of power, that is to say, the realities of a federal system and the necessity of its constitutional survival. Neither *Melbourne Corporation*, other cases in which it has been cited with approval, nor *Austin* is determinative of this one. What all of those cases do however, is compel that in any constitutional contest between the Commonwealth and the States, careful regard be had, and significance attached to what I have described as the federal balance.

792 The role of federalism was also relevant to the controversy in the *Boilermakers' Case*[999], which concerned, principally, the question whether the Constitution required a separation of judicial and executive power. Dixon CJ, McTiernan, Fullagar and Kitto JJ said there[1000]:

> "In a federal form of government a part is necessarily assigned to the judicature which places it in a position unknown in a unitary system or under a flexible constitution where Parliament is supreme. A federal constitution must be rigid. The government it establishes must be one of defined powers; within those powers it must be paramount, but it must be incompetent to go beyond them."

But what their Honours later said is of particular relevance here[1001]:

> "Probably the most striking achievement of the framers of the Australian instrument of government was the successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism. This meant that the distinction was perceived between the essential federal conception of a legal distribution of governmental powers among the parts of the system and what was accidental to federalism, though essential to British political conceptions of our time, namely the structure or composition of the legislative and executive arms of government and their mutual relations.

---

999 (1956) 94 CLR 254.

1000 (1956) 94 CLR 254 at 267.

1001 (1956) 94 CLR 254 at 275.

> The fact that responsible government is the central feature of the Australian constitutional system makes it correct enough to say that we have not adopted the American theory of the separation of powers. For the American theory involves the Presidential and Congressional system in which the executive is independent of Congress and office in the former is inconsistent with membership of the latter. But that is a matter of the relation between the two organs of government and the political operation of the institution. It does not affect legal powers. It was open no doubt to the framers of the Commonwealth Constitution to decide that a distribution of powers between the executive and legislature could safely be dispensed with, once they rejected the system of the independence of the executive. But it is only too evident from the text of the Constitution that that was not their decision."

793 The joint reasons hold[1002] that because the Act regulates or affects the relationship between corporations and a class of those through whom those corporations may act, it is constitutionally valid. If that is correct, the opportunities for further central control are very numerous. It is not difficult to foresee legislation seeking, for example, to control wholly or at least partly, subcontractors to corporations, or the solicitors or barristers who act for a corporation, or anyone else who deals with, purchases from or sells to a corporation, or has any form of financial, or indeed any other, relationship with a corporation, insofar as it touches or concerns a corporation. It is not unreasonable, far-fetched or indeed unorthodox to have regard to these sorts of consequences in the process of constitutional interpretation. Precisely that was done by Higgins J in *Huddart Parker*[1003]:

> "If the argument for the Crown is right, the results are certainly extraordinary, big with confusion. If it is right, the Federal Parliament is in a position to frame a new system of libel laws applicable to newspapers owned by corporations, while the State law of libel would have to remain applicable to newspapers owned by individuals. If it is right, the Federal Parliament is competent to enact licensing Acts, creating a new scheme of administration and of offences applicable only to hotels belonging to corporations. *If it is right, the Federal Parliament may enact that no foreign or trading or financial corporation shall pay its employés less than 10s per day, or charge more than 6 per cent interest, whereas other corporations and persons would be free from such restrictions.* If it is right, the Federal Parliament can enact that no officer of a corporation shall be an Atheist or a Baptist, or that all must be teetotallers. If it is

---

1002 At [198], [246], [252], [262], [268], [270], [275], [278], [286], [294].

1003 (1909) 8 CLR 330 at 409-410.

> right, the Federal Parliament can repeal the *Statute of Frauds* for contracts of a corporation, or may make some new *Statute of Limitations* applicable only to corporations. Taking the analogous power to make laws with regard to lighthouses, if the respondent's argument is right, the Federal Parliament can license a lighthouse for the sale of beer and spirits, or may establish schools in lighthouses with distinctive doctrinal teaching, although the licensing laws and the education laws are, for ordinary purposes, left to the State legislatures." (emphasis added)

And here we are today, confronted with one of the very claims, I would say, excess, of power that his Honour feared.

794 The potential reach of the corporations power, if it is as extensive as the majority would have it, is enormous. The extent to which corporations and their activities pervade the life of the community can be gleaned from the numbers quoted in the explanatory memorandum and to which the joint judgment refers. The reach of the corporations power, as validated by the majority, has the capacity to obliterate powers of the State hitherto unquestioned. This Act is an Act of unconstitutional spoliation.

795 It is appropriate to answer in this part of my reasons a question raised in the joint reasons[1004]: why should the text of the Constitution be so read as to pre-empt the exercise of other heads of legislative power to which s 51(xxxv) could not apply? The answer is that the only place in the Constitution in which the text refers to industrial matters is in that placitum; and, secondly, that if control over industrial affairs were to be imported into the subject matter of virtually every placitum of s 51, there would be little of substance left for the States in this area of importance to them. All of this is simply to say, federalism, as it is enshrined in the Constitution.

796 It is also said in the joint reasons[1005], in reliance upon *Bourke v State Bank of New South Wales*[1006], that a law with respect to a subject matter within Commonwealth power does not cease to be valid because it affects a subject matter outside power, or can be characterized as a law with respect to a subject matter outside power, unless the second subject matter with respect to which the law can be characterized is not only outside power but also is the subject of a positive prohibition or restriction. In my respectful opinion that statement cannot be accepted in the absolute terms in which it is put. In any event, *Bourke* was decided before *Lange*, which holds that the exercise of any constitutional power

---

1004 At [215].

1005 At [219].

1006 (1990) 170 CLR 276 at 285.

is, if relevant to it, subject, not just to a positive restriction, but to a negative one and a merely implied one at that, of freedom of political communication.

797 The federal balance is not to be maintained as a matter of political or social preference, but as a matter of constitutional imperative. It may only yield, if it is to yield at all, to the exercise of the defence power (or perhaps, on occasions, the external affairs power) in circumstances of the gravest danger to the nation. As Dixon J said in *Australian Communist Party v The Commonwealth*[1007]:

> "The Federal nature of the Constitution is not lost during a perilous war. If it is obscured, the Federal form of government must come into full view when the war ends and is wound up. The factors which give such a wide scope to the defence power in a desperate conflict are for the most part wanting."

The Constitution mandates a federal balance. That this is so should be closely and carefully kept in mind when construing the Constitution. That the federal balance exists, and that it must continue to exist, and that the States must continue to exist and exercise political power and function independently both in form and substance, until the people otherwise decide in a referendum under s 128 of the Constitution, are matters that necessarily inform and influence the proper construction of the Constitution. The Act here seeks to distort that federal balance by intruding into industrial and commercial affairs of the States.

PART VI. THE NECESSITY TO CONSTRUE S 51 AS A WHOLE

798 I now turn to a consideration of s 51 of the Constitution as a whole, because it is the requirement to do this which is decisive here. Each of the placita of s 51 deals with a discrete topic. There may be, indeed there is in some cases, a clear possibility of some overlapping, but instances of it are likely to be rare and slight, and a construction which allows them should, wherever possible, be avoided, for two reasons: that it is unlikely that the authors of the Constitution intended to repeat themselves, or did so by accident; and because it is an elementary principle of construction that each word and phrase of an instrument has its own work to do. It is no answer to those fundamental propositions to say, as Deane J did in his dissenting judgment in *The Incorporation Case*[1008]:

1007 (1951) 83 CLR 1 at 203.

1008 *New South Wales v The Commonwealth* (1990) 169 CLR 482 at 504.

> "that the plenary grants of legislative powers which are contained in the first thirty-five paragraphs of s 51 are not to be constricted by ill-conceived attempts to prevent or confine overlapping between them."

799 In Pt III of the joint judgment their Honours describe s 51(xx) of the Constitution as the principal issue. I have not myself chosen that as the starting point, nor indeed do I see it as an issue that can be treated at any point without close attention to s 51(xxxv). As these reasons will show, the reading of the Constitution as a whole, and in particular, of s 51 are not to be regarded as matters to which lip service only should be paid. In a number of places the joint reasons accept the necessity for a reading of the Constitution, or s 51, as a whole[1009], but it is a negation of that acceptance to read each placitum, in particular placitum (xx), as broadly as possible, regardless whether it is verbally apt for the matters enacted in purported reliance upon it, or whether it is productive of a form of overlapping of a power of a kind which it is inconceivable that careful and accomplished drafters such as the founders would ever have intended or achieved. The second point can be made by a rhetorical question: "why should the focus first and almost entirely be, in assessing the constitutional validity of the Amending Act which is concerned exclusively with 'industrial matters', upon the corporations power rather than upon the industrial power?" That the Commonwealth says it is so in this Court, does not make it so. In my opinion the logical starting point is the industrial power.

800 The joint reasons repeat[1010], whether in support of validity or not, is not clear, the factual assertions made in the explanatory memorandum derived from a report of the Australian Bureau of Statistics which record that large and medium-sized businesses in Australia are almost invariably incorporated, that is to say, 85 per cent of them, and that 49 per cent of small businesses employing staff are similarly incorporated. If these assertions are true, and if the corporations power is as broad as the Commonwealth submits, the result, that the Commonwealth has power to intrude upon, indeed dominate, much of the industrial, commercial and related activities within a State, is one that was neither intended nor legislated for by the founders in the Constitution. This too should be said. Any suggestion that the founders were in some way uninformed about, or unacquainted with, the doing of business by companies, or intended when drawing the corporations power that it might and should embrace all activities of a corporation, including its arrangements with its employees, would be to do them a grave injustice. Corporate business may not have been as pervasive in the last decade of the 19th century as it is now, but the references in the Convention Debates to the activities of companies incorporated in the various colonies and

---

1009 See, eg, at [52], [194].

1010 At [122].

elsewhere are enough to indicate an acute awareness of their economic relevance, and the need for some national, that is federal, power, subject to other provisions in the Constitution, over, at most, their trading and financial conduct.

801 The joint reasons also mention[1011] that the corporations power had previously been relied upon by the Commonwealth as a source of industrial power, and that in the *Industrial Relations Act Case*[1012] three of the States conceded that s 51(xx) empowered the Parliament to make industrial laws governing corporations. Whilst the joint reasons accept that the concessions do not preclude the States from challenging them now, they point out that the Amending Act is "not novel"[1013]. I would regard the fact that some 12 years earlier the federal Parliament enacted, and some State executives accepted as valid for purposes of argument in a particular case, provisions in purported reliance upon the corporations power as, with respect, utterly irrelevant, or, on any view, of much less relevance than the universal acceptance since 1906 until 1993, as the failed referenda show, by several parliaments of whom many eminent lawyers were members, that constitutional change would be necessary to secure the power now asserted.

802 It is said in the joint reasons that the Constitution should be read as a whole, but that that does not provide an answer: it merely advances further enquiry as to the nature of the enquiry[1014]. I respectfully disagree. The answer is the objective ascertainment of the drafters' intentions by reference to the structure of the document, the interrelationship of the parts and sections of it with one another, in the setting in which it was drawn, on the basis of the assumptions underlying it, and the manifest purposes to which it was to give effect, relevantly here a new nation comprising a federation in which the States would not be deprived of powers they formerly possessed, except as identified.

803 I venture to repeat what I said in *Minister for Immigration and Multicultural and Indigenous Affairs v B*[1015]:

> "With all due respect, and acknowledging that constitutionally conferred powers may overlap, I am unable to accept that the Constitution is not to be read according to one of the most elementary canons of

---

1011 At [46].

1012 *Victoria v The Commonwealth* (1996) 187 CLR 416.

1013 At [46].

1014 At [52].

1015 (2004) 219 CLR 365 at 438 [213].

> construction of all relating to instruments of any kind: as a whole. Nor can I accept a proposition that the language of each part of it is incapable of having a bearing, including in some circumstances, a restrictive or limiting effect upon other parts. This Court has held that implications can be drawn from the relationships of various sections of the Constitution with one another and its structure[1016]. That approach is consistent only with its being read as a whole and careful regard being had to context. This means that s 51(xxi) and (xxii) not only may, but should be read together, and in consequence, having regard to their proximity, read as intended to deal with separate and quite distinct, that is to say not overlapping topics. And despite that sometimes, probably very rarely, constitutional provisions and powers may overlap, the better view is that the drafters neither engaged in a process of intentional duplication nor accidentally achieved it."

804 It was suggested in argument[1017] in this case that the challenged provisions are designed to produce and enhance a national economy. This has echoes of the lamentations of the Prime Minister, Mr Bruce, in the second reading speech[1018] for the Bill for the referendum for the enlargement of Commonwealth power in 1926[1019], that the future happiness and prosperity of the Australian people were at risk unless the relevant powers were granted by referendum.

805 The points that I seek to make can be made by reference to several of the placita of s 51 and a few other provisions of the Constitution.

806 It is important to notice that s 51(i) specifically recognizes and contemplates legislation by the Commonwealth for the promotion of trade and commerce, not only with other countries but also "among the States". In doing so, it necessarily recognizes that the States have their own economies, that is, internal trade and commerce, which exist side-by-side with, but may also be part of, the national economy. The enhancement and the regulation of a State economy and industrial affairs within it could hardly be fairly described as

---

1016 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-562.

1017 [2006] HCATrans 233 at 19090.

1018 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 May 1926 at 2159-2160, 2164. See also *Federated State School Teachers' Association of Australia v State of Victoria* (1929) 41 CLR 569 at 574 where it was said that "the Constitution is not a thesis upon economics. It is an instrument of Government".

1019 Constitution Alteration (Industry and Commerce) Bill 1926 (Cth).

anything other than essential functions of a State. Some further reference to this placitum will be necessary when I discuss *Rocla Pipes*.

807 Some of the other placita of s 51 have in common with s 51(xxxv) language which carefully distinguishes between what can be done legislatively by the Commonwealth independently and exclusively of the States, and what can only be done deferentially to State power or State action, for example banking and insurance. Other placita and sections of the Constitution insist upon non-discrimination. The taxation power (s 51(ii)) prevents the Commonwealth from enacting taxation laws discriminating between States or parts of States. Section 51(iii) may be contrasted with s 51(xxxv) in that the former provides that bounties shall be uniform throughout the Commonwealth, whereas the latter contemplates Commonwealth intervention, and a degree of national uniformity when there is, and only when there is, as it has inelegantly been put, the "interstateness"[1020] of an industrial dispute, which as I elsewhere point out, is nonetheless an extremely wide power as it has been allowed and developed by this Court.

808 On occasions it has been said that the Constitution is too rigid, that it requires, for its continued vitality, flexibility in its construction. The language of s 51(v) gives the lie to claims of rigidity. The reference to "other like services" was made far-sightedly and is obviously broad enough to comprehend the remarkable advances in modern communications and the technology upon which they now rely.

809 It is sometimes forgotten that at federation the colonies maintained their own defence forces. Section 51(vi) refers, in terms, to the naval and military defence of the Commonwealth "and of the several States", making clear that defence is to be exclusively a Commonwealth activity. There is something else however that needs to be noted about this provision. It is that, literally, that is textually exclusively, it appears to contemplate the use of the military forces of the Commonwealth to execute and maintain the laws of the Commonwealth[1021],

---

1020 See, eg, *Re State Public Services Federation; Ex parte Attorney-General (WA)* (1993) 178 CLR 249 at 267, 271 per Mason CJ, Deane and Gaudron JJ, 272 per Brennan J, 293, 294-295 per Toohey J.

1021 Section 51(vi) provides:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> ...

(Footnote continues on next page)

at any time and in any circumstances. Elsewhere I refer[1022] to statements by judges of this Court to the effect that constitutional provisions should be construed with "all the generality which the words admit". The use of military forces, the imposition in effect of martial law in a democracy, except perhaps in times of external threat or civil insurrection, is anathema to democracy itself, and yet, if s 51(vi) is to be construed too generally and textually or literally, and without reference to other provisions of the Constitution, including perhaps that all of the powers are to be exercised to make laws for the good (democratic) government of the Commonwealth, that result might conceivably follow.

810 Reliance was placed upon some remarks of Latham CJ in *Pidoto v Victoria*[1023] for a proposition that because the defence power was not subject to any restriction imposed by s 51(xxxv), nor should the corporations power be. *Pidoto* was decided in 1943 when Australia was still engaged in a war that menaced the whole nation. In these circumstances it is easy to see how the regulation as it was then put of "man power" could be closely aligned with the defence of the nation. It was also a major source of food and raw materials for our armed forces and their allies. As has been said many times, the defence power waxes and wanes as the danger mounts and fades away. The remarks of Latham CJ in *Pidoto* were singularly his and obviously greatly influenced by the perils of the times. Decisions made in such circumstances not infrequently are products of them and cannot withstand the scrutiny of peaceful posterity[1024].

811 I next make reference to s 51(x), which is concerned with fisheries in Australia beyond territorial limits. My reference to this placitum is not so much for the language that it uses, but to show how this Court has departed, from time to time, from its earlier, and sometimes even relatively recent, decisions. In *Bonser v La Macchia*[1025], Barwick CJ, Kitto, Menzies and Owen JJ (Windeyer J dissenting) held that the Commonwealth Parliament had no power over fisheries under s 51(x) within three nautical miles of the coast of an Australian State. In

---

(vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth".

1022 See Pt IV, Div 2 of these reasons.

1023 (1943) 68 CLR 87 at 101.

1024 Another example is *Sickerdick v Ashton* (1918) 25 CLR 506, decided during the First World War, in relation to the vexed issue of wartime recruitment. There, legislation was held to be constitutional within the defence power in its application to a pamphleteer who published some mildly passivist statements.

1025 (1969) 122 CLR 177.

the *Seas and Submerged Lands Case*[1026] the Court, Gibbs J dissenting, decided that the boundaries of the former Australian colonies ended at the low-water mark, and that they had no sovereign or proprietary rights in respect of the subjacent land and superjacent sky[1027]. True it is that the latter case was decided under s 51(xxix), the external affairs power, but it is nonetheless very difficult to reconcile many of the statements in it with *Bonser v La Macchia* which had been decided only six years before. Nor is the *Seas and Submerged Lands Case* easy to reconcile with *The Commonwealth v Yarmirr*[1028]. This Court, over the hundred years or so of its existence has, it must be acknowledged, failed in many cases to distinguish, or distinguish convincingly, between its current decisions and apparently binding precedents, or to justify or explain changes in the law including constitutional law whether incremental or radical[1029].

812 Section 51(xiii) and (xiv) may, subject to one qualification, be dealt with together. They have this feature: they use relevantly similar language to s 51(xxxv), by confining Commonwealth powers, with respect to banking and insurance, to banking and insurance extending "beyond the limits of the State concerned". It seems to me to be objectively reasonable and correct to infer from s 51(xiii), (xiv) and (xxxv), that those who wrote the Constitution very carefully turned their minds to, and adopted language to mark out and distinguish, as this Court should, between federal legislative powers that could be exercised over activities conducted by or within States, and those conducted across the borders of the States. That proposition is consistent with what Latham CJ said in the *Bank Nationalization Case*[1030] in which his Honour restated the fundamental principles of a federal balance and stressed the need to search for the true character of the legislation in question for the determination of the question whether it fell within Commonwealth power:

> "Another example can be found in provisions which are directly relevant to the present cases. Under s 51(xx) of the Constitution there is

---

1026 *New South Wales v The Commonwealth* (1975) 135 CLR 337.

1027 See (1975) 135 CLR 337 at 373-374 per Barwick CJ, 382 per McTiernan J, 475-476 per Mason J, 503-504 per Murphy J.

1028 (2001) 208 CLR 1.

1029 See generally what I said in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 320 [310]; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 80 ALJR 1100 at 1140 [216]; 227 ALR 425 at 473-474.

1030 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 184-187. See also *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 285, 301-304.

power to make laws with respect to financial corporations formed within the limits of the Commonwealth. Under s 51(xiii) there is power to make laws with respect to banking other than State banking. A State bank would almost certainly be a corporation, and, if so, it would be a financial corporation. If pl (xx) were construed to mean that the Commonwealth Parliament could pass any law whatever which touched and concerned financial corporations, then the Commonwealth Parliament could make laws controlling State banks. The result would be that the exception of State banking from the power conferred by pl (xiii) would mean nothing. When the two provisions are read together it is a reasonable conclusion that pl (xx) was not meant to reduce to complete insignificance the specific provision excluding State banking from Federal legislative power.

Thus the Constitution must be read as a whole, and each power conferred upon the Federal Parliament must be read in the context of the words prescribing the other legislative powers of the Parliament.

The Constitution assigns only specific legislative powers to the Commonwealth Parliament. It is a Federal Constitution, not a unitary Constitution. This has been emphasised again and again in the judgments of this Court, and in no case more clearly than in the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[1031] where reference is made to the conclusion 'as to which this court has never faltered, that the Commonwealth is a government of enumerated or selected legislative powers': see also[1032]: 'It is undoubted that those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power containing the requisite authority.' Accordingly, no single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament. Each provision of the Constitution should be regarded, not as operating independently, but as intended to be construed and applied in the light of other provisions of the Constitution. Thus an endeavour should be made to 'reconcile the respective powers ... and give effect to all': *Citizens Insurance Co of Canada v Parsons*[1033]. A recent application of this principle is to be found in *Melbourne Corporation v The Commonwealth*[1034]. If the fact that a

---

1031 (1920) 28 CLR 129 at 150.

1032 (1920) 28 CLR 129 at 154.

1033 (1881) 7 App Cas 96 at 109.

1034 (1947) 74 CLR 31.

statute 'touched and concerned' a matter within the power of the Commonwealth Parliament were held to be sufficient to establish its validity, there would be no distribution of powers between Commonwealth and States – the Commonwealth would have complete power of controlling by law all persons and things in Australia, subject only to such prohibitions as the Constitution contains. For the reasons which I have stated, I am of opinion that the Commonwealth Constitution should not be construed upon the basis that any legislation is valid if it can be said to 'touch and concern' one of the subject matters assigned to the Commonwealth Parliament.

Nor, on the other hand, am I of opinion that the phrase 'pith and substance,' in spite of its frequent use by high authorities, solves any difficulties. It lends itself to emphatic asseveration, but it provides but little illumination. It is a metaphorical phrase possibly derived from 'pith and marrow' in patent law. Wills J in *Incandescent Gas Light Co v De Mare Incandescent Gas Light System Ltd*[1035], said of the latter phrase: – '"Pith" is a great deal less than the substance of the vegetable structure of which it is part, and "marrow" a great deal less than the substance of the animal structure of which it is part. Metaphors are very apt to mislead, as they are seldom close enough to the things to which they are applied.' The difference, if any, between 'pith' and 'substance' is not explained.

The distinction marked by the phrase is a distinction between 'pith and substance' as representing 'primary object and effect' and incidental application to other matter: *Attorney-General for Canada v Attorney-General for Quebec*[1036]. The case of *Prafulla Kumar Mukherjee v Bank of Commerce*[1037] shows that there is no difference between asking: 'What is the pith and substance of a statute?' and asking: 'What is its true nature and character?'[1038]. In *Great West Saddlery Co Ltd v The King*[1039] it was said with respect to the construction of statutes for the purpose of determining constitutional validity: 'The only principle that can be laid down for such cases is that legislation the validity of which has to be tested must be scrutinized in its entirety in order to determine its true character.' But there is no rule which will settle all cases. A question of

---

1035 (1896) 13 RPC 301 at 332.

1036 [1947] AC 33 at 44.

1037 (1947) LR 74 Ind App 23.

1038 (1947) LR 74 Ind App 23 at 43.

1039 [1921] 2 AC 91 at 117.

ultra vires 'must be determined in each case as it arises, for no general test applicable to all cases can safely be laid down': *Attorney-General for Alberta v Attorney-General for Canada*[1040].

A power to make laws 'with respect to' a specific subject is as wide a legislative power as can be created. No form of words has been suggested which would give a wider power. The power conferred upon a Parliament by such words in an Imperial statute is plenary – as wide as that of the Imperial Parliament itself: *R v Burah*[1041]; *Hodge v The Queen*[1042]. *But the power is plenary only with respect to the specified subject.* In determining the validity of a law it is in the first place obviously necessary to construe the law and to determine its operation and effect (that is, to decide what the Act actually does), and in the second place to determine the relation of that which the Act does to a subject matter in respect of which it is contended that the relevant Parliament has power to make laws. A power to make laws with respect to a subject matter is a power to make laws which in reality and substance are laws upon the subject matter. It is not enough that a law should refer to the subject matter or apply to the subject matter: for example, income tax laws apply to clergymen and to hotelkeepers as members of the public; but no-one would describe an income tax law as being, for that reason, a law with respect to clergymen or hotelkeepers. Building regulations apply to buildings erected for or by banks; but such regulations could not properly be described as laws with respect to banks or to banking.

...

Thus when a question arises as to the validity of legislation it is the duty of the Court to determine what is the actual operation of the law in question in creating, changing, regulating or abolishing rights, duties, powers or privileges, and then to consider whether that which the enactment does falls *in substance* within the relevant authorized subject matter, or whether it touches it only incidentally, or whether it is really an endeavour, by purporting to use one power, to make a law upon a subject which is beyond power." (emphasis added)

813 The search here for the true character or substance of the Act is neither elusive, arduous nor long. It appears immediately from the objects of the Act as amended, and practically every word of every section of it: industrial affairs.

1040 [1939] AC 117 at 129.

1041 (1878) 3 App Cas 889.

1042 (1883) 9 App Cas 117.

The passages that I have set out above from the reasons of Latham CJ are, with respect, far more persuasive than statements to the contrary, made by Murphy J in *R v Lambert; Ex parte Plummer*[1043]:

> "There is no constitutional requirement for a close relationship between the subject matter of the legislative power and the challenged law. The argument for such a requirement is constitutional heresy. It disregards the words, 'with respect to' in s 51 which must not be disregarded. This phrase enables Parliament to make laws on the subjects enumerated in s 51 and s 52 which need not be 'closely' related to the subject."

814 Placitum (xvii) is of significance in this case. Its presence and language are relevant to the construction of the corporations power. I note that matter at this point only, dealing with it in more detail when I consider the corporations power.

815 It is appropriate to say something more about s 51(xviii) which empowers the Commonwealth to legislate with respect to copyrights, patents, designs and trademarks. It was in relation to the exercise of this head of power that the most recent statements of the Court invoking the "generality" doctrine of interpretation were made[1044]. It seems to me that the invocation of this doctrine in relation to this placitum is justifiable, and should be understood on the basis that, if ever amplitude and generality were called for, it was in relation to the protection and exploitation of intellectual innovation. To deny amplitude to this provision would have been to deny intelligence and its product, intellectual innovation, itself. It would be absurd for a court to say that a new type of original intellectual effort and its describable and exploitable product should not be regarded as entitled to protection because no intellect in 1901 foresaw that anybody could or would invent a particular invention, or devise a new commercially exploitable idea. In that respect s 51(xviii) and the construction that it should be given are unique.

816 Brief reference only need be made to placitum (xxxiv). It too is a provision which reserves a right and role to the States, by requiring their consent to any construction of a railway by the Commonwealth within them, indicating thereby, in a not dissimilar way to s 51(xxxv), that the Commonwealth is not to intrude into a particular area or areas with which those placita respectively deal.

1043 (1980) 146 CLR 447 at 470.

1044 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

817 Other provisions of the Constitution and their treatment by the Court are relevant. One provision which has however received little attention by the Court should first be noticed. It is s 101 which provides as follows:

> "There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder."

The section is expressed in mandatory terms as to the establishment of a Commission, *but* not as to the expression of its powers. But its presence in the Constitution is a further indication of two matters: that there will continue to be State commerce as well as national commerce and that there should be a machinery, non-judicial[1045], as it has been held to be, for the resolution of differences arising out of laws with respect to trade and commerce enacted by the Commonwealth[1046].

818 Section 102, which empowers the Commonwealth Parliament to make laws with respect to trade or commerce "forbid[ding], as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State", is also in point. If the corporations power is as wide as the Commonwealth contends, then does that not raise the possibility that to the extent that corporations operate State railways, the Commonwealth can control them? I doubt it. But the exercise involved in deciding whether that is so would be an exercise in reconciling apparently conflicting provisions.

819 Other relevant provisions of the Constitution, apart from s 51, need to be noticed. Section 107 is one of these[1047]. Its use of language, including "power ... unless ... withdrawn from the Parliament of the State [shall] continue", cannot be airbrushed out of the Constitution by the "explosion" of the doctrine of implied

---

1045 *The State of New South Wales v The Commonwealth* (1915) 20 CLR 54.

1046 See *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327 at 353-354 per Latham CJ.

1047 Section 107 provides:

> "Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

intergovernmental immunities or reserved powers, as Barwick CJ appears to have done in *Rocla Pipes*[1048]. Apart from citing[1049] passages from the judgment of Griffith CJ in *Huddart Parker*[1050] in which s 107 arises, Barwick CJ made no attempt in *Rocla Pipes* to reconcile that section with other sections of the Constitution, so as to give it real meaning and substance. Section 107 is an important one. Nothing unfavourable to the States turns upon the use of the word "continue" rather than "reserve" which is used in the Tenth Amendment of the Constitution of the United States. Indeed the contrary is the case. The Australian provision is a saving provision, thereby emphasizing the continuation of power unless "exclusively" vested in the Commonwealth.

820 The language of s 128 of the Constitution has bearing upon the meaning of other sections of the Constitution. It places the States is a special position with respect to constitutional stability. Read with s 107 it necessarily imposes a limitation upon any expansion of central power and is not to be circumvented by judicial intervention. It is also of central importance to other matters: the federal balance and the continued existence of discrete State powers. The requirement that for constitutional change there must be a majority of votes *in a majority of the States* makes this clear. Section 128 is not expressed to be subject to any other provision of the Constitution. And of course it is not. It is an overarching provision. It is certainly not to be trumped by Ch III of the Constitution. If it were, the Court would be elevated above the people. The power to make laws constitutionally granted by s 76(i), which provides that the Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under the Constitution or involving its interpretation, does not vest political power in the Court. Its purpose is to give the High Court, as a final court, additional, that is to say an original jurisdiction in various federal matters. It is a power to *confer* judicial and not political power upon the Court. Section 76(i) certainly cannot and does not "commit" political power to the Court, or, to put it another way, empower the Court to substitute itself for the people voting in a referendum. The words "involving [the Constitution's] interpretation", beyond all doubt, cannot be read as "involving its *alteration*".

1048 (1971) 124 CLR 468 at 485 per Barwick CJ (see also at 510 per Menzies J).

1049 (1971) 124 CLR 468 at 486.

1050 (1909) 8 CLR 330 at 352, 354.

PART VII. THE REACH AND IMPACT OF THE INDUSTRIAL AFFAIRS POWER

Div 1: General

821 This brings me then to s 51(xxxv) of the Constitution, the very broad ambit of which does more than merely cast a shadow over other placita of s 51: it operates to deny their application to industrial affairs, except interstate and some other, presently irrelevant, ones.

822 It is the natural order to deal with s 51(xxxv) before the corporations power because, from beginning to end the Act is an Act concerned with industrial matters. Only s 51(xxxv) in the whole of the Constitution refers to, and confers powers upon the Commonwealth with respect to those. It is, in my opinion, an inversion of logical order to go first to the corporations power, so as to try to find somewhere in it a power to regulate industrial affairs, and having chosen to do so, necessarily to confine or reduce the operation of s 51(xxxv). The more expansive the industrial power can be seen to be, the more likely it is that the power is the only power of the Commonwealth to legislate about industrial affairs.

Div 2: Paper disputes

823 The great reach of the industrial affairs power is nowhere better demonstrated than in its operation upon artificially created industrial differences. By reason of a rather extraordinary, but by now well-established legal fiction, entirely weighted in favour of the Commonwealth, and despite that this Court has appropriately, in the interests, among other things, of candour and transparency, turned its face against legal fictions[1051], s 51(xxxv) has been construed as a vast power to legislate with respect to industrial disputes involving both juristic and natural persons throughout the Commonwealth. The legal fiction is that a "paper [interstate] dispute" should be regarded as a real dispute no matter that it may have been wholly artificially created, that is, both as to the dispute and the involvement of an out-of-State party to it. Of paper disputes, extra-curially Sir Harry Gibbs said, in my respectful view, correctly[1052]:

1051 See, eg, *Cattanach v Melchior* (2003) 215 CLR 1 at 35-36 [77]-[79] per McHugh and Gummow JJ, 52-53 [135]-[136] per Kirby J, 104-105 [292] per Callinan J.

1052 "Some Thoughts on the Australian Constitution", address delivered at the All Nations Club, 21 November 1985 at 8-9.

> "My predecessors on the High Court, by a series of decisions marked by a metaphysical subtlety of reasoning that would have delighted a medieval schoolman, invented a doctrine of paper disputes which has had the result that disputes which to the uninitiated might appear to be purely local in character have been held to extend beyond the limits of one State. The Commonwealth Conciliation and Arbitration Commission has thus acquired power to affect the wages and working conditions of most workers in Australia. It is something of a legal oddity that an instrumentality created by the Commonwealth Parliament has power to bring about economic results which the Parliament itself cannot achieve."

824 The doctrine of paper disputes represents a departure from early decisions of the Court in which emphasis was placed upon the necessity for the existence of a real dispute in fact and, for example, a log of claims representing real (interstate) grievances[1053]. Convincing legal justification of the fiction is impossible to find. Statements of Windeyer J in support of it in *Ex parte Professional Engineers' Association*[1054] read more like a political speech by a candidate at a rally for election to the federal Parliament than a statement of an orthodox, measured, rational canon of constitutional construction:

> "The dispute here is a 'paper dispute'. To permit the creation of a malady so that a particular brand of physic may be administered must still seem to some people a strange way to cure the ills and ensure the health of the body politic. But the expansive expositions by this Court of the meaning and effect of par (xxxv) ... have brought a great part of the Australian economy directly or indirectly within the reach of Commonwealth industrial law and of the jurisdiction of the Commonwealth industrial tribunal. The artificial creation of a dispute has become the first procedural step in invoking its award-making power."

825 Pronouncements to a similar, or even more expansive, but, it should be said, less extravagant, effect have been made on other occasions.

826 In *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association*[1055], the applicants had been served, together with various other owners of theatres in Australia, with a demand relating to conditions of employment. One employer argued that there was no "industrial dispute"

1053 *Holyman's Case* (1914) 18 CLR 273 at 285-286; *The Tramways Case [No 2]* (1914) 19 CLR 43; *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1921) 29 CLR 290 at 299.

1054 (1959) 107 CLR 208 at 268.

1055 (1925) 35 CLR 528.

because its employees "were in fact satisfied with the wages paid to them and with their conditions of employment."[1056] Another said that its employees were not members of the respondent association, and therefore that there was no dispute involving them. The Court held (Isaacs J, Powers J, Rich J and Starke J, Knox CJ and Gavan Duffy J dissenting) that there were disputes in both instances. Isaacs J said this[1057]:

> "Every employer that enters the competitive field of the industry is co-operating to carry it on, in the broader sense in which the people of the Commonwealth are interested. That sense is national service and supply, the interruption of which is the evil dealt with in pl xxxv. So also is every employee a co-operator in the same sense, for his labour is not to be looked on as a mere commodity, as if he were a machine, animate like the horse or inanimate like a steam-engine. The nexus of all the co-operators is the industry itself, irrespective of how its ownership or its operative arrangements are subdivided. If we confine our attention for the moment to disputes between employers and employed, we have to visualize the disputants respectively as portions of groups representing capital and labour. 'Employer' and 'employee' are terms which denote, not individuals contracting with each other whose industrial relations arise out of and are limited by their specific contracts, but membership of a group with which the individual has identified himself in relation to a given industry."

827 In *Metal Trades Employers Association v Amalgamated Engineering Union*[1058], Latham CJ said:

> "A dispute exists only between the disputants. Generally and naturally it relates to their mutual industrial relations. But there is no reason why it should not relate to the industrial relations between one set of the disputants and third persons. In actual experience preference to unionists is an industrial matter which is a common source of industrial disputes between unionists and their employers. In such disputes the contention of the disputants essentially relates to the employment or non-employment by one set of disputants of third persons who are not parties to the dispute. Such a matter is of great industrial importance alike to unionists and non-unionists (as well as to employers), but only unionists, in the case supposed, are parties to the dispute on the side of the employees. There does not appear to be any reason in principle for denying that the terms upon which non-unionists may be employed may

---

1056 (1925) 35 CLR 528 at 535.

1057 (1925) 35 CLR 528 at 540.

1058 (1935) 54 CLR 387 at 402.

> be as much the subject matter of an industrial dispute as the question whether non-unionists shall be employed at all."

Rich and Evatt JJ said in that case[1059]:

> "The only question which can be raised in relation to the constitutional power to settle such a dispute as has been defined above is whether what is, *ex hypothesi*, a dispute between employers and employees in an industry ceases to be 'industrial' merely because the employees require that the employers shall observe certain wages and conditions in the employment not only of employees, parties to the dispute, but of employees who are not parties to the dispute, but are employed in the same industry. The practical interest of unionist employees in making such a demand is obvious. It is not made from motives of altruism, but for two important reasons of material interest. In the first place, if the employer is allowed to employ non-unionists at lower wages than in the case of unionists, there will be a direct inducement to the employer to employ the cheaper class of labour, and to dispense with, or not engage at all, the services of unionists. In the second place, the economic result of differing standards of wages for employees engaged in similar work in the same trade or industry is a powerful tendency towards the general adoption of the lower standard, because, under modern conditions of easy communication between all parts of industry, the tendency of the wages standard is to reach the lower level. Both these results of a lower wage for non-unionists are, or may be, disastrous to the union and its members, and may tend to produce great dissatisfaction and discontent. It is difficult to see why, in insisting upon the one standard throughout the industry, the unionists are not precipitating a dispute which is essentially 'industrial' in character. The demand of the unionists may be considered unreasonable by an arbitrator, but the only question for our consideration is whether the demand, being genuinely made and refused, is part of the industrial dispute. If it is, an arbitrator may either grant it in whole or in part, or refuse it altogether. If the dispute is not 'industrial,' what kind of dispute is it? It is not a dispute as to social, political, religious, moral, business, literary, artistic, scientific, domestic, or sporting matters. It arises from demands by an organization of employees in an industry upon employers in the same industry. It relates to what is to be done by such employers in reference to other employees doing similar work in the same industry. It has come into existence because the unionists either will, or suppose that they will, be adversely affected if their union wage standard is not adhered to by all the employers upon whom they are making their demands.

1059 (1935) 54 CLR 387 at 416-417.

> Whether such a dispute is wise or unwise in genesis, it is, in all respects, 'industrial' in nature and character."

828 When the Court has countenanced some limitations upon the breadth of the words "industrial disputes", for example in *R v Kelly; Ex parte State of Victoria*[1060] in which it held that there was no power to make, under s 51(xxxv) of the Constitution, a "common rule" for all industries, the Court acknowledged[1061] the technicality of the distinction which its decision made between a "common rule", and a (paper) dispute drawing in the same or many of the same people.

829 Dixon J, who had been in dissent in *Metal Trades Employers Association v Amalgamated Engineering Union*[1062], subsequently accepted its binding force. Dixon CJ joined with Kitto, Taylor and Windeyer JJ in *R v Portus; Ex parte McNeil*[1063] in saying this:

> "[I]t is said that ... there was no industrial matter in contest. ... The answer to this lies in the facts: there was a very distinct disagreement about a whole subject matter backed by a preliminary resort to or threat of industrial dislocation. An industrial dispute may exist without a formulation of a definite and clear cut demand followed by an equally definite and clear cut refusal. Familiarity with paper disputes consisting of carefully drawn logs of demand and general refusals has perhaps led to a somewhat artificial conception of what amounts to an industrial dispute. But an attempt to gain higher rewards by means first of negotiation and then of pressure and threatened dislocation is no less an industrial dispute because the exact stand taken by the respective parties may be less definite and precise than a paper log would be apt to make it."

830 In *Re Australasian Meat Industry Employees' Union; Ex parte Aberdeen Beef Co Pty Ltd*[1064], Mason CJ, Brennan, Deane, Dawson, Toohey and

---

1060 (1950) 81 CLR 64.

1061 (1950) 81 CLR 64 at 82.

1062 See in particular, (1935) 54 CLR 387 at 425-426.

1063 (1961) 105 CLR 537 at 544. See also *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 239.

1064 (1993) 176 CLR 154.

Gaudron JJ said that the expression "industrial disputes" was used in s 51(xxxv) "in its popular and not in any narrow sense"[1065], and later said this[1066]:

> "It is not of great significance that there was no exact coincidence between the activities carried on in the respective States in respect of which demands were made. It is of greater significance that those upon whom or in respect of whom the demands were made had a community of interest. That factor may exist because of the employers' or employees' participation in a single industry and is present here. A dispute involving parties having a community of interest is likely to be a single industrial dispute despite differences between the activities of those parties. In this case a single industry can be identified in which there is a history of common industrial regulation by a single award containing the same classifications as were adopted by the log of claims."

831 Mason CJ, Deane and Gaudron JJ said in *Re State Public Services Federation; Ex parte Attorney-General (WA)*[1067]:

> "It is sometimes said that a 'paper dispute' must be a 'genuine dispute'. That means no more than that written demands must be genuine demands[1068]. If not – if, for example, they are part of a hoax or if they are intended to dress up a *purely* intrastate dispute[1069] – their rejection will not involve any disagreement and, thus, will not result in a dispute at all.
>
> To ascertain whether demands are 'genuine demands', it is sometimes asked whether the demands are seriously advanced[1070] or, in

---

1065 (1993) 176 CLR 154 at 159.

1066 (1993) 176 CLR 154 at 160.

1067 (1993) 178 CLR 249 at 267-268.

1068 *Australian Tramway and Motor Omnibus Employees' Association v Commissioner for Road Transport and Tramways (NSW)* (1938) 58 CLR 436 at 442-443 per Evatt J.

1069 See, eg, *R v Gough; Ex parte BP Refinery (Westernport) Pty Ltd* (1966) 114 CLR 384.

1070 See, eg, *Caledonian Collieries Ltd v Australasian Coal and Shale Employees' Federation [No 2]* (1930) 42 CLR 558 at 570-571 per Isaacs J; *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54 at 94 per Fullagar J; *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 181.

the case of demands by or on behalf of employees, whether they are advanced with a view to 'obtaining improved terms and conditions ... within the framework of the claims made'[1071]. This last formulation is one that takes account of the doctrine of ambit[1072] and allows that a demand may be genuine notwithstanding that neither the union making it nor its members are 'intent on obtaining forthwith every item which is mentioned in the log of claims or the particular terms and conditions of employment in the form and in the amounts in which they are expressed in the log'[1073].

Given the doctrine of ambit and given that there is nothing inherently artificial about written demands, or 'paper disputes', it will not often be the case that a written demand with respect to the wages or conditions of employees will be other than a genuine demand." (emphasis added)

832 In *Re Australian Education Union; Ex parte Victoria*[1074], in which the Court held that the States, as employers, could be subject to laws made under s 51(xxxv), Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ said[1075]:

"The notion that interstate employers must have a common business or operate in a particular industry as a pre-condition of the existence of interstate industrial dispute has never been accepted. Although statements have been made which assert that the nexus or unifying factor which combines in a single industrial dispute a number of demands made on behalf of a number of employees is 'the industry' itself[1076], the nexus may also be found in the calling or vocation in which

---

1071 *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 183.

1072 *R v Bain; Ex parte Cadbury Schweppes Australia Ltd* (1984) 159 CLR 163 at 172-173 per Wilson and Dawson JJ, 176 per Brennan and Deane JJ; *R v Holmes; Ex parte Victorian Employers' Federation* (1980) 145 CLR 68 at 76 per Mason J.

1073 *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 182-183.

1074 (1995) 184 CLR 188.

1075 (1995) 184 CLR 188 at 236-237.

1076 *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 373 per Isaacs J; *R v Commonwealth Court of Conciliation and*

(Footnote continues on next page)

> the participants are engaged. ... And, in the final analysis, the adoption of the popular meaning of 'industrial dispute' and the rejection of the view that there must be a dispute in an industry, is fatal to the contention that the necessary nexus or unifying factor must be found in the industry."

833 Despite the apparently intentionally limiting language of s 51(xxxv), the placitum has been given, not a complete but certainly an enormous national application in industrial affairs and one not confined, or indeed even referable, to constitutional or other corporations. Whatever doubts I might have about the breadth of the construction given, I will accept, as I do the *Engineers' Case*, that it is now so well entrenched it is not to be disregarded here. In short, s 51(xxxv) as it has been construed provides for an extremely wide power, capable of conferring, for practical purposes, an almost complete national power over industrial affairs in practice. Moreover, both the language of s 51(xxxv), in particular the word "prevention", and the generally consistent disposition of the Court to give the placitum such an expansive operation, suggest that there may as yet be unplumbed depths of the industrial power able to be exercised by the Commonwealth.

834 The construction now accepted of s 51(xxxv) also provides an example of the Court's departure from textualism, in one instance at least[1077], on the basis only of its perception of, and preference for national, centralized control of economic and other affairs. Because of the extent of the power conferred by s 51(xxxv), as repeatedly held by the Court, as well as its usage alone of all the placita, of the language of industrial affairs, it can be seen to represent the totality of the Commonwealth's powers of control of industrial affairs, and to give rise to a negative or restrictive implication of the absence of a conferral of industrial power elsewhere under s 51, except of course in relation to employees of the Commonwealth and perhaps other limited categories of employees which it is unnecessary to define in this case. I would not regard this holding, of a negative implication, as different in substance from the holding of Kirby J[1078] that s 51(xx) be read down so as to exclude its application to industrial affairs.

Arbitration; Ex parte Jones ("*Builders' Labourers' Case*") (1914) 18 CLR 224 at 242 per Isaacs J.

1077 *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 268.

1078 Reason of Kirby J at [531], [559].

PART VIII. THE REACH AND IMPACT OF THE CORPORATIONS POWER

Div 1: General

835 In general, I would accept the submissions of New South Wales with respect to the effect of the cases in which consideration has been given to the reach of the corporations power, that they do not conclude this case. It will be necessary however to give some detailed consideration to the more relevant of the authorities to which the parties have referred. I say "some detailed consideration" because none of them, as the Commonwealth correctly concedes, governs this case, that is to say, no decision of this Court directly supports the Act. Indeed, the texts approximately contemporaneous with federation are, in many respects, more illuminating than the cases. But before coming to these there is a matter about which I am compelled to express my deep concern. The matter is, to quote the majority judgment[1079], "[the recognition of] the fundamental and far-reaching legal, social, and economic changes in the place now occupied by the corporation, compared with the place it occupied when the Constitution was drafted and adopted, and when s 51(xx) was first considered in *Huddart Parker*", as a basis apparently for the construction of the placitum which their Honours adopt. It is easy to overstate the extent of the changes. The founders would have been well aware of the capacity for causing national financial consequences, of corporations and their predecessors, various forms of partnerships[1080]. The collapse not just of banking corporations but also of land and pastoral corporations would have been very fresh in their minds when they wrote the Constitution. As I have said in other cases[1081], judges, as unelected members of judicial institutions, should be careful about forming views about social and economic conditions. But even if they can, do or even must, in some cases for some purposes, they, including judges of this Court, should not use those views to alter the Constitution.

836 It is unnecessary to repeat what was said in the speeches for the bills for the referenda seeking a corporations power broad enough to cover industrial affairs in the way that the Act here seeks to do. All that I need do is point out that almost invariably, the speakers and Parliament itself, repeatedly, accepted that the relevant constitutional power did not exist.

1079 At [67].

1080 Joint reasons at [96]-[108], [114].

1081 See, eg, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 298-299 [252]; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 510-515 [162]-[169].

837 It is necessary to consider the Convention Debates on the topic.

Div 2: Convention Debates

838 In Sydney in 1891 one delegate, Mr Munro, said he did not see why the same provision should not be made with respect to the incorporation of corporations as in respect of banks[1082]:

> "We have agreed to sub-clause 13, dealing with the incorporation of banks, and I do not see why a similar provision should not be made in regard to the incorporation of companies. Why should they not be under the control of federal officers? At the present time the law as to incorporation is different in the different colonies, and the result is extremely unsatisfactory in many cases. I do not see why we should not make the same provision in regard to the incorporation of companies as we have made in regard to the incorporation of banks. We might introduce at the commencement of the sub-clause words to this effect: 'The registration or incorporation of companies.'"

Sir Samuel Griffith expressed[1083] opposition to the imposition of a uniformity of the means of incorporation, adding that it was difficult to say what a trading corporation was. He did not doubt, however, that the law should be uniform throughout the Commonwealth for the *recognition* of corporations. No speaker in this debate even hinted at any need for federal control over the industrial affairs of companies.

839 There can be discerned from the later Debates in Adelaide in 1897 a concern about the activities of foreign corporations in Australia. Mr Barton was keen to ensure that the Commonwealth have power to regulate the mode in which such companies conducted their operations[1084].

840 It can be seen that the corporations power received only the most cursory of attention during the Debates[1085]. It is inconceivable that the founders

---

1082 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 3 April 1891 at 685-686.

1083 *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 3 April 1891 at 686.

1084 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 12 April 1897 at 439.

1085 Joint reasons at [118].

visualized a power as broad as the one now asserted. Throughout the Debates, the principal preoccupation of the delegates was with the adjustment of powers between the new polity and the States, as they would become. I do not doubt that if the corporations power were intended to abrogate so much industrial power as would otherwise be within State power, as the majority hold, the possibility and desirability of that abrogation would have been of intense concern to the founders. That it was not strengthens my view that they did not so intend it.

841 I would not myself accept that external and internal relationships of a corporation are relevant only to choice of law rules[1086]. There are many other reasons why such a distinction needs to be made: a director has an entirely different relationship with a corporation as a director, from his relationship with it as a shareholder; much of what a corporation does internally is of no relevance or significance to what it may and does do externally; shareholders have an entirely different relationship as shareholders from their external relationship with a company in doing, as many people do, especially in the case of a private company, business with it. The founders would have well understood by the time of the final drafting of the Constitution that a corporation and its shareholders were separate juristic personalities, so much so that they needed to make no express reference to that fact.

842 The joint reasons say[1087] that there can be "little doubt" that by 1897 the drafting committee, Mr Deakin and others, saw that a national [absolute] power was required over corporations and their status within the Commonwealth. If there is little doubt about the former then why did they not say that? I do not think it correct for this Court to make that assumption. Nor does it follow that a lack of political controversy during the Debates about the corporations power, means that the power should be regarded as practically unlimited. Furthermore, the founders were not concerned only with what was politically controversial. Indeed the words "politically controversial" are an unsatisfactory description of the matters that engaged the founders' attention. Their purpose was to write as complete and clear a constitution as possible, fully accepting that it would not eventuate without many compromises, but not compromises which it is open for this Court rather than the people under s 128 to unravel. The fact that some matters might not have been politically controversial does not mean that they were not important: there are many examples across the Debates of efforts to clarify and refine matters, but as to the principles, and the conclusions, there was obviously usually a high degree of agreement. As I read the Debates, the real purpose of s 51(xx) was to ensure uniformity of status of corporations throughout Australia, rather than to appropriate State control over them.

1086 cf joint reasons at [91]-[95].

1087 At [118].

843 The fact that corporations law was still developing in the last decade of the 19th century does not provide support for an unduly expansive interpretation of s 51(xx) now. The use of "corporations" in s 51(xx), rather than "companies", makes unlikely what is suggested in the joint reasons[1088], that the founders understood neither the significance nor the possible consequences of their choice. Bankruptcy, companies and lunacy were jurisdictions conferred by statute on the English Courts of Chancery before federation[1089], and those three jurisdictions would have been in the minds of the founders: "bankruptcy" appears in placitum (xvii), "lunacy" was suggested for placitum (xvii) but its inclusion was not accepted[1090], and "corporations" appears in placitum (xx), deliberately, it would seem, in place of "companies". Given that the United Kingdom 1844 Statute 7 & 8 Vict c 111 allowed creditors to proceed against an insolvent company "in like Manner as against other Bankrupts"[1091], and "in its corporate or associated Capacity"[1092], I think it would be unwise to try to draw too much from the fact of the decision in *Salomon v Salomon & Co Ltd*[1093]. Corporations law is still, in any event, developing[1094]. It is a subject that occupies the time of the courts throughout this country daily. Developments in corporate law should, however, have no effect on the ambit of Commonwealth power under the Constitution: s 128 provides the sole mechanism for constitutional amendment.

1088 At [122]-[123].

1089 See Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed (2002) at 9 [1-080].

1090 See *Official Record of the Debates of the Australasian Federal Convention*, (Sydney), 22 September 1897 at 1076-1077.

1091 Section 1.

1092 Section 2.

1093 [1897] AC 22.

1094 A topical debate is the extent of directors' duties, and whether the corporations law should require that principles of "corporate social responsibility" be observed by directors. See the report of the Parliamentary Joint Committee on Corporations and Financial Services (Cth), *Corporate responsibility: Managing risk and creating value*, (June 2006). In Austin, Ford and Ramsay, *Company Directors: Principles of Law and Corporate Governance*, (2005) at 6 [1.3], it is suggested that corporate governance is topical in the light of high-profile corporate collapses, institutional shareholder activism, and executive remuneration.

Div 3: Texts

844 After discussing "foreign corporations"[1095], Quick and Garran turned their minds to other aspects of s 51(xx) of the Constitution. Their focus then was on those aspects of a corporation's legal personality which distinguished it from the legal personality of a natural person: incorporation, registration, security, the rights of creditors, and the powers of liquidators[1096]. Nowhere do they imply, let alone say, that the power extended to the regulation of, or a supervisory power of any kind over, the conditions of employment of workers for corporations.

845 Harrison Moore appears to have anticipated the argument of the Commonwealth here[1097]. He resoundingly rejected it[1098]: "[I]t is not reasonable to suppose that the Constitution contemplated the revival of a medieval system of personal laws." He added[1099]:

> "[Section 51(xx) covers] first the recognition of foreign companies, and the definition of the conditions upon which they may be admitted to carry on business in Australia. Next, in the case of companies formed within Australia, ie (it would seem) under the laws of any State, the like definition of the conditions upon which they may carry on business throughout the Commonwealth. Thirdly, the control of the constitution and administration of corporations formed within Australia for the purpose of carrying on business in any part thereof or elsewhere. The recognition, the field of operations, and the management, the winding up and dissolution – *all the inherent qualities which distinguish the juristic from the natural person, would thus be submitted to federal law*. But there the Commonwealth law would leave it; and the actual carrying on of business by the corporation, and the legal relations with outsiders to which it gives rise – its property, its contracts, and its liabilities – would be under the sole control of the State laws." (emphasis added)

1095 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 604-606, §195.

1096 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 606-608, §§196-199.

1097 Moore, *The Constitution of The Commonwealth of Australia*, 2nd ed (1910) at 469-473.

1098 Moore, *The Constitution of The Commonwealth of Australia*, 2nd ed (1910) at 470.

1099 Moore, *The Constitution of The Commonwealth of Australia*, 2nd ed (1910) at 470-471.

The same author also said this[1100]:

> "The subject of 'foreign corporations' has always been of especial importance in Australia, because many of the largest companies carrying on business there had been formed in England, while of the companies formed in Australia, a large number carried on operations in several Colonies. The result was that there was much legislation in the various Colonies relating to 'foreign corporations.'"

Div 4: The bankruptcy and insolvency power

846 Also relevant to the scope of the corporations power is the bankruptcy and insolvency power, conferred by s 51(xvii) of the Constitution[1101]. The terms "bankruptcy" and "insolvency" had well-accepted meanings and usages at federation, to which regard should be had today for the purpose at least of deciding the limits of the power[1102], and of identifying the contemporary meaning of the language used[1103].

847 Quick and Garran referred to the historical distinction between the terms "bankruptcy" and "insolvency"[1104]:

> "The historical distinction between bankruptcy and insolvency is, that insolvency laws were intended for the benefit and relief of ordinary

---

1100 Moore, *The Constitution of The Commonwealth of Australia*, 2nd ed (1910) at 469.

1101 Section 51(xvii) provides:

> "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> ...
>
> (xvii) bankruptcy and insolvency".

1102 *Singh v The Commonwealth* (2004) 222 CLR 322 at 424-425 [295] per Callinan J.

1103 *Cole v Whitfield* (1988) 165 CLR 360 at 385 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

1104 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 586, §188.

> private debtors, poor and distressed, but honest; whilst bankruptcy laws were those specially designed and passed for the protection of creditors against insolvent traders and particularly against fraudulent traders."

On the other hand an English text, Fletcher's *The Law of Insolvency*, says that insolvency is a "factual" condition and bankruptcy a "legal" one[1105]. It makes the point that it would be "perfectly possible (if somewhat exceptional)" for a person to be made bankrupt, or for a company to be wound up, merely because of a "perverse refusal to pay a single debt which the debtor could perfectly well afford to discharge"[1106].

848 By 1901 the two terms, bankruptcy and insolvency, had assumed different meanings or, at least the position had been reached that "insolvency" had become the preferred term for the financial failure of a corporation[1107]:

> "[B]y the later nineteenth century, insolvency law had evolved into specialised branches – individual and corporate – whose provisions were contained in two separate collections of statutes – the Bankruptcy Acts and the Companies Acts – administered judicially by different courts under different sets of procedural rules. Although many points of resemblance existed, and in some cases entire doctrines or legislative provisions were directly duplicated from the one branch of law to the other,[1108] the divergences between the two types of insolvency became, and to this day remain, substantial. This has resulted in a state of affairs, unknown to most other systems of law apart from those which have closely followed this country in the development of their company law,[1109] whereby insolvent companies are not amenable to the law of bankruptcy but instead undergo the separate process known as liquidation, or winding-up, administered under separate rules by a separate branch of the courts."

1105 3rd ed (2002) at 5 [1-009].

1106 Fletcher, *The Law of Insolvency*, 3rd ed (2002) at 6 [1-011].

1107 Fletcher, *The Law of Insolvency*, 3rd ed (2002) at 13 [1-022].

1108 eg the doctrine of fraudulent preference, developed under bankruptcy law, was made directly applicable in the winding up of companies by s 76 of the *Companies Act* 1856. The public official known as the official receiver, whose office was created by the *Bankruptcy Act* 1883, Pt 4, was given duties and functions in relation to company winding-up by the *Companies (Winding Up) Act* 1890.

1109 Examples are Australia, New Zealand, and the Republic of Ireland.

849 In short, insolvency had truly become a concept and legal term apt for failed companies rather than persons[1110].

850 In my opinion therefore, it is likely that the term "insolvency" was used to broaden the scope of s 51(xvii) beyond natural persons. That this is so is supported by other statements in this Court. In *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd*[1111] the question was essentially whether in the winding-up of a company, the claims of the Crown in right of the Commonwealth ranked *pari passu* with those of the Crown in right of the State of New South Wales, or whether they took priority over the State's claim. In the course of his reasons Dixon J made the following observations[1112]:

> "The power given by sec 51(xvii) to make laws with respect to bankruptcy and insolvency is an example of a legislative power which ... might be interpreted as enabling the Parliament of the Commonwealth to destroy or vary the ranking of debts due to the State and Commonwealth in any administration of assets falling under the description of bankruptcy or insolvency. For it is a specific power, and priority in the distribution of assets among a bankrupt's creditors is a matter to be governed by bankruptcy legislation. ... In the United States the power of Congress to establish uniform laws on the subject of bankruptcies has been held to extend to *insolvent corporations*[1113]." (emphasis added)

851 His Honour returned to the theme 17 years later in the *Second Uniform Tax Case*[1114]. There, in the course of considering the constitutional validity of the *Income Tax and Social Services Contribution Assessment Act* 1936 (Cth), his Honour, then the Chief Justice, said[1115]:

1110 See *Companies Act* 1874 (NSW), Pt IV (ss 126-221); *The Companies Statute* 1864 (Vic), Pt IV (ss 68-155); *The Companies Act* 1864 (SA), Pt IV (ss 70-157); *The Companies Act* 1863 (Q), Pt IV (ss 73-171); *The Companies Act* 1893 (WA), Pt V (ss 100-190); *The Companies Act* 1869 (Tas), Pt IV (ss 106-205).

1111 (1940) 63 CLR 278.

1112 (1940) 63 CLR 278 at 313-314.

1113 *Ashton v Cameron County Water Improvement District* 298 US 513 at 536 (1936).

1114 *The State of Victoria v The Commonwealth* (1957) 99 CLR 575.

1115 (1957) 99 CLR 575 at 611-612.

> "[Section 221] falls into two parts. The second part is comprised in par (b)(i) and (ii). Sub-paragraph (i) of par (b) is concerned only with the order of priority in which federal income tax is to be paid by a trustee in bankruptcy administering the estate of the bankrupt. I would unhesitatingly uphold the validity of this provision as a law made in the exercise of the power conferred by s 51(xvii) of the Constitution to make laws with respect to bankruptcy and insolvency. Sub-paragraph (ii) of par (b) is concerned with a similar priority in the liquidation of a company. Probably this also is to be upheld as an exercise of the same power. For in Canada and in the Unites States the analogous power has been held to extend to liquidations of insolvent corporate trading bodies[1116]."

852 As is made clear by his Honour in *Farley* and the *Second Uniform Tax Case*, the equivalent power found in the constitutions of the United States and Canada has been considered sufficient for the passing of laws with respect to the winding-up of companies.

853 That "insolvency" in placitum (xvii) means the insolvency of a corporation, and not a natural person, is also supported by *Insurance Commissioner v Associated Dominions Assurance Society Pty Ltd*[1117] in which Fullagar J said this:

> "It is quite true that the Parliament of the Commonwealth has no general power to make laws with respect to the creation of corporations, or the powers and capacities of corporations, or the liquidation and dissolution of corporations. The power given by s 51(xx) of the Constitution with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth', whatever may be its true scope, does not amount to any such general power[1118] ... If there is no general power to provide for the creation of corporations, it may be taken that there is no general power to wind up or dissolve corporations."

854 Fullagar J was, with respect, right to say that s 51(xx) does not go so far as to authorize corporate windings-up. It does not need to. Section 51(xvii), in its

---

1116 See *Shoolbred v Clarke; In re Union Fire Insurance Co* (1890) 17 Can SCR 265 at 274; *Re Colonial Investment Co of Winnipeg* (1913) 15 DLR 634 at 642, 646; *Continental Illinois National Bank & Trust Co v Chicago Rock Island & Pacific Ry Co* 294 US 648 (1935).

1117 (1953) 89 CLR 78 at 86.

1118 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 349, 363, 371, 394, 412.

reference to insolvency, I would say of corporations, marks out an area of power not covered by s 51(xx). The presence of s 51(xvii) argues against too expansive a construction of the corporations power. If that power goes as far as the majority says it does, then the word "insolvency" in s 51(xvii) is otiose.

Div 5: Previous cases

855 No majority of this Court has read s 51(xx) as extending to each and every aspect of a corporation, its activities and its employees. The first endorsement of the concept of an apparently untrammelled corporations power was given by Mason J (Aickin J agreeing) and Murphy J in *Actors and Announcers Equity Association v Fontana Films Pty Ltd*[1119]. Mason J made no explicit reference to s 51(xxxv) or to any other placitum, in making the sweeping statement that "[n]owhere in the Constitution is there to be found a secure footing for an implication that the [corporations] power is to be read down so that it relates to 'the trading activities of trading corporations' and, I would suppose, correspondingly to the financial activities of financial corporations and perhaps to the foreign aspects of foreign corporations."[1120] The views of Murphy J are even more expansive: he would not have hesitated to include within the power, industrial relations[1121], which were not in issue in the case.

856 More persuasive, in my respectful opinion, is the opinion of Gibbs CJ (with whom Wilson J agreed) that the words used in s 51(xx) "suggest that the nature of the corporation to which the laws relate must be significant as an element in the nature or character of the laws, if they are to be valid"[1122]. The view of Brennan J was closer to that of the Chief Justice than those of a different mind. Brennan J stated that the subject matter of the power is corporate persons, not functions, activities or relationships. Nevertheless, his Honour said that "[t]he subject matter of activities or relationships which the law affects may be relevant to the question whether the law is truly to be described as a law with respect to corporations mentioned in par (xx)"[1123].

1119 (1982) 150 CLR 169 at 207-208 per Mason J (Aickin J agreeing at 215), 212 per Murphy J.

1120 (1982) 150 CLR 169 at 207.

1121 (1982) 150 CLR 169 at 212.

1122 (1982) 150 CLR 169 at 182 (Wilson J agreeing at 215). Stephen J may be taken to have adopted a similar view to Gibbs CJ. This is so because of his Honour's focus upon the trading activities of the corporation in question, and also his statement (at 194) that "[t]o describe it [the law in question] as a law with respect to trading corporations seems entirely apt."

1123 (1982) 150 CLR 169 at 222.

857 The balance of opinion in *The Tasmanian Dam Case* tilted in favour of a narrower view of s 51(xx). Mason and Murphy JJ adhered to their broad view of the power[1124]. Deane J, although a little Delphic perhaps, leaned towards the broader view[1125]. The other four members of the Court rejected or did not consider it necessary to address either view[1126].

858 In that case the Court was concerned with the validity of s 10 of the *World Heritage Properties Conservation Act* 1983 (Cth), in its application to the property of trading corporations declared by the Governor-General to be property to which the section applied. Under s 10(2) specified activities, for example, excavation, and interference with buildings or other structures and trees on declared property, were prohibited without the written consent of the Minister. Section 10(3) prohibited any other action which was damaging to or destructive of property to which the section applied. Section 10(4) made it unlawful for a body corporate to undertake the types of activities referred to in sub-ss (2) and (3) when done "for the purposes of its trading activities".

859 Mason, Murphy and Deane JJ held the section to be entirely valid. Wilson and Dawson JJ held it to be entirely invalid. Gibbs CJ was prepared to accept the validity of s 10(4) but not of the remainder of the section. Brennan J held that s 10(4) was valid, and that the validity of the other sub-sections did not need to be determined. The actual decision of the Court on this issue was therefore that s 10(4) was valid, as well as the definition in sub-s (1), but that it was unnecessary to determine the validity of sub-ss (2) and (3)[1127].

860 There was a second question, whether the Hydro-Electric Commission was a trading corporation and, if s 10(4) were valid, whether it was carrying out any of the acts prohibited in sub-ss (2) or (3) of s 10 for the "purposes of its trading activities". The answer that the majority of the Court gave to this question was an affirmative one although Gibbs CJ would not have answered the question that way. The majority comprised Mason, Murphy, Brennan and Deane JJ on this issue.

861 It follows that it is right, as the written submissions of New South Wales relevantly assert, that the ratio of the *Tasmanian Dam Case* with respect to the

---

1124 (1983) 158 CLR 1 at 148-150 per Mason J, 179-180 per Murphy J.

1125 (1983) 158 CLR 1 at 270 and 272.

1126 (1983) 158 CLR 1 at 116-119 per Gibbs CJ, 200-202 per Wilson J, 240-241 per Brennan J, 315 per Dawson J.

1127 See (1983) 158 CLR 1 at 324-326.

corporations power is at most that s 10(4) of the 1983 Act was a valid exercise of the corporations power, applying as it did to specified activities undertaken by a "constitutional corporation" "for the purposes of its trading activities". That ratio self-evidently does not support the validity of the Act in question here. What also follows from that case is the proposition that the trading activities of a corporation are quite discrete activities, readily identifiable as such, and distinct from its activities as an employer. The history of industrial affairs in the colonies, as they were known and understood by the founders during the Convention Debates, and the legislation for such affairs enacted almost immediately after federation, as a special and separate enactment to deal with a special and separate subject matter, in my opinion put this issue beyond question.

862 New South Wales is also correct in submitting that the ratio of *The Tasmanian Dam Case* relating to the validity of s 10(4) effectively depends upon the reasoning of only two judges, Gibbs CJ and Brennan J, Mason J, Murphy J, and probably Deane J, taking the broad view, that is of a general power. Wilson J followed the approach that he and Gibbs CJ had adopted in *Fontana Films*, holding that for a law to be a law with respect to trading corporations "the substance of the law must bear a sufficient relation to those *characteristics* of such corporations which distinguish them from corporations which cannot be so described"[1128], a test that s 10 failed. Dawson J adopted a similar approach, pointing out that the section was "bereft of any attribute which connects it with corporations other than the fact that the command which it contains is directed to trading and foreign corporations"[1129]. As to s 10(4), Dawson J said that the attempt to bring the law within power there was "a transparent one, for even if the activities which s 10 proscribes are confined to activities for the trading purposes of a trading corporation, it is nevertheless not a law in which the character of a trading corporation has any significance"[1130].

863 Gibbs CJ, with reservations, accepted that s 10(4) did have a sufficient connexion with the head of power conferred by s 51(xx)[1131]. The focus, however, his Honour said, was upon the trading activities. On the particular facts Gibbs CJ did not regard the activities of the corporation as being within the scope of trading activities: s 10(4) did not therefore validly apply to it in that respect.

864 With respect to the validity of s 10(4), Brennan J said this[1132]:

1128 (1983) 158 CLR 1 at 202 (emphasis added).

1129 (1983) 158 CLR 1 at 317.

1130 (1983) 158 CLR 1 at 317.

1131 (1983) 158 CLR 1 at 119.

1132 (1983) 158 CLR 1 at 241.

> "I should not wish to decide a question wider than the circumstances of the case require. The acts prohibited by sub-s (4) are the acts referred to in sub-ss (2) and (3), and the qualification 'for the purposes of its trading activities' results in the affection of the trading activities of trading corporations. It is clearly a law with respect to trading corporations, but can its validity be sustained without deciding the validity of sub-ss (2) and (3)?
>
> It is unnecessary to decide the validity of sub-ss (2) and (3). Even if sub-ss (2) and (3) were invalid, their invalidity would not affect sub-s (4). Sub-section (4) is not dependent upon sub-ss (2) and (3)".

865 His Honour's answer to the factual question was that the carrying out of the scheme for the dam was a trading activity because the "dominant if not exclusive purpose of constructing the dam is to provide additional generating capacity for the [corporation's] system, an element in [its] co-ordinated activity of generation, distribution and sale of electrical energy"[1133]. His Honour's holding necessarily meant therefore that to be within constitutional power, under s 51(xx), the power must be confined to the trading activities of a corporation.

866 Before leaving *The Tasmanian Dam Case* I should signify my respectful disagreement, for the reasons given elsewhere in this judgment[1134], with much of a passage in the judgment of Mason J, relied on by the Commonwealth in its written submissions in an attempt to meet a submission by the States that the Convention Debates are supportive of their position. The passage is as follows[1135]:

> "*Koowarta* makes the point that the content of the external affairs power has expanded greatly in recent times along with the increase in the number of international conventions and the extended range of matters with which they deal[1136]. The same point had been made earlier by Latham CJ in *Burgess*[1137]. It is this development 'that promises to give the Commonwealth an entrée into new legislative fields': see *Koowarta*[1138]. It

---

1133 (1983) 158 CLR 1 at 241.

1134 At [679], above.

1135 (1983) 158 CLR 1 at 126-127.

1136 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 216-217, 229.

1137 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 640-641.

1138 (1982) 153 CLR 168 at 228.

> is, of course, possible that the framers of the Constitution thought or assumed that the external affairs power would have a less extensive operation than this development has brought about and that Commonwealth legislation by way of implementation of treaty obligations would be infrequent and limited in scope. The framers of the Constitution would not have foreseen with any degree of precision, if at all, the expansion in international and regional affairs that has occurred since the turn of the century, in particular the co-operation between nations that has resulted in the formation of international and regional conventions. But it is not, and could not be, suggested that by reason of this circumstance the power should now be given an operation which conforms to expectations held in 1900. For one thing it is impossible to ascertain what those expectations may have been. For another the difference between those expectations and subsequent events as they have fallen out seems to have been a difference in the frequency and volume of external affairs rather than a difference in kind. Only if there was a difference in kind could we begin to construct an argument that the expression 'external affairs' should receive a construction which differs from the meaning that it would receive according to ordinary principles and interpretation. Even then mere expectations held in 1900 could not form a satisfactory basis for departing from the natural interpretation of words used in the Constitution."

867 I am quite unwilling to attribute to the founders the limited vision and foresight which the passage quoted attributes to them. They were greatly concerned with international affairs, including, in particular, regional affairs[1139]. Discourse about international affairs, agreements and treaties, albeit predominantly about mutual resistance to aggression, throughout the 19th century was intense and prolonged[1140]. Shifting alliances made by treaties and otherwise, and the need for international cooperation and a body such as the League of Nations were not new ideas in 1919[1141]. The century before federation

---

1139 See *XYZ v Commonwealth* (2006) 80 ALJR 1036 at 1071-1074 [157]-[173] per Callinan and Heydon JJ; 227 ALR 495 at 538-543.

1140 See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 631-637, §214.

1141 Sir Frederick Pollock KC wrote in *The League of Nations*, 2nd ed (1922) at 3-4:

> "From about 1500 at latest it was not only the fact, but an openly recognised fact, that Europe was divided into many kingdoms, principalities, and commonwealths, based no longer on real or fictitious kindred or on feudal allegiance, but on territorial control and jurisdiction, and that these independent units of political life did not own any common superior authority. As in theory it had always been allowed that war among civilised nations was a scandal (for

(Footnote continues on next page)

was a century of many wars between both large and small belligerents. In 1900 Australia aspired to be a nation of significance. The founders did not intend it to be tied to the apron strings of Britannia for ever. Otherwise there would have been no need for an external affairs power at all, or at least one as expansive as the power in terms is.

868 The Commonwealth also relies on the passages from Mason J that I have quoted for the submission that implications may not be drawn from the "federal balance". I have rejected that submission. Much more was drawn from less by this Court in *Lange*[1142]. These further points should be made. His Honour's statement was made before *Cole v Whitfield* which approved recourse to the Convention Debates in the passage that I have quoted elsewhere[1143]. Such recourse would have revealed to his Honour the founders' concern about the matters which his Honour said they would not have foreseen. The second point is that his Honour's remarks were made before *Austin v The Commonwealth*[1144] to which also I have referred elsewhere[1145] and which, by stressing the essential and constitutional features of the States, recognizes the need for, and the constitutional requirement and reality of the federal balance. The third point is that his Honour's judgment, with respect to international affairs, in the context of a convention about heritage, mirrors, without direct advertence to it, the much criticized dissenting reasons of Latham CJ in the *Communist Party Case*[1146], of

---

the paradoxical position that war is rather a good thing in itself cannot vouch any ancient author to my knowledge), the question of finding some reasonable governance for the relations of independent Powers was now regarded as urgent by thinking men of divers nations. Sir Thomas More expressed the pious wish 'that, whereas the most part of Christian princes be at mortal war, they were all at universal peace.' That wish took shape in a line of speculation pursued from the sixteenth to the eighteenth centuries by several authors. Little visible fruit came of their labours at the time; nevertheless, they were the forerunners of the new movement aroused by the war of 1914, fostered by the zeal of leading publicists in Europe and in America, and at last embodied in the plan of the Paris Conference."

1142 (1997) 189 CLR 520.

1143 (1988) 165 CLR 360 at 385. See also *XYZ v Commonwealth* (2006) 80 ALJR 1036 at 1069-1070 [153] per Callinan and Heydon JJ; 227 ALR 495 at 536-537.

1144 (2003) 215 CLR 185.

1145 At [788]-[791], above.

1146 (1951) 83 CLR 1 at 142-149, especially 149.

leaving it to the Executive or Parliament to decide a contestable matter which the rest of the Court there regarded as a matter for itself[1147]:

> "[T]he Court would undertake an *invidious* task if it were to decide whether the subject-matter of a convention is of international character or concern. On a question of this kind the Court cannot substitute its judgment for that of the executive government and Parliament. The fact of entry into, and of ratification of, an international convention, evidences the judgment of the executive and of Parliament that the subject-matter of the convention is of international character and concern and that its implementation will be a benefit to Australia. Whether ... the convention ... is capable of yielding ... a benefit to Australia, whether non-observance by Australia is likely to lead to adverse international action or reaction, are not questions on which the Court can readily arrive at an informed opinion." (emphasis added)

869 The last point that I would make here regarding *The Tasmanian Dam Case* is that the test posed by Mason J seems to me, with respect, to lean too far in favour of the Commonwealth: that "it is not enough that Commonwealth law adversely affects the State in the exercise of some governmental function as, for instance, by affecting the State in the exercise of a prerogative. Instead, it must emerge that there is a substantial interference with the State's capacity to govern, an interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system."[1148] The problem that I see about this formulation is that it could lead to the reduction of the States to mere facades of authority possessing parliaments and courts but little else, and lacking real power to perform the continuing functions left to them by the Constitution, of which an essential one is the internal industrial function.

870 The next case to be considered is *Re Dingjan; Ex parte Wagner*[1149], in which the validity of some sections (ss 127A, 127B and 127C(1)(b)) of the *Industrial Relations Act* 1988 (Cth) was challenged. Those provisions empowered the AIRC to renew contracts of employment on grounds of unfairness or harshness, or contrariety to the public interest, if the contract entered into by a corporation was one "relating to the business" of the corporation.

871 Mason CJ reiterated his view that the power "must be construed as a plenary power with respect to the categories of corporations mentioned in

---

1147 (1983) 158 CLR 1 at 125.

1148 (1983) 158 CLR 1 at 139.

1149 (1995) 183 CLR 323.

s 51(xx) of the Constitution"[1150]. He also agreed with the reasons given by Gaudron J, as did Deane J[1151]. Gaudron J did not, however, quite accept the unqualified language in which the plenary view of the power had been stated by those two judges, although her Honour was of the view that the power extended to the persons by whom corporations carry out their trading or financial, that is to say, business activities. Her Honour said this[1152]:

> "[I]t is clear that, at the very least, a law which is expressed to operate on or by reference to the business functions, activities or relationships of constitutional corporations is a law with respect to those corporations. In this regard, it is sufficient to note that, although the business activities of trading and financial corporations may be more extensive than their trading or financial activities, those corporations, nonetheless, take their character from their business activities ...
>
> As their business activities signify whether or not corporations are trading or financial corporations and the main purpose of the power to legislate with respect to foreign corporations must be directed to their business activities in Australia, it follows that the power conferred by s 51(xx) extends, at the very least, to the business functions and activities of constitutional corporations and to their business relationships. ...
>
> Once it is accepted that s 51(xx) extends to the business functions, activities and relationships of constitutional corporations, it follows that it also extends to the persons by and through whom they carry out those functions and activities and with whom they enter into those relationships."

872 Her Honour's remarks were however directed to dealings between contractors and "constitutional corporations", and not relations between them and their employees. This appears from the emphasis that her Honour placed upon a connexion between the contractors and the *business* functions and activities of corporations, and their business relationships with others.

873 Of the judges in the majority in the case, Dawson J maintained his earlier stance[1153]. Brennan J again set out his view that to be supported by s 51(xx) the law must discriminate between constitutional corporations and other persons.

1150 (1995) 183 CLR 323 at 333-334.

1151 (1995) 183 CLR 323 at 333 per Mason CJ, 342 per Deane J.

1152 (1995) 183 CLR 323 at 364-365.

1153 (1995) 183 CLR 323 at 344-346.

The opinion of Brennan J was to an effect similar to those of Gibbs CJ and Dawson J in *The Tasmanian Dam Case*[1154]:

> "Though I see no error in this approach, it leaves much to judicial impression from case to case. If the constitutional character be 'significant' to the relationship with the law, it must be because the character of the corporation is the factor which attracts the operation of the law. If that be so, I perceive no distinction between that test and a test of discriminatory operation. I prefer to state the test as one of discrimination, for that test admits of an objective ascertainment of the rights, duties, powers or privileges which the law creates or affects."

874 Toohey J was of the view that to say that a law cannot validly be based on the power "unless the fact that the corporation is a trading or financial corporation is significant in the way in which the law relates to it may be to focus too narrowly on the process of characterisation"[1155].

875 McHugh J, a member of the majority on the issue for determination, took a somewhat broader view of the corporations power. He said that for a law to be validly based upon the power[1156]:

> "it must have some significance for the activities, functions, relationships or business of the corporation. If a law regulates the activities, functions, relationships or business of a s 51(xx) corporation, no more is needed to bring the law within s 51(xx). That is because the law, by regulating the activities, etc, is regulating the conduct of the corporation or those who deal with it. Further, if, by reference to the activities or functions of s 51(xx) corporations, a law regulates the conduct of those who control, work for, or hold shares or office in those corporations, it is unlikely that any further fact will be needed to bring the law within the reach of s 51(xx)." (footnote omitted)

It is important to notice that when his Honour used the words "work for ... corporations" he used them in the context of the conduct of persons in performing functions, which I would take to be the trading or financial functions of corporations, and not to embrace the conduct of corporations as employers. This view is I think confirmed by his Honour's further statement that for the law to be within power, the conduct in question must have "significance for trading, financial or foreign corporations", which would, in most cases, "mean that the

---

1154 (1995) 183 CLR 323 at 337.

1155 (1995) 183 CLR 323 at 352.

1156 (1995) 183 CLR 323 at 369.

conduct must have some beneficial or detrimental effect on trading, financial or foreign corporations or their officers, employees or shareholders"[1157].

876 The *Industrial Relations Act Case*[1158] is of no assistance. The issue of the scope of the corporations power did not relevantly arise because the only State to challenge the provisions in issue there, Western Australia, expressly, and I would hold, erroneously, conceded in argument "that the Parliament has power to legislate as to the industrial rights and obligations of constitutional corporations ... and their employees"[1159]. As I have said elsewhere[1160], constitutions are not disposable property of governments of the day. Concessions of this kind are often driven by expediency and short-term aims of particular governments at particular times. They certainly say nothing helpful about the proper construction of the Constitution. Dawson J, writing separately in the *Industrial Relations Act Case*, found it unnecessary to consider the extent of the corporations power at all[1161]. The joint judgment merely noted that another part of the law being considered did operate with respect to the trading activities of corporations and was "to that extent, clearly authorised by s 51(xx) of the Constitution"[1162]. The case cannot therefore stand as any authority to support the broad view of the corporations power propounded by the Commonwealth.

877 In *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union*[1163] the issue was as to the operation of s 51(xxxv) of the Constitution. There was little or no discussion of the corporations power in argument. Gaudron J, in the minority, taking a step beyond her position in *Re Dingjan*, stated, unnecessarily for the decision, that in her view the corporations power "extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct

---

1157 (1995) 183 CLR 323 at 370.

1158 (1996) 187 CLR 416.

1159 (1996) 187 CLR 416 at 539.

1160 *Sweedman v Transport Accident Commission* (2006) 80 ALJR 646 at 663 [94]; 224 ALR 625 at 645.

1161 Dawson J did not address the issue, except in passing reference: see (1996) 187 CLR 416 at 566.

1162 (1996) 187 CLR 416 at 558.

1163 (2000) 203 CLR 346.

their industrial relations"[1164]. I respectfully agree with Kirby J[1165] that it is not right to seize, and to rely conclusively, upon a pronouncement made by a dissenting judge on a point not even argued, and, as Kirby J points out, also greatly qualified by other passages from her Honour's reasons in that case.

878 *Strickland v Rocla Concrete Pipes Ltd*[1166] will require more detailed consideration later. For now however it is important to keep in mind that several Justices there said that it was neither necessary nor appropriate to explore the outer boundaries of the corporations power[1167]. Barwick CJ said this[1168], of the laws in question in *Huddart Parker*:

> "They were clearly laws regulating and controlling amongst other things the trading activities of foreign corporations and trading and financial corporations formed within the limits of the Commonwealth. In my opinion such laws were laws with respect to such corporations. They dealt with the very heart of the purpose for which the corporation was formed, for whether a trading or financial corporation, by assumption, its purpose is to trade, trade for constitutional purposes not being limited to dealings in goods. ...
>
> I ought to observe that it does not follow either as a logical proposition, or, if in this instance there be a difference, as a legal proposition, from the validity of those sections, that any law which in the range of its command or prohibition includes foreign corporations or trading or financial corporations formed within the limits of the Commonwealth is necessarily a law with respect to the subject matter of s 51(xx). Nor does it follow that any law which is addressed specifically to such corporations or some of them is such a law. Sections 5(1) and 8(1), in my opinion, were valid because they were regulating and controlling the trading activities of trading corporations and thus within the scope of s 51(xx). But the decision as to the validity of particular laws yet to be enacted must remain for the Court when called upon to pass upon them. No doubt, laws which may be validly made under s 51(xx) will cover a wide range of the activities of foreign corporations and trading and financial corporations:

1164 (2000) 203 CLR 346 at 375.

1165 Reasons of Kirby J at [486]-[489].

1166 (1971) 124 CLR 468.

1167 (1971) 124 CLR 468 at 490-491 per Barwick CJ, 511 per Menzies J, 515 per Walsh J, 525 per Gibbs J.

1168 (1971) 124 CLR 468 at 489-490.

> perhaps in the case of foreign corporations even a wider range than that in the case of other corporations: but in any case, not necessarily limited to trading activities."

879 Of the other judges, McTiernan J, Owen J and Walsh J, and perhaps Windeyer J, agreed with the Chief Justice on the relevant issues[1169]. Menzies J accepted that "a law relating to the trading of trading corporations formed within Australia" is prima facie within power[1170]. Gibbs J expressed a similar view[1171].

880 I agree with the written submissions of New South Wales that *Rocla Pipes* is authority for no more than the proposition that some regulation of trading activities is the object of s 51(xx). This is consistent in my opinion with history, the views expressed in the Convention Debates, the early text writers, and the views of Isaacs J and Higgins J in *Huddart Parker* (to which I will refer), all of which are to the same effect, that the power extends to no more than the business affairs of a constitutional corporation conducted with the general public.

881 Nothing that I have said would diminish the constitutional power of the Commonwealth over accessorial liability[1172] of natural persons in relation to the trading or financial activities of corporations. As I said in *Andar Transport Pty Ltd v Brambles Ltd*[1173]:

> "Corporations can only think, decide and act by natural persons. If as Dawson J thought correct in *Nicol*[1174], and as the respondent here contended, the duty of an employer and employee can never be coterminous, in practice a corporate employer, obliged as it is to think and act by natural persons, would always be at risk, no matter how diligent it may have been, of being held not to have discharged its duty to its

---

1169 (1971) 124 CLR 468 at 499 per McTiernan J, 512 per Windeyer J, 513 per Owen J, 515 per Walsh J.

1170 (1971) 124 CLR 468 at 508.

1171 (1971) 124 CLR 468 at 525.

1172 In *Fencott v Muller* (1983) 152 CLR 570 at 598-589, Mason, Murphy, Brennan and Deane JJ said "that the corporations power extends to the regulation of the trading activities of trading corporations" possibly embracing thereby the notion of accessorial liability of the natural persons who undertake those activities of the corporation.

1173 (2004) 217 CLR 424 at 461-462 [103].

1174 *Nicol v Allyacht Spars Pty Ltd* (1987) 163 CLR 611 at 624-625.

> employees. I am unable to accept that there is some robotic unidentifiable agency remote from human agency for which a company may be held to be responsible. If it were otherwise there would have been no need for the majority in *Nicol* to undertake the careful examination that it did of the conduct of the injured plaintiff and other directors. It was only because another human agency on behalf of the company was involved, another director or directors who participated in the devising and adoption of the unsafe method of work there, that the injured director was able to succeed in his claim against the company."

A natural person conducting the company's business, can only be and act as an alter ego of the company. Accessorial liability is a recognition of that.

882 *Murphyores Incorporated Pty Ltd v The Commonwealth*[1175], to which I have referred elsewhere[1176], is relied on by the Commonwealth as an example of the extent to which Commonwealth constitutional power may embrace practically any activity with which the power can be said to be connected, another aspect, an extreme one, of the generality doctrine. The issue, it will be recalled, was whether the Commonwealth could legislate, under the trade and commerce power, for the imposition of environmental conditions upon mining operations carried on within a State. The Court (Barwick CJ, McTiernan, Gibbs, Stephen, Mason, Jacobs, Murphy JJ) held that it could. The principal judgment, with which Gibbs and Jacobs JJ agreed, was given by Stephen J, Mason J writing an extensive judgment to a similar effect. It is something of an irony that the Court reached this conclusion even though Stephen J accepted that "the control of the plaintiffs' mining operations and of their effect upon the local environment is, no doubt, essentially a matter for the State"[1177]. Nonetheless it was held that because the principal markets for the ore mineral mined by the plaintiffs lay overseas, the Commonwealth's power to prohibit exports was within the competence of the Commonwealth.

883 Two points may be made about that case. If ever the connexion, such as it was, between constitutional power and legislation were "insubstantial, tenuous or distant"[1178], and therefore impermissible, it was the connexion there between the relevant impugned legislation, and the Commonwealth's power to prohibit or regulate exports. The second is that the decision is inconsistent with the

---

1175 (1976) 136 CLR 1.

1176 See [677]-[678], above.

1177 (1976) 136 CLR 1 at 9.

1178 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79 per Dixon J.

reasoning and later decision of this Court in *Austin v The Commonwealth*[1179], which holds that the Commonwealth may not interfere with or curtail *essential* State functions, even in the exercise of specific constitutional powers.

884 I return to *Rocla Pipes*. In it Barwick CJ referred to the "*current* doctrine of this Court"[1180], an expression occasionally used in argument in this Court. To the extent that it suggests that it is right for judges of this Court to take continually shifting views of the Constitution, it is an unfortunate one. It is one thing to say that constitutional expressions may have to apply to changing conditions, but entirely another, and unacceptable thing, to treat constitutional doctrine as an ever-moving feast.

885 None of the plaintiffs here have contended, or need to contend for their argument to succeed, that the *Engineers' Case* should be overturned. That somewhat unsatisfactory case, an early instance of judicial activism[1181], was

---

1179 (2003) 215 CLR 185.

1180 (1971) 124 CLR 468 at 485 (emphasis added).

1181 Sir Robert Menzies described what happened in "Growth by Judicial Interpretation of Commonwealth Powers – The Engineers' Case", the second of his seven lectures to the University of Virginia, subsequently published as Menzies, *Central Power in the Australian Commonwealth*, (1967) 26 at 38-39:

> "Well, what happened was that an hour or so after I had begun by developing this argument, distinguishing the *Railway Servants' Case*, doing lip service to the Doctrine [of Instrumentalities], Mr Justice Starke, who was a very distinguished Common lawyer, and whose blunt habits of expression made no exception in favour of a very young man, looking at me in a grumbling way, said, 'This argument is a lot of nonsense!' ... in what I later realized to be an inspired moment, [I] replied: 'Sir, I quite agree.' 'Well', intervened the Chief Justice, Chief Justice Knox, never the most genial of interrogators, 'why are you putting an argument which you admit is nonsense?' 'Because', said the young Menzies ... 'I am compelled by the earlier decisions of this Court. If your Honours will permit me to question all or any of these earlier decisions, I will undertake to advance a sensible argument.' I waited for the heavens to fall. Instead, the Chief Justice said: 'The Court will retire for a few minutes.' And when they came back, he said, 'This case will be adjourned for argument at Sydney. Each government will be notified so that it may apply to intervene. Counsel will be at liberty to challenge any earlier decision of this Court!'"

Sir Robert's account is doubted in Blackshield, Coper and Williams (eds), *The Oxford Companion to the High Court of Australia*, (2001) at 237. The Commonwealth Law Reports refer to the sittings in Sydney but not to any earlier

(Footnote continues on next page)

concerned with, and rejected the doctrine of reserved powers which had been referred to in *Huddart Parker*. It does not follow that everything said in the latter ceased to have any precedential, or other persuasive value. Furthermore, whatever Isaacs J said in *Huddart Parker* may fairly safely be regarded as having little or no dependence upon the doctrine of reserved powers because of his subsequent participation in the joint judgment in the *Engineers' Case* which so strenuously disapproved it[1182]. In any event his Honour's actual language in *Huddart Parker* makes it clear that he was speaking of real powers of the State over aspects of trading and financial corporations in the sense of residual powers beyond Commonwealth power, rather than reserved powers. This follows from his reference to the relevant matters having been "left entirely to the States" in the following passage[1183]:

> "The creation of corporations and their consequent investiture with powers and capacities was left entirely to the States. With these matters, as in the case of foreign corporations, the Commonwealth Parliament has nothing to do. It finds the artificial being in possession of its powers, just as it finds natural beings subject to its jurisdiction, and it has no more to do with the creation of the one class than with that of the other.
>
> But laying aside creative power, what is left? It cannot be merely the power to legislate for the corporations with relation to Inter-State and foreign commerce. That, as already indicated, is conferred to the fullest extent by the first sub-section, and to confine paragraph (xx) to that would give no meaning to its very definite words.
>
> Again, to restrict its operation to internal company regulation would be absurd. Apart from the inherent improbability of investing the national authority with merely subordinate functions while retaining to the State the superior power of incorporation which, effectively exercised, could go far to nullify the inferior power, there are serious practical difficulties. I am unable, therefore, to accept the argument that what the Constitution has handed over to the Federal Parliament is simply the body of company law. That would include all the prohibitory and creative provisions contained in the State Statutes; it would also include the power

---

sittings. The Reports in those days were somewhat less meticulously compiled. So too, judges' notebooks can sometimes be more instructive for what they omit than what they note. There seems to be no good reason not to accept Sir Robert's recollection of his first, and perhaps most important, case in the High Court, as an accurate one.

1182 See (1909) 8 CLR 330 at 388.

1183 (1909) 8 CLR 330 at 394-396.

> to alter the conditions of a company's existence, which is equivalent to creation, and to annihilate the corporation altogether – which I think is, equally with creation, outside the region of federal competency[1184]. All this, I think, the language of the Constitution has left to the States. I take the power to legislate 'for the peace, order, and good government of the Commonwealth with respect to foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth' to be a power to act upon certain beings, which are found and remain in actual existence, possessing a fixed identity, a defined ambit of potentiality, having certain capacities and faculties unalterable by the Commonwealth, beings ready to act within their sphere of capabilities in relation to the people of the Commonwealth. Necessarily you cannot legislate for such corporations except with respect to some extraneous circumstances or events, whether trade, or finance, or contracts, &c, and there is nothing in the Constitution which says anything about the object, primary or secondary. I adhere to my view regarding purpose, motive, and objects expressed in *Barger's Case*[1185]. The power does not look behind the charter, or concern itself with purely internal management, or mere personal preparation to act; it views the beings upon which it is to operate in their relations to outsiders, or, in other words, *in the actual exercise of their corporate powers, and entrusts to the Commonwealth Parliament the regulation of the conduct of the corporations in their transactions with or as affecting the public*. Many of the matters that in one aspect are internal – such as balance sheets, registers of members, payment of calls, &c – may in another aspect and in certain circumstances be important elements in connection with outward transactions, and have a direct relation to them, and so fall incidentally within the ambit of federal power. The same may be said of legal proceedings, remedies, and so on, including winding up proceedings so far as necessary to satisfy creditors, but not so far as extinction. But whether any given provision is part of the federal power or not must, as I view it, depend on whether it includes or is necessarily incidental to the control of *the conduct of the corporations in relation to outside persons*. This follows from the process of reasoning and elimination that the language itself forces upon us when effect is given to every word." (further emphasis added)

886 I would not take his Honour to be saying in that passage that the "public" included a corporation's own employees, or that the relationship, or matters

---

1184 See Westlake, *A Treatise on Private International Law*, 4th ed (1905) at 359.

1185 *R v Barger*; *The Commonwealth v McKay* (1908) 6 CLR 41.

affecting it, of a corporation with its employees fell within the corporations power. This view is reinforced by this other passage in his judgment[1186]:

> "This disposes of the contention that, if these sections be valid, the Commonwealth Parliament would be entirely at large, and that a schedule of wages and hours could be prescribed for these corporations, so also as to the qualifications of their directors; all that is purely internal management and equipment, and in no way directly affects the exercise of their capacities of trading or their financial operations or other public capacities, nor is it incidental to the control of their activities."

887 If anything, the reasoning of Higgins J was even narrower and does not depend upon any view of the suitability or otherwise or existence of a doctrine of reserved powers. Higgins J said in *Huddart Parker*[1187]:

> "The Federal Parliament can, in my opinion, prescribe what capital must be paid up, probably even how it must have been paid up (in cash or for value, and how the value is to be ascertained), what returns must be made, what publicity must be given, what auditing must be done, what securities must be deposited.
>
> The Federal Parliament controls as it were the entrance gates, the tickets of admission, the right to do business and to continue to do business in Australia; the State Parliaments dictate what acts may be done, or may not be done, within the enclosure, prescribe laws with respect to the contracts and business within the scope of the permitted powers."

888 Nor do I think that the judges in *Huddart Parker* were inappropriately distracted by the significance for the purpose of private international law only or substantially of a difference between the internal and external affairs of corporations. The difference is undoubtedly significant for that purpose and is no doubt reflected, to some extent, in the language of both placita (xvii) and (xx). Considerations of private international law are not irrelevant to constitutional law just as the common law in very many other aspects influenced the language of the Constitution and therefore influenced its interpretation. Sir Owen Dixon perspicaciously wrote[1188]:

1186 (1909) 8 CLR 330 at 396.

1187 (1909) 8 CLR 330 at 412-413.

1188 Dixon, "The Common Law as an Ultimate Constitutional Foundation", (1957) 31 *Australian Law Journal* 240 at 241.

> "Federalism means a rigid constitution and a rigid constitution means a written instrument. It is easy to treat the written instrument as the paramount consideration, unmindful of the part played by the general law, notwithstanding that it is the source of the legal conceptions that govern us in determining the effect of the written instrument."

889 Before returning to *Rocla Pipes* there is only one other case to which I should refer in this section of my reasons: *The Incorporation Case*[1189]. The majority there did not regard the doctrine of reserved powers, which the Court in the *Engineers' Case* cast aside, as pervading all of the reasoning in *Huddart Parker*. In *The Incorporation Case* the majority (Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ) held, even accepting the validity of the generality doctrine, that there were limits to the reach of s 51(xx), and that it did not extend to power over the incorporation of companies. Their Honours said[1190]:

> "The subject of a valid law is restricted by that phrase to corporations which have undergone or shall have undergone the process of formation in the past, present or future. That is to say, the power is one with respect to 'formed corporations'."

890 The submission made by New South Wales that nothing held or said in *The Incorporation Case* gives sustenance to any proposition that the corporations power covers what has been compendiously, and almost universally called for decades in this country, "industrial relations" or "industrial matters", is correct.

891 The other significant matter is that although *Rocla Pipes* had been decided some years before *The Incorporation Case*, the majority in it quoted with approval[1191] part of the section of the judgment of Isaacs J in *Huddart Parker*, which I have already set out, the effect of which is that the creation of corporations and their investiture with powers and capacities was left entirely to the States[1192].

892 A question left unanswered in this case is as to which corporations may be characterized as financial and trading corporations, a very big question indeed, and which will occupy, I believe, a deal of the time of the courts in the future. It is not answerable in this case, because of the absence of actual facts to which the decision here will apply, highlighting again the undesirability of dealing with this

---

1189 (1990) 169 CLR 482.

1190 (1990) 169 CLR 482 at 498.

1191 (1990) 169 CLR 482 at 499-500.

1192 (1909) 8 CLR 330 at 394.

case on the basis which it has been presented to the Court. I would simply make the point that, "foreign", "trading" and "financial" are words not only descriptive of the types of corporations in respect of which the power under s 51(xx) may be exercised, they also suggest a delineation of the scope of the power itself, as a power with respect to foreign, trading and financial activities. I need reach no conclusion as to this matter however, because, whatever the extent of the power the Commonwealth may possess under s 51(xx), it does not extend to industrial matters, the power of the Commonwealth over which is measured by s 51(xxxv).

893 The decision in *Rocla Pipes* does not conclude this case. And, it may be observed, not all that was said in it is unsupportive of the States' and unions' arguments. In his judgment, Menzies J spoke of "the *limited* power in relation to trade conferred upon [the Commonwealth] Parliament"[1193]. Windeyer J stated as a requirement of constitutional validity that a law "*truly answers*"[1194] to the description of a law with respect to a given subject matter. No judge in that case suggested that s 51(xx) conferred a power over a corporation's industrial relations. The decision and the reasoning do not come to grips with the limitation upon Commonwealth power under s 51(i) to which Menzies J referred. The distinction between external and internal relationships of a corporation is not relevant only for the purposes of private international law. It is highly relevant to matters such as accessorial liability, the liability of directors, and the relationships between corporations, directors and their shareholders.

894 At this point it is convenient to deal with a question that some of the reasoning in *Rocla Pipes* might appear to raise, that if s 51(xx) is not affected by the limitations in s 51(i), why is it affected by limitations inherent in s 51(xxxv)? There are several answers. The first is, as history, the Debates, the various parliaments of the Commonwealth, and the Justices of this Court have constantly treated it, the industrial affairs power in s 51(xxxv) is a discrete, unique and very great power. The analysis that Kirby J and I have separately made of it demonstrate that. The second answer is that, contrary to statements made in *Rocla Pipes*, particularly by Barwick CJ[1195], the whole of the reasoning in *Huddart Parker* does not depend upon the application of the doctrine of implied immunities or reserved powers. The same decision would have been open even if such a doctrine did not hold sway. Only Griffith CJ[1196] in *Huddart Parker* suggested that industrial affairs might be part of a corporation's trading activities. Isaacs J, the Justice most averse, it appears, to the doctrine of reserved powers

---

1193 (1971) 124 CLR 468 at 510 (emphasis added).

1194 (1971) 124 CLR 468 at 512 (emphasis added).

1195 (1971) 124 CLR 468 at 485.

1196 (1909) 8 CLR 330 at 348.

unequivocally rejected the suggestion[1197]. The third reason is that if s 51(i) were to be given the same textual construction as the majority here gives to s 51(xx) *Rocla Pipes* would not have been decided as it was. It is also relevant that in *Rocla Pipes*, in common with *Murphyores*, mention of *Melbourne Corporation* is nowhere to be found in any of the judgments. That it is not raises real questions as to the persuasive value of *Rocla Pipes*. If it were necessary, which I do not think it is, I would in any event be prepared to depart from *Rocla Pipes* to decide this case as I do. No, *Rocla Pipes* does not stand in the way of the plaintiffs here.

895 Assuming that the doctrine of *stare decisis* were inevitably and completely to govern or fetter the obligation of a judge of this Court in constitutional cases, a proposition which I elsewhere[1198] demonstrate to have, at best, a fragile foundation, there is no other decision, as the Commonwealth concedes, that compels a conclusion either way here.

Div 6: A consequence of the "object of command" test

896 Although, as I have just said, the doctrine of *stare decisis* is not determinative in constitutional cases, I think that the Court ought, directly, in the interests of candour and certainty, to acknowledge whether it intends to overrule an earlier case or apparently settled principle. The joint reasons in the *Engineers' Case* did not in terms say that the doctrine of implied intergovernmental immunities or reserved powers was being set aside: instead their Honours heavily criticized it[1199], noted that it had been rejected by the Privy Council in *Webb v Outtrim*[1200] and was the subject of persistent dissents[1201], and declared that the doctrine had "never been unreservedly accepted and applied"[1202]. In *Cole v Whitfield*[1203], by contrast, the Court acknowledged that it was reconsidering "approximately 140 decisions of this Court and of the Privy Council". Similarly, in *XYZ v Commonwealth*[1204], Heydon J and I said that the

---

1197 (1909) 8 CLR 330 at 396.

1198 See Pt IV, Div 1 of these reasons.

1199 (1920) 28 CLR 129 at 144-145, 150.

1200 (1906) 4 CLR 356; [1907] AC 81.

1201 (1920) 28 CLR 129 at 150.

1202 (1920) 28 CLR 129 at 150.

1203 (1988) 165 CLR 360 at 385.

1204 (2006) 80 ALJR 1036 at 1082 [206]; 227 ALR 495 at 554.

geographic externality view of s 51(xxix) should be "rejected" and cases applying it "overruled" to that extent.

897 In my opinion, a consequence of the apparent acceptance of the "object of command" test by the majority here[1205] is that *The Incorporation Case* may well now be effectively overruled. In that case, Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ held that the Commonwealth lacked legislative competence for the incorporation of corporations under s 51(xx), and did so for textual, structural, doctrinal and historical reasons[1206]. Now that the Commonwealth may, it seems, legislate that "a s 51(xx) corporation shall ...", or "no s 51(xx) corporation shall ...", the States' powers over incorporation may well be rendered meaningless. The Commonwealth might legislate that "no s 51(xx) corporation shall do business without a licence", and make that licence a licence, for all useful purposes, to exist. It might now seek to require, for example, that the corporation be of a certain type, that its proposed name be approved, that the name and address of each corporator and proposed director be supplied to a particular authority of the Commonwealth, and that the other sorts of requirements now found in s 117 of the *Corporations Act* 2001 (Cth) be satisfied. But an equivalent of s 117, along with other provisions of the *Corporations Act* 1989 (Cth), were held to be invalid by the majority in *The Incorporation Case*[1207]. Their Honours said[1208]:

> "The fact that the character of a corporation may vary, so that it may be at one time a trading or financial corporation and not at another, makes it less likely at least that s 51(xx) was intended to confer power upon the Commonwealth to incorporate companies over which its power of regulation might fluctuate, possibly without knowledge upon either side."

The "object of command" test is not reconcilable with the majority's holdings in *The Incorporation Case*, but as to this the joint reasons are silent.

1205 At [178].

1206 See (1990) 169 CLR 482 at 498 ("formed" a past participle), 499 (power of incorporation given expressly in s 51(xiii) and not in s 51(xx)), 498-503 (precedent and history indicate no power of incorporation).

1207 (1990) 169 CLR 482 at 503. As a result of *The Incorporation Case*, s 117 of the *Corporations Act* 2001 (Cth) relies on s 51(xxxvii) of the Constitution for validity.

1208 (1990) 169 CLR 482 at 503.

PART IX. THE DIFFERENT POSITION OF VICTORIA

898 Under the *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic), the Victorian Parliament referred legislative competence over various industrial matters to the Commonwealth Parliament[1209]. Other matters were expressly excluded from the reference[1210]. The matters referred are these:

> "**4.** ***Reference***
>
> (1) A matter referred to the Parliament of the Commonwealth by a sub-section of this section is so referred subject to the Commonwealth of Australia Constitution Act and pursuant to section 51(xxxvii) of that Act.
>
> (2) The matter of conciliation and arbitration for the prevention and settlement of industrial disputes within the limits of the State, to the extent to which it is not otherwise included in the legislative powers of the Commonwealth, is referred to the Parliament of the Commonwealth for a period commencing on the day on which this sub-section commences and ending on the day fixed under or by section 6 as the day on which the reference of that matter under this Act terminates but no longer.
>
> (3) The matter of agreements about matters pertaining to the relationship between an employer or employers in the State and an employee or employees in the State, to the extent to which it is not otherwise included in the legislative powers of the Commonwealth, is referred to the Parliament of the Commonwealth for a period commencing on the day on which this sub-section commences and ending on the day fixed under or by section 6 as the day on which the reference of that matter under this Act terminates but no longer.
>
> (4) The matter of minimum terms and conditions of employment for employees in the State, to the extent to which it is not otherwise included in the legislative powers of the Commonwealth, is referred to the Parliament of the Commonwealth for a period commencing on the day on which this sub-section commences and ending on the day fixed under or by section 6 as the day on which the reference of that matter under this Act terminates but no longer.

1209 Set out in ss 4 and 4A.

1210 Set out in s 5.

(5) The matter of termination, or proposed termination, of the employment of an employee, other than a law enforcement officer, to the extent to which it is not otherwise included in the legislative powers of the Commonwealth, is referred to the Parliament of the Commonwealth for a period commencing on the day on which this sub-section commences and ending on the day fixed under or by section 6 as the day on which the reference of that matter under this Act terminates but no longer.

(6) The matter of freedom of association, namely the rights of employees, employers and independent contractors in the State to join an industrial association of their choice, or not to join such an association, to the extent to which it is not otherwise included in the legislative powers of the Commonwealth, is referred to the Parliament of the Commonwealth for a period commencing on the day on which this sub-section commences and ending on the day fixed under or by section 6 as the day on which the reference of that matter under this Act terminates but no longer.

(7) The matter of the setting and adjusting of minimum wages for employees in the State within a work classification that, immediately before the commencement of this sub-section is a declared work classification under the **Employee Relations Act 1992**, or has been declared, by the Commission within the meaning of that Act, to be an interim work classification, who are not subject to an award or agreement under the Commonwealth Act, to the extent to which that matter is not otherwise included in the legislative powers of the Commonwealth, is referred to the Parliament of the Commonwealth for a period commencing on the day on which this sub-section commences and ending on the day fixed under or by section 6 as the day on which the reference of that matter under this Act terminates but no longer.

(8) The matter of attempting to settle, conciliate or arbitrate, or exercising any other power in relation to, an industrial matter or industrial dispute, being an industrial matter or industrial dispute that arose before the commencement of Part 3 and in relation to which the Employee Relations Commission of Victoria exercised, or could have exercised, powers (other than an industrial matter or industrial dispute in respect of which that Commission in Full Session had made a decision before that commencement), to the extent to which it is not otherwise included in the legislative powers of the Commonwealth, is referred to the Commonwealth for a period commencing on the day on which this sub-section commences and ending on the day fixed under or by section 6 as

the day on which the reference of that matter under this Act terminates but no longer.

4A. ***Further reference – common rules***

(1) The matter of the making of an award or order as, or declaring any term of an award or order to be, a common rule in the State for an industry, but so as not to exclude or limit the concurrent operation of any law of the State, to the extent to which it is not otherwise included in the legislative powers of the Commonwealth, is referred to the Parliament of the Commonwealth for a period commencing on the day on which section 52 of the **Federal Awards (Uniform System) Act 2003** commences and ending on the day fixed under sub-section (2) as the day on which the reference of that matter under this Act terminates but no longer.

(2) The Governor in Council, by proclamation published in the Government Gazette, may fix a day as the day on which the reference under sub-section (1) terminates.

(3) The matter referred to the Parliament of the Commonwealth by sub-section (1) is so referred subject to the Commonwealth of Australia Constitution Act and pursuant to section 51(xxxvii) of that Act."

899 The matters expressly excluded from the reference are these:

"**5.** ***Matters excluded from a reference***

(1) A matter referred by a sub-section of section 4 or 4A does not include –

(a) matters pertaining to the number, identity, appointment (other than terms and conditions of appointment) or discipline (other than matters pertaining to the termination of employment) of employees, other than law enforcement officers, in the public sector;

(b) matters pertaining to the number, identity, appointment (other than matters pertaining to terms and conditions of appointment not referred to in this paragraph), probation, promotion, transfer from place to place or position to position, physical or mental fitness, uniform, equipment, discipline or termination of employment of law enforcement officers;

(c) matters pertaining to the number or identity of employees in the public sector dismissed or to be dismissed on grounds of redundancy;

(d) matters pertaining to the following subject matters –

(i) workers' compensation;

(ii) superannuation;

(iii) occupational health and safety;

(iv) apprenticeship;

(v) long service leave;

(vi) days to be observed as public holidays;

(vii) equal opportunity –

but not so as to prevent the inclusion in awards or agreements made under the Commonwealth Act of provisions in relation to those matters to the extent to which the Commonwealth Act, as enacted as at 30 November 1996 (whether or not in force), allows such awards or agreements to include such provisions;

* * * * *

(f) matters pertaining to Ministers, members of the Parliament, judicial officers or members of administrative tribunals;

(g) matters pertaining to persons holding office in the public sector to which the right to appoint is vested in the Governor in Council or a Minister;

(h) matters pertaining to persons holding senior executive offices in the service of a Department within the meaning of the **Public Sector Management Act 1992**;

(i) matters pertaining to persons employed at the higher managerial levels in the public sector;

(j) matters pertaining to persons employed as ministerial assistants or ministerial advisers in the service of Ministers;

(k) matters pertaining to persons holding office as Parliamentary officers;

(l) matters pertaining to the transfer or redundancy of employees of a body as a result of a restructure by an Act;

(m) matters pertaining to the duties of employees if a situation of emergency is declared by or under an Act or an industry or project is, by or under an Act, declared to be a vital industry or vital project and whose work is directly affected by that declaration.

(2) Insofar as a matter specified in sub-section (1) of this section does not fall within the terms of a sub-section of section 4 or 4A, sub-section (1) of this section must be taken to have been enacted for the avoidance of doubt."

900 Section 898 of the Act provides that the Act is intended to apply to the exclusion of all Victorian laws which relate (i) to employment generally and (ii) to one or more of the matters referred to the Commonwealth by Victoria. The Commonwealth would seem to be seeking to engage s 109 of the Constitution by s 898 of the Act, which is as follows:

"**Additional effect of Act – exclusion of Victorian laws**

(1) This Act is intended to apply to the exclusion of all the following laws of Victoria so far as they would otherwise apply in relation to an employee or employer:

(a) a law of Victoria that applies to employment generally and relates to one or more of the following matters:

(i) agreements about matters pertaining to the relationship between an employer or employers in Victoria and an employee or employees in Victoria;

(ii) minimum terms and conditions of employment (other than minimum wages) for employees in Victoria;

(iii) setting and adjusting of minimum wages for employees in Victoria within a work classification;

(iv) termination, or proposed termination, of the employment of an employee in Victoria;

(v) freedom of association;

(b) a law of Victoria that is prescribed by regulations made for the purposes of this paragraph.

Victorian laws that are not excluded

(2) However, subsection (1) does not apply to a law of Victoria so far as:

(a) the law deals with the prevention of discrimination and is neither a State or Territory industrial law nor contained in such a law; or

(b) the law is prescribed by the regulations as a law to which subsection (1) does not apply.

Definitions

(3) In this section:

freedom of association has the same meaning as in subsection 4(6) of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

minimum terms and conditions of employment has the same meaning as in subsection 4(4) of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

minimum wage has the same meaning as in subsection 4(7) of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

work classification has the same meaning as in section 865.

Note: See also clause 87 of Schedule 6 (common rules in Victoria), which has effect despite any other provision of this Act."

901 I have set out some of the provisions of the Victorian Act to show just how much needed to be referred for the consensual enlargement of Commonwealth industrial power. That the Commonwealth appears to have accepted that Victorian legislation and s 51(xxxvii) of the Constitution were necessary to achieve this end, and that the Commonwealth did not seek to achieve it by exercising power under s 51(xx) are not matters of which very much may be made. They do, however, again provide some indication of informed legislators' and their legal advisors' thinking, both State and federal, on the topics of State and Commonwealth powers as recently as 1996.

902 Victoria submits that if s 898 is not supported by the Commonwealth's power to make laws with respect to "matters referred to the Parliament of the

Commonwealth by the Parliament or Parliaments of any State or States"[1211], the section is invalid, there being no other source of power to support it.

903 Victoria acknowledges that when a State refers power to the Commonwealth, the Commonwealth and the State have concurrent power in relation to the matter[1212], and, to the extent that the Commonwealth intends to "cover the field", s 109 of the Constitution will apply to render the State law or laws inoperative[1213]. Victoria makes the submission, however, that because its referral excluded a number of matters, the Commonwealth does not have the power to legislate comprehensively even over the matters specifically referred, because there may be some overlap. The submission is this:

> "In the present case, the Referral Act[1214] excludes a number of matters from the scope of the matters referred to the Parliament of the Commonwealth; the Referral Act does not refer a power to legislate comprehensively or exhaustively on the matters identified in ss 4 and 4A. It follows that it is not open to the Commonwealth Parliament to legislate comprehensively or exhaustively on those matters, or to express an intention to exclude State laws on such matters, and the expression of this intention is invalid."

This submission may be correct. It is not however necessary for me to reach a concluded view about it.

904 Victoria makes a further or alternative submission, that s 898 impermissibly curtails, or interferes with, the capacity of the State of Victoria to function as a government[1215]. Victoria submits that s 898 of the Act:

1211 Constitution, s 51(xxxvii).

1212 *Graham v Paterson* (1950) 81 CLR 1 at 19 per Latham CJ, 22 per McTiernan J, 24-25 per Williams J, 25 per Webb J, 26 per Fullagar J. Windeyer J made a similar observation in *Airlines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1 at 52.

1213 *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 108-110 per Latham CJ, 114 per Rich J, 120 per Dixon J, 122 per McTiernan J.

1214 ie the *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic).

1215 *Austin v The Commonwealth* (2003) 215 CLR 185 at 219 [28] per Gleeson CJ, 249 [124] per Gaudron, Gummow and Hayne JJ, 281-282 [223]-[225] per McHugh J, 300-301 [280]-[281] per Kirby J.

> "purports to exclude laws of Victoria relating to the employment of persons at the higher levels of government, including Ministers, ministerial assistants and advisers, head of departments and high level statutory office holders, parliamentary officers and judges[1216]".

905 Victoria also contends that s 898(1) would, if valid, exclude various provisions of the *Juries Act* 2000 (Vic), which, for example, require employers to pay make-up pay[1217], and create offences for terminating or threatening to terminate employment because of jury service[1218].

906 The Commonwealth submits that s 898 has application only to the extent of the powers referred to it by Victoria. In particular, the Commonwealth points to s 859 of the Act, which provides:

> "**Part only has effect if supported by reference**
>
> A provision of this Part (other than paragraph 862(b) or Division 11 or 12) has effect only for so long, and in so far, as the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria refers to the Parliament of the Commonwealth a matter or matters that result in the Parliament of the Commonwealth having sufficient legislative power for the provision so to have effect."

907 The Commonwealth submits that s 859 ensures that s 898 does not purport to operate in relation to matters beyond the scope of powers referred to the Commonwealth. The Commonwealth's submission is this:

> "In this case, the Commonwealth accepts that the referral does not refer a power to legislate exhaustively in respect to the matters identified in ss 4 and 4A of the Referral Act because of the exclusions in s 5 of that Act. The Commonwealth cannot make laws with respect to the excluded matters in s 5 of the Referral Act and does not purport to do so. It can, however, legislate exhaustively with respect to the referred subject matter (the ss 4 and 4A matters read down by reference to the s 5 matters) and exclude Victorian law in that field. This is what s 898 does."

908 The Commonwealth submits, further, that the Act does not interfere impermissibly with the essential functions of Victoria's government, principally

---

1216 cf *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 233.

1217 Section 52.

1218 Sections 76 and 83.

because the express exceptions found in Victoria's reference of power protect the essential functions of Victoria's government. To the extent that the Victorian *Juries Act* may be affected, the Commonwealth says:

> "Just because a law may pertain to the essential functions of government does not mean that it impermissibly interferes with a State government within the meaning of the *Melbourne Corporation* principle. ...
>
> The laws in question go only to entitlements to payment and prohibition on termination. They do not undermine the jury system or the ability of Victoria to empanel juries as necessary. Furthermore, the laws are excluded only in their application to employees in Victoria who are not covered by s 5 of the [Referral] Act."

909 In my opinion the Act, despite the reference of power by Victoria, is invalid to the extent at least of Victoria's challenge to it. This is so for the same reasons as lead me to conclude against validity generally.

PART X. THE DIFFERENT POSITION OF THE TERRITORIES

910 I need not delay for long on the question of the validity of the Act under the territories power. It may be, as Kirby J says[1219], that the power of the Commonwealth to make laws for the government of any territory, including in relation to industrial affairs, stands apart, is relevantly plenary and is not subject to any implication or limitation imposed by s 51(xxxv). Like Kirby J, however, I agree that it would be preferable to dispose of the precise scope of the territories power in relation to s 51(xxxv) in proceedings in which that question is essential for the disposition of an actual case. I would say this however. Whatever the ambit of federal power in relation to industrial affairs may be, on no view should the Act or any like Act be allowed to be used as a Trojan horse for the invasion of State industrial powers by the device of a territorial connexion by reason merely of, for example, incorporation in a Territory, or some other slight connexion of a Territory with the corporation: the reality and substance of any employment in question, both as to locality of it, and matters closely related thereto, should be determinative of the sufficiency or otherwise of territorial connexion[1220].

911 In his Honour's reasons for judgment, Kirby J poses the question whether it is feasible or necessary to dissect provisions of the Act and to judge their validity on various of the constitutional underpinnings now suggested by the Commonwealth. To do that would be to require the Court, among other things,

---

1219 Reasons of Kirby J at [460(2)].

1220 See *Lamshed v Lake* (1958) 99 CLR 132 at 141-146 per Dixon CJ.

to identify any "accidental bullseyes" that the Commonwealth may have hit, and to say whether unintended results have been achieved, that is, to hold that although the Commonwealth may have sought but failed to engage the corporations power, a section or sections of the Act could have been validly enacted under another power or powers. But as Kirby J points out, the measures were put to the Parliament and enacted as ones to be integrated with some of the preceding legislation, designed overall to change substantially the foundation and approach to federal workplace relations law[1221]. I agree with his Honour that it accordingly is appropriate to take "the resulting legislative 'package' at face value, and to treat it as an integrated endeavour, intended to stand or fall in its entirety"[1222]. The joint reasons are to that effect in invalidating no provision of it[1223].

912 As Kirby J holds[1224], it is not the function of this Court to save bits and pieces of the new law. I agree generally with his Honour's reasons for rejecting the submissions of the Commonwealth that the Court may and should dissect those sections which might be valid, standing alone, or in a different context, on the basis of the injunction in s 14 of the Act itself, or s 15A of the *Acts Interpretation Act* 1901 (Cth), for validity under s 51(xx) of the Constitution or otherwise. There is also this, as Windeyer J said in *Rocla Pipes*[1225]:

> "The question whether an enactment truly answers to the description of a law with respect to a given subject matter must be decided as it arises in any particular case in reference to the facts of that case."

This Court has no relevant facts before it.

PART XI. SUMMARY OF CONCLUSIONS

913 The Amending Act is invalid. The reasons in summary why this is so are these.

(i) The Constitution should be construed as a whole and according to the principles of construction that I have stated in these reasons[1226].

1221 Reasons of Kirby J at [460(2)], [584]-[586].

1222 Reasons of Kirby J at [590].

1223 At [422].

1224 At [604].

1225 (1971) 124 CLR 468 at 512.

1226 See Pt VI of these reasons.

(ii) The Amending Act was presented and enacted as a comprehensive integrated measure containing generally interdependent provisions.

(iii) The substance, nature and true character of the Amending Act is of an Act with respect to industrial affairs.

(iv) The power of the Commonwealth with respect to industrial affairs is a power in relation to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State" and not otherwise (except for Commonwealth employment and other presently not relevant purposes). As the jurisprudence of this Court shows, that power is a very large one. Much can properly be characterized as preventative of a relevant industrial dispute.

(v) The corporations power has nothing to say about industrial relations or their regulation by the Commonwealth. To the extent, if any, that s 51(xx) might otherwise appear to confer such power, it must be subject to the implied negative restriction imposed by s 51(xxxv).

(vi) The corporations power is concerned with the foreign, trading and financial activities and aspects of corporations, the precise limits of which it is unnecessary to decide in this case. In Australia, history, the founders, until 1993 the legislators who have followed them, and this Court over 100 years, as Kirby J has pointed out[1227], have treated industrial affairs as a separate and complete topic, and s 51(xxxv) as defining the Commonwealth's total measure of power over them, except in wartime.

(vii) To give the Act the valid operation claimed by the Commonwealth would be to authorize it to trespass upon essential functions of the States. This may not be the decisive factor in the case but it at least serves to reinforce the construction of the Constitution which I prefer, that industrial affairs within the States, whether of corporations or of natural persons, are for the States, and are essential for their constitutional existence.

(viii) The validation of the legislation would constitute an unacceptable distortion of the federal balance intended by the founders, accepted on many occasions as a relevant and vital reality by Justices of this Court, and manifested by those provisions of the Constitution to which I have referred, and its structure.

914 I would make the same orders as Kirby J.

1227 Reasons of Kirby J at [428], [431]-[442].