THE LAW OF CONCILIATION AND ARBITRATION

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I. Introduction

> 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: -
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> Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

[*Constitution of Australia*, section 51 (xxxv)]

The story of the law of conciliation and arbitration in Australia is, to a large extent, a story of constitutional interpretation. One of the key issues that arises in any study of constitutional law in a country like Australia with a written constitution, concerns the theory that will be adopted in giving meaning to the constitutional text. Obviously, the judges of a final court who have the responsibility of assigning that meaning could do so on the basis of considerations such as their impressions, intuitive feelings or consultation of a good dictionary or two. On the other hand, the judges might, for consistency, try to develop a more sophisticated analysis of the constitutional charter and of their function in interpreting it.

Thus, the judges could follow an approach that insisted upon assigning to disputed constitutional words a meaning derived from the perceived meaning of those words at the time the Constitution was adopted as law. This is the so-called "originalist" approach to constitutional interpretation. As will appear, in the assignment of meaning to the words of the Australian Constitution that include the conciliation and arbitration power, the foundation and early Justices of the High Court of Australia sometimes embraced this originalist doctrine. They could readily do so because all of the early Justices had been participants in the Constitutional Conventions that resulted in the final language in which, for the most part, the Constitution passed into law.[1]

With the passage of time, however, it was no longer possible for the members of the High Court to rely on their own memories and recollections of what had transpired in the years before 1900. After that point, the adoption of the "originalist" approach to interpretation, including for the meaning of s 51(xxxv) of the Constitution, became more problematic. This change coincided substantially with the decision of the High Court in 1920 in the *Engineers' Case*.[2] As will be shown, that decision represented a watershed in the Court's constitutional exposition.

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[1] See further Plowman & Smith 1986: 206-09. On the origins of section 51 (xxxv) see the essays collected in Macintyre & Mitchell 1989, Fitzpatrick 1941; Patmore 1991 ch 5; Bennett 1994 and the chapters by Plowman and Rowse in this volume.

Since that time, the struggle to give meaning to the constitutional text has taken several forms. They have included what Justice Scalia of the Supreme Court of the United States (an exponent of originalism in constitutional interpretation) has called "faint-hearted" originalism (Scalia 1995:142). But they have also ranged through other theories or explanations such as the "living force" doctrine of constitutional meaning embraced by Deane J and some of his predecessors and successors.[3]

The debates over theories of constitutional interpretation have attracted vigorous expressions of opinion in the High Court in recent times.[4] Many scholarly articles have been written analysing the conflicting opinions, their viability and consistency of application.[5]

Despite this, there is no area of constitutional discourse which more clearly demonstrates that during the first century of the Constitution, the High Court has failed consistently to apply an originalist construction (robust or faint-hearted) to the federal legislative powers than the Court's approach to the interpretation of the industrial conciliation and arbitration power. Indeed, this area of constitutional law illustrates more vividly than most the impact upon constitutional exposition of the forces of history, economics, national values and survival as well as the forces of changing legal doctrine and political and social needs.

In this chapter we will illustrate, by reference to the constitutional powers relevant to the law of industrial arbitration, the way in which the High Court of Australia, and other Australian courts, have developed the sparse words of the Constitution to apply to an area of society's activities that has changed more over the century than most others. The history of the High Court's response to the very large number of cases challenging the invocation of the federal power over industrial arbitration, demonstrates the unacceptability of simplistic demands that constitutional courts should simply apply the words of the constitutional text as if, without more, those words alone were sufficient to solve all of the problems. As the reader embarks on the legal and political history recounted in this chapter, he or she will become a witness to the naive character of calls for "pure legalism" in constitutional interpretation and the mischief that such adolescent approaches to constitutional meaning (or law generally) can engender.

If this chapter shows nothing else, it is that choices must be made in constitutional interpretation. The real question is whether those choices are made candidly and

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[3] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[4] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171, 174 per Deane J quoting Clark 1901; cf *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Professional Engineers Association* (1959) 107 CLR 208, 267; *Victoria v The Commonwealth* (1971) 122 CLR 353, 396 per Windeyer J.

[5] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 551-554 [40]-[49]; 599-600 [186]; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479, 511-513 [76]-[80], 522-530 [110]-[129]; *Eastman v The Queen* (2000) 203 CLR 1, 41-51 [134]-[158]; 79-81 [240]-[245]; *Brownlee v The Queen* (2001) 207 CLR 278, 285 [8], 297 [52], 300-301 [59]-[64], 320-327 [122]-[128].

[6] See eg. Craven 1990: Dawson 1990; Goldsworthy 1997; Kirk 1999; Bagaric 2000; Goldsworthy 2000; Kirby 2000; Meagher 2002a and 2002b.

transparently, by reference to the real reasons that lay behind them - or explained in words that deny the choices and obscure the reasons.

2. Common Rule and Registered Organisations

Writing in 1898, Sidney and Beatrice Webb noted that "the Device of the Common Rule" was a "universal feature of Trade Unionism" and that "the assumption on which it is based is held from one end of the Trade Union world to the other" (Webbs 1898: 561). The "assumption" to which the Webbs referred was that "in the absence of any Common Rule, the conditions of employment are left to 'free competition', this always means, in practice, that they are arrived at by Individual Bargaining between parties of very unequal bargaining strength" (Webbs 1898: 560).

By "common rule" the Webbs meant the fixing of terms and conditions of employment which applied to "whole bodies of workers" in a given trade or industry. In principle, such rules could be imposed by means of collective bargaining. However, for the Webbs, the distribution of power in a capitalist system was such that "the only available method of securing a Common Rule is Legal Enactment – difficult in the face of interests so powerful for the Trade Unions to obtain, but once obtained...easy of application and enforcement" (Webbs 1898: 554).

This logic clearly constituted part of the conceptual underpinning of the conciliation and arbitration and wages board systems that were adopted in the Australian colonies/States in the late 19th and early 20th centuries.[6] It also found expression in section 38(f) of the original *Commonwealth Conciliation and Arbitration Act*. This empowered the Commonwealth Court of Conciliation and Arbitration "to declare by any award or order that any practice, regulation, rule, custom, term of agreement, condition of employment or dealing whatsoever determined by an award in relation to an industrial matter shall be a common rule of any industry in connection with which the dispute (ie the dispute which gives rise to the award) arises." In the intellectual context of the day, it is easy to understand how it might be assumed that the technique of the common rule was consistent with both the letter and the spirit of the new province for law and order which was to be ushered in by the 1904 Act.[7] But it is equally easy to understand why use of this technique might be seen as highly controversial.

Given the initial general hostility of the business community towards the conciliation and arbitration system,[8] it is hardly surprising that the constitutional validity of this provision should have been put at issue at an early stage in the history of the system. The challenge duly occurred in 1910 in the *Whybrow Case*.[9]

This was actually the third case to reach the High Court in that year involving Whybrow & Co.

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[6] See Reeves 1902: 69-181; Mitchell 1989; Creighton & Stewart 2000: 36-39.

[7] See further Higgins 1915, 1919 and 1920.

[8] See Plowman & Smith 1986; Plowman 1989a; 1989b, chs 1-2.

[9] *The Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 11 CLR 311.

Earlier, in *Australian Boot Trade Employees Federation v Whybrow & Co*[10] the High Court had, in reliance upon the "reserved State powers" doctrine, ruled that the Commonwealth Court of Conciliation and Arbitration lacked the capacity to make an award that was inconsistent with a State law (in this instance determinations of Wages Boards in New South Wales, Queensland, South Australia and Victoria) – although the Court also determined that "inconsistency" did not arise for this purpose where it was possible to give effect to both the State law and the Federal law.[11] In the second case in the sequence, *The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co*,[12] the High Court unanimously rejected an argument to the effect that the "compulsory" aspects of the regime established by the 1904 Act were unconstitutional because they were inconsistent with the essentially "voluntary" character of arbitration at common law. Plowman & Smith (1986: 214) observe that this decision shows that the three original members of the Court "were prepared to adhere to canons of constitutional interpretation even though this resulted in the preservation of aspects of the arbitration system to which they were personally opposed."[13]

The third case in the *Whybrow* trilogy saw a rather different outcome. In this instance, all five members of the Court found that section 38(f) of the 1904 Act was beyond the power of the Federal Parliament acting in reliance upon section 51(xxxv). Griffith CJ put the matter thus:

> I adhere to the opinion which I expressed in the *Woodworkers' Case*[14] that the term 'dispute' connotes the existence of parties taking opposite sides, to which I would add that the word 'arbitration' connotes the same idea. In the nature of things, an industrial dispute may be prevented from coming into existence by various means, but the only means which the parliament is authorised to employ are conciliation and, perhaps, arbitration. If, therefore, the state of things such that there are no ascertainable parties between whom an ascertainable difference capable of being composed exists the basis of arbitration is wanting. *A fortiori* if all the parties concerned are contented.[15]

Griffith CJ, Barton and O'Connor JJ all proceeded from the assumption that it simply was not possible for the Parliament to pass a law in reliance upon section 51(xxxv) that permitted the

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[10] (1910) 10 CLR 267.

[11] This proposition has played an important role in determining the relationship between federal awards and State laws (and awards and agreements). It has the effect that employees who are covered by both State and Federal provision on a given topic may obtain the benefit of both sets of provisions, so long as it is possible to comply with both of them in a manner that is not inconsistent with the federal provision – cf *Blakeley v Devondale Cream (Victoria) Pty Ltd* (1968) 117 CLR 253.

[12] (1910) 11 CLR 1.

[13] The original members of the Court, Griffith CJ, Barton and O'Connor JJ, were appointed in 1903. In 1906 the size of the Court was increased to five with the appointments of Issacs and Higgins JJ.

[14] *Federated Sawmill, Timberyard and General Woodworkers Employees' Association of Australasia v James Moore & Son Pty Ltd* (1909) 8 CLR 465, 468.

[15] (1910) 11 CLR 311, 317-18.

making of common rule awards. In separate judgments, Higgins and Isaacs JJ agreed that section 38(g) as it then stood was invalid. However, they both left open the possibility that differently worded provisions might be found to fall within the power conferred by section 51(xxxv), so long as they relied upon techniques of conciliation and arbitration.[16] The Legislature made no attempt to explore these possibilities for almost 40 years,[17] and when it did do so, it again foundered on the rocks described in the reasoning in *Whybrow*.[18] The consequence is that the principal focus of the system for virtually all of its first century has been upon the settlement of disputes, with little attempt to explore the possibilities afforded by the concept of prevention.[19]

It is not entirely surprising that Griffith CJ and Barton and O'Connor JJ should have been uncomfortable with provisions enabling the making of common rule awards. For most of the founders of the Constitution, including the three original members of the High Court, it was expected that the conciliation and arbitration power would be invoked in only highly exceptional circumstances such as those which had arisen in the early 1890s. Principal responsibility for industrial relations was to remain with the States. The concept of common rule awards must have appeared inimical to this original view of the "federal balance". Taken to its logical conclusion, the availability of such awards could have had the effect of entirely displacing State regulation by ensuring that Federal common rule awards operated in all sectors of the economy – especially if the Federal instruments had the effect of entirely displacing any inconsistent State provisions dealing with the same issue. Obviously, the foundation justices of the High Court thought that such an operation of the power in section 51(xxxv) of the Constitution would exceed the paragraph and also that it was inconsistent with the implied relationship between the federal and State law making authorities.

The *Whybrow* litigation ensured that this did not happen. The first case appeared to establish that the Commonwealth Court of Conciliation and Arbitration could not make any award that was inconsistent with a law of a State – although that principle did not survive the demise of the reserved State powers doctrine in the *Engineers Case* in 1920.[20] Of more lasting effect was the decision in the third case to the effect that section 51(xxxv) did not provide authority for the making

[16] (1910) 11 CLR 311, 336 (Isaacs J), 342 (Higgins J). See further McCallum & Smith 1986: 68-69.

[17] The legislation has for many years contained provision for the making of common rule awards in the Territories. These provisions depend for the constitutionality upon the Territories power in section 122 of the Constitution. See now *Workplace Relations Act* 1996, sections 141- 142.

[18] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389, 401. See also *R v Kelly; Ex parte State of Victoria* (1950) 81 CLR 64. The provision that was at issue in *Ozone Theatres* was an attempt to extend the operation of a common rule measure that had been put in place during World War II in reliance upon the defence power in section 51(vi).

[19] See further Ford 1984: 65-78 – but cf *R v Turbet; Ex parte Australian Building Construction Employees and Builders Labourers Federation* (1980) 144 CLR 335, 353-56 (per Murphy J); *Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Victoria) Ltd* (1989) 166 CLR 311, 320-21 (per Mason CJ), 327-28 (per Deane J). Partly in response to the observations in *Wooldumpers*, the legislation was amended in 1993 by the insertion of provision intended to prevent "industrial situations" developing into "disputes" – see WR Act, section 4(1).

[20] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

of common rule awards, and that the Federal tribunal could deal only with disputes to which there were identifiable parties. As indicated, this not only helped preserve the autonomy of the State systems, but also severely circumscribed the development of the prevention power in the Federal sphere. This, in turn, meant that the development of the system as a whole had to depend on the highly artificial and increasingly unwieldy concept of the industrial "dispute".

Although the decision in the third *Whybrow Case* undoubtedly served to inhibit the development of the federal system of conciliation and arbitration, its practical impact was much less marked than might have been anticipated simply by taking the decision at face value. This can be attributed to a number of factors, among the most important of which were the decisions of the High Court in the *Burwood Cinema*[21] and *Metal Trades* cases.[22]

The first of these cases enabled registered trade unions to generate industrial disputes with employers who did not presently employ any members of the union, and irrespective of whether their existing employees were satisfied with their terms and conditions of employment. This decision was based on the premise that unions were parties principal to disputes in their own right, and not just as agents for their members. This reasoning meant that unions could now generate disputes on behalf of persons who were presently neither employees nor members, but who might become their members in the future. Furthermore, they could do this by service upon employers of demands set out in written logs of claims. If the employer rejected or ignored these demands, or put a counter-offer, that was sufficient to create a "dispute" for purposes of attracting the jurisdiction of the federal tribunal, even though the dispute existed only "on paper".[23] Ten years later, in *Metal Trades*, a majority of the High Court took this reasoning a stage further by determining that unions could also generate disputes about the terms and conditions of non-members who were presently employed by employer parties.[24] An award made in settlement of such a dispute could require the

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[21] *Burwood Cinema Limited v The Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528.

[22] *The Metal Trades Employers Association v The Amalgamated Engineering Union* (1935) 54 CLR 387.

[23] On the origins of paper disputes see *R v Commonwealth Court of Conciliation and Arbitration; Ex parte GP Jones* (1914) 18 CLR 224.

[24] In deciding this case, the Court overruled its earlier decision in *Amalgamated Engineering Union v Alderdice Pty Ltd; In re Metropolitan Gas Co* (1928) 41 CLR 402, in which the Court had decided that the Commonwealth Court of Conciliation and Arbitration did not have power to make awards "prescribing the duties of employers to employees who are neither parties to the industrial dispute before the Court nor members of nor represented by an organisation which is a party to that dispute" (per Knox CJ, 411). Interestingly, only one member of the Court (Isaacs J, 419) made even passing reference to the decision in *Burwood Cinema*. In *Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) Pty Ltd* (1993) 178 CLR 352 by a 4:3 majority the Court determined that the AIRC could not include provision in an award to the effect that employers in the insurance industry make superannuation contributions in respect of all employees, irrespective of union membership, into a named superannuation fund. In reaching this decision Mason CJ, Deane, Toohey and Gaudron JJ (at 361) suggested that the *Metal Trades* principle extended only to claims relating to wages and conditions of non-members, and not to claims that relate to matters beyond that. This decision is not without difficulty. On one view, any claim that falls within the jurisdiction of the Commission in relation to employees who are union members ought logically also to pertain to the terms and conditions of non-members. Unfortunately, their Honours did not provide any guidance as to how the distinction between member and non-member claims was to be drawn, and subsequent decisions provide little indication as to the extent, if any, to which the *Metal Trades* principle has been compromised.

employer party to observe the terms and conditions set out therein in respect of both members and non-members, but could not impose obligations upon those non-members by reason of the fact that they were not party to the dispute, and were not members of an organisation that was such a party.[25]

The logic of *Metal Trades* also led to the result that awards could be binding upon all members of a registered organisation of employers that was a party to an industrial dispute, even though that member was not itself a party to the dispute.[26] It followed that employers who wished to escape the reach of awards could endeavour to do so either by resigning from an organisation that had been made party to a relevant dispute, or by not joining an organisation in the first place.[27] Yet this avoidance strategy would be ineffectual in circumstances where a union elected to generate an entirely new dispute with the employer, or to "rope" them in to an existing award. This latter technique generally involved the union creating a dispute by serving a log of claims upon the employer demanding that they observe the terms of the award that is attached to the log. An award made in settlement of any such dispute would then bind the employer to observe the terms of the original award.[28]

The constraints imposed by *Whybrow* were also mitigated by the provisions of the 1904 Act which dealt with the continuing operation of awards in circumstances where there has been a transmission of business by an employer who was respondent to an award to another employer entity who was not respondent to that particular award, or who was not respondent to any award. The constitutionality of these provisions was upheld in *George Hudson*.[29] Although they have generated relatively little litigation over the years,[30] they did serve to maintain the integrity of the federal system by ensuring that employers could not escape award coverage simply by transferring their business to another entity that was not party to an industrial dispute, and consequently was covered

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[24] See *Re Media, Entertainment and Arts Alliance; Ex parte Arnel* (1994) 179 CLR 84; *Re National Tertiary Education Industry Union; Ex parte Quickenden* (1996) 71 ALJR 75; *Attorney General (Queensland) v Riordan* (1998) 192 CLR 1, 39-48 (per Kirby J).

[25] See now *Workplace Relations Act* 1996, section 149(1)(f).

[26] This logic caused some employer organisations to devise a form of "associate" or "non-industrial" membership, which carried most (if not all) of the benefits of membership, but did not carry the burden of award coverage. The efficacy of this technique has been thrown into some doubt by the decision of the AIRC in *Carpenter v Corona Manufacturing Pty Ltd*, Whelan C, 30 October 2002, Print PR924136.

[27] Section 111AAA of the WR Act is intended to help preserve the integrity of State systems of conciliation and arbitration by requiring the AIRC to cease dealing with a dispute involving employees whose terms and conditions are regulated by a State award or agreement, unless satisfied that it would not be in the public interest for it to cease dealing with the dispute. This provision was introduced in 1996, and appears to have had the effect of reducing the use of roping-in awards, although it certainly has not eliminated the practice.

[28] *George Hudson Limited v Australian Timber Workers' Union* (1923) 32 CLR 413.

[29] But see *Shaw v United Felt Hat Pty Ltd* (1927) 39 CLR 533. More recently, see *North Western Health Care Network v Health Services Union of Australia* (1999) 92 FCR 477; *PP Consultants Pty Ltd v Finance Sector Union* (2000) 201 CLR 648. For comment see Creighton 1998; Ginters 1999; McCallum 2001.

by an award.

The combined effect of the decisions in *Burwood Cinema*, *Metal Trades* and *George Hudson*, was to enable the federal system of conciliation and arbitration to maintain and to extend its reach notwithstanding the constraints imposed by the third *Whybrow* decision. These decisions were the product of the expanded and reconstituted High Court as described earlier. However, their practical impact would have been significantly less profound had it not been for what some might regard as a counter-intuitive decision of the Court whilst the founding members were still in the majority.

Jumbunna Coal Mine NL v Victorian Coal Miners' Association[31] arose out of a decision of Higgins J as President of the Commonwealth Court Conciliation and Arbitration to uphold a decision of the Industrial Registrar to register a union of Victorian coalminers under the 1904 Act. The case raised three principal issues: whether a trade union all of whose members were in one State had the capacity to engage in an interstate industrial dispute thereby triggering the jurisdiction of the Federal tribunal; whether those provisions of the Act which provided for the registration and regulation of trade unions and employer associations, including the conferral of corporate status upon registered bodies, were within the scope of the conciliation and arbitration and incidental powers; and whether the expansive definition of "industrial dispute" in the 1904 Act was within the legislative competence of the Parliament.

The Court, comprising Griffith CJ, Barton, O'Connor and Isaacs JJ, unanimously upheld Higgins J's decision to register the applicant union, and in doing so rejected all of the arguments put forward by the employers to the effect that the registration provisions of the 1904 Act were beyond the legislative powers of the Parliament under section 51(xxxv). The Court was also unanimous in rejecting employer arguments that the definition of "industrial dispute" in section 4 of the 1904 Act was beyond power.

The decision in *Jumbunna* played a crucial role in the development of the federal system of industrial regulation over the ensuing decades. For example, it helped legitimate provisions intended to protect the organisational security of registered organisations and to give such organisations the capacity to access the Commonwealth Court of Conciliation and Arbitration by agitating disputes as representative of their members and (post-*Burwood Cinema*) as parties principal in their own right. It also helped to expand and consolidate the jurisdiction of the federal tribunal by permitting the legislature to adopt an expansive approach to the range of matters that could be made subject to conciliation and arbitration – although, as will appear, the jurisprudence in this area took some curious twists and turns over the years.

In the course of their reasons in *Jumbunna*, several members of the Court exhibited a very real appreciation of the logic of collective bargaining, and of the central role of representative organisations in that process. For example O'Connor J observed that:

> It may well be conceded that there is no general power to prevent and settle industrial disputes by any means the legislature may think fit to adopt. The power is restricted to prevention and settlement by conciliation and arbitration. Any attempt to effectively prevent and settle industrial disputes by either of these means would be idle if individual workmen and employees only could be dealt with. The application of the 'principle of collective bargaining,' not long in use at the time of the passing of the Constitution, is

[31] (1908) 6 CLR 309.

> essential to bind the body of workers in a trade and to ensure anything like permanence in the settlement. Some system was therefore essential by which the powers of the Act could be made to operate on representatives of workmen, and on bodies of workmen, instead of on individuals only. But if such representatives were merely chosen for the occasion without any permanent status before the Court [of Conciliation and Arbitration], it is difficult to see how the permanency of the settlement of the dispute could be assured.[32]

This awareness of the nature of collective bargaining and sensitivity to the need for representative organisations of employees and (to a lesser extent) employers helps explain a decision that may at first blush appear to be somewhat at odds with the views of the three original members of the High Court concerning the implied constitutional limitations on the power of the Federal Parliament to enact laws or authorise the making of awards intruding upon the sphere of State legal regulation. Although both Barton and O'Connor JJ (and Griffith CJ less overtly) had opposed the inclusion of the conciliation and arbitration power in the Constitution, they would have been fully aware of the reasons for its inclusion. As such, they were clearly prepared to countenance the enactment of legislation which was apt to, and indeed essential for, the achievement of that purpose.[33] Subsequent developments have clearly demonstrated that, having in *Jumbunna* permitted the genie of conciliation and arbitration to escape from the bottle of section 51(xxxv), it was quite impossible, particularly where that power was enhanced by the express and implied incidental powers, to restore its status as a means of last resort where collective bargaining had proved to be ineffectual or impossible. After the *Engineers Case*,[34] comparatively few cases have been argued before the High Court in an attempt to revive the notion that the Constitution itself imported an implied federal restriction on the Commonwealth's law-making. None has attempted to reverse the historic ruling in *Jumbunna*.

3. The Industry Requirement

(i) The dispute must be in an industry

The employers' challenge to the validity of the 1904 Act in *Jumbunna* was based, in part, on the assertion that the definition of "industrial dispute" in section 4 of that Act, and the criteria for registration as an organisation set out in section 55, encompassed disputes and organisations who were engaged in activities that did not fall within the meaning of "industry" as that term is used in section 51(xxxv) of the Constitution. O'Connor J dealt with this issue in a straightforward and commonsense manner:

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[32] Ibid, 358-59. See too Griffith CJ, at 334; Barton J at 345; and Isaacs J at 377-78.

[33] Plowman & Smith (1986: 213) suggest that the decision may be attributed to the fact that the members of the Court may not have fully considered the implications of the decision; that they may "have been carried away by the sense of occasion, given that this was the first time they had been called upon to examine the scope of the conciliation and arbitration power; and that "having excluded the majority of employees of State governments' (sic) and State instrumentalities from the jurisdiction of the Arbitration Court [in *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488] the Judges were more prepared to give the Arbitration court a free reign (sic)."

[34] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

> The words ["industrial dispute"] are free from ambiguity, and must be construed with their ordinary grammatical meaning. So construed, the definition includes within the term 'industry' every kind of employment for pay, hire, advantage, or reward... 'Industrial dispute' was not, when the Constitution was framed, a technical or legal expression. It had not then, nor has it now, any acquired meaning. It meant just what the two English words in their ordinary meaning conveyed to ordinary persons... [35]

This expansive approach to the concept of "industry" survived for some considerable time. For example, in the *Municipal Employees Case*[36] a majority of the High Court decided that manual workers employed by local government authorities were engaged in industry in the requisite sense. In the course of his reasons Higgins J expressly rejected the proposition that only manual employees could be so engaged:

> It is true that up to the present most of the disputes are disputes with manual workers; but we are discussing a remedial power conferred on parliament for all time; and we have no right to limit the meaning of the words to manual disputes, even if it were true that when the Constitution became law there had been no disputes with non-manual workers as to their conditions of labour...[37]

Gavan Duffy J, in dissent, saw the matter rather differently:

> In my opinion an 'industrial dispute' within the meaning of section 51(xxxv) of the Constitution is one in which a number of employees organised or united together are in contest with their employer or employers with respect to the remuneration of the employees, or with respect to any matter directly affecting them in the performance of their duties, in an undertaking or undertakings carried on for the purpose of gain and wholly or mainly by means of manual labour.[38]

These observations of Gavan Duffy J neatly encapsulate the tensions that were to bedevil the interpretation of the "industrial dispute" concept for more than sixty years: the notion that white collar workers in general, and professional staff in particular, could not engage in "industrial" disputation for purposes of attracting the jurisdiction of the Federal tribunal; that "industrial" disputes could only arise in situations where business was undertaken for purposes of profit; and that even where the parties were engaged in an "industry" in the relevant sense, the range of matters in relation to which they could engage in disputation was limited to "remuneration" and to "any matter directly affecting them in the performance of their duties."

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[35] (1908) 6 CLR 309, 365. See also Griffith CJ at 333, and Isaacs J at 370. Barton J did not make any direct reference to this issue, but nor did he disagree with his colleagues on this point.

[36] *Federated Municipal and Shire Council Employees' Union of Australia v City of Melbourne* (1919) 26 CLR 508.

[37] *Loc. cit.*, 575.

[38] *Loc. cit.*, 584. It is perhaps worth mentioning in this context that Gavan Duffy J was counsel for the employers in *Jumbunna*.

White-collar employment was found to be within the reach of the federal tribunal in the *Insurance Staff* and *Bank Officials Cases* in 1923.[39] This was essentially on the basis that the activities of banks and insurance companies were ancillary to the functioning of industry, and as such could be regarded as "incidental" to industry for purposes of access to the conciliation and arbitration system.[40] However, the High Court adopted a rather different approach in the *State Teachers Case* in 1929.[41] In that case it was held that school teachers employed in State schools were not engaged in industry in the relevant sense. In the course of their joint reasons, Knox CJ and Gavan Duffy and Starke JJ found that the educational activities of the States could not constitute an industry:

> They bear no resemblance whatever to an ordinary trade, business or industry. They are not connected directly with, or attendant upon, the production or distribution of wealth; and there is no cooperation of capital and labour, in any relevant sense, for a great public scheme of education is forced upon the communities of the States by law.[42]

Furthermore:

> If carrying on a system of public education is not within the sphere of industrialism, those who confine their efforts to that activity cannot be engaged in an industry or in an industrial occupation or pursuit.[43]

In the course of a vigorous dissent, Isaacs J made it clear that he saw the matter in a very different light:

> Education, cultural and vocational, is now and is daily becoming as much the artisan's capital and tool, and to a great extent his safeguard against unemployment, as the employers' banking credit and insurance policy are part of his means to carry on the business. There is at least as much reason for including the educational establishments in the constitutional power as 'labour' services, as there is to include insurance companies as 'capital' services.[44]

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[39] *Australian Insurance Staffs' Federation v Accident Underwriters' Association* and *Bank Officials Association v Bank of Australasia* (1923) 33 CLR 517. The two cases were heard together.

[40] See Rich and Isaacs JJ, *loc. cit.*, 527. See also *Proprietors of Daily News Limited v Australian Journalists Association* (1920) 27 CLR 532, where the High Court unanimously rejected the proposition that journalists were incapable of being involved in an industrial dispute.

[41] *Federated State School Teachers Association of Australia v Victoria* (1929) 41 CLR 569. Prior to the decision in the *Engineers Case* (*supra*), the majority could have achieved the same result in reliance upon either or both of the reserved State powers and implied governmental immunities doctrines.

[42] *Loc. cit.*, 575.

[43] *Loc. cit.*, 575-76.

[44] *Loc. cit.*, 588.

Despite the force of this logic, over the next fifty years the High Court handed down a series of decisions which had the effect that some groups of workers were adjudged to be engaged in "industry" in the relevant sense, whilst others in apparently similar situations were found not to be so engaged. For example, in the *Professional Engineers Case*,[45] professional engineers employed by State government departments and authorities were found to be engaged in an "industry" in the relevant sense. The same was the case for credit union clerks,[46] for insurance clerks employed by the Tasmanian Motor Accidents Insurance Board,[47] and for clerks employed by health funds in Victoria.[48] By way of contrast, clerical officers employed by State governments were found not to be employed in an "industry" in the *State Public Servants' Case*.[49] Clerical workers employed by the Commissioner for Motor Transport of New South Wales,[50] firefighters,[51] and university teachers all met a similar fate.[52]

The end-result of these decisions was that, by 1983, it was impossible to predict with any degree of certainty whether any given group of employees would or would not be regarded as being engaged in an "industry" for purposes of accessing the jurisdiction of the federal tribunal. Creighton, Ford & Mitchell (1993: 443) have suggested that to the extent that it is possible to derive any principles of general application from the decided cases, it was to the effect that a dispute could be regarded as requisitely industrial if:

> (a) the activity of the employers directly involved the production or distribution of material wealth ('tangible goods and commodities');
>
> (b) regardless of the activity of the employers, the work of the relevant employees was indistinguishable in character from work performed by other employees directly engaged in the production and distribution of material wealth;
>
> (c) the activity of the employers, whilst not of itself directly productive of material wealth,

[45] *The Queen v The President etc of the Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers, Australia* (1959) 107 CLR 155.

[46] *The Queen v Marshall; Ex parte Federated Clerks Union of Australia* (1975) 132 CLR 595.

[47] *R v Cohen; Ex parte Motor Accidents Insurance Board* (1979) 141 CLR 577.

[48] *R v Holmes and Federated Clerks Union of Australia; Ex parte Manchester Unity Independent Order of Oddfellows in Victoria* (1980) 147 CLR 65.

[49] *The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488.

[50] *R v Holmes; Ex parte Public Service Association of New South Wales* (1978) 140 CLR 63.

[51] *Pitfield v Franki* (1970) 123 CLR 448.

[52] *R v McMahon; Ex parte Darvall* (1982) 151 CLR 57.

was so closely associated with it as to be 'incidental' or 'ancillary' to industry proper. The closeness of the connection required was a matter of degree.[53]

Obviously, the notion that "industry" was confined to manual labour must be taken to have been rejected by the time *Professional Engineers* was decided in 1959. Furthermore, with the passage of time, and the increasing integration of the modern economy, the dissenting opinion of Isaacs J in the *State Teachers* case becomes more and more compelling.

(ii) The subject-matter of the dispute must be industrial in character

It was noted earlier that in the course of his dissenting reasons in the *Municipal Employees Case*, Gavan Duffy J had indicated that in his opinion "industrial disputes" within the meaning of section 51(xxxv) were disputes with respect to the remuneration of employees or to "any matter directly affecting them in the performance of their duties". This form of words clearly suggests that Gavan Duffy J considered that the jurisdiction of the federal tribunal did not extend to "disputes" that had only an indirect bearing upon the performance of work by the employees to whom the alleged dispute related.

This reasoning is also evident in the opinion of O'Connor J in *Clancy*,[54] an early case involving the interpretation of the *Industrial Arbitration Act* 1901 (NSW). The case turned upon whether the definition of "industrial matter" in the 1901 Act extended to regulation of the closing hours of butchers shops. O'Connor J stated that:

> The construction of the section must be controlled by the subject matter, and the general intention of the Act. The subject matter is to regulate the relations between employers and employees...If we confine the effect of the sections to matters directly affecting industries, its scope and intention can be carried out. But once we begin to introduce and include in its scope matters indirectly affecting work in the industry, it becomes very difficult to draw any line so as to prevent the power of the Arbitration Court from being extended to the regulation and control of businesses and industries in every part.[55]

The views of Gavan Duffy J (in the *Municipal Employees Case*) and O'Connor J (in *Clancy*) stand in marked contrast to those of Isaacs and Rich JJ in the *Union Badge Case*:

> The words of the Constitution 'industrial disputes' stand unabridged by any specified subject matter of disputes; they fit themselves to every phase of industrial growth, and look only to the single fact of an industrial dispute. Parliament, shaping the national policy in accordance with the predominant political ideas for the time being, may or may not restrict causes upon which public intervention shall proceed; but unless it does so, we are unable to see how the court can impose any limitations on the matters which, at any given moment in the life of the Commonwealth, do in fact, and by their practical operation, affect at some

[53] For more detailed consideration of the industry requirement see Creighton, Ford & Mitchell 1993: ch 17; McCallum & Pittard 1995: 237-57; Williams 1998: 68-78.

[54] *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181.

[55] *Loc. cit.*, 207.

stage interrelations of employers and employed so as to give rise to what would then be regarded as an industrial dispute.[56]

Isaacs and Rich JJ clearly contemplated that the legislature could place restrictions upon the range of matters that could properly be made the subject matter of arbitral disputes. But they were equally clearly of the view that no such restrictions were inherent in section 51(xxxv) itself.

This distinction between inherent constitutional constraints upon the subject matter of industrial disputes and those imposed by the legislature became a constant refrain in the decisions of the High Court over the years following the *Municipal Employees* case. In some instances, the Court simply did not make clear whether it was dealing with the interpretation of the statutory definition of the term "industrial dispute", or with the metes and bounds of what was permissible in terms of section 51(xxxv). In other cases, it seemed to elide the two concepts. On either view, the High Court's doctrine on this subject was unclear and open to the criticism that it lacked consistency.

In particular, the Court appeared for a time to vacillate between an apparent desire to respect the principle of "managerial prerogatives", and an acceptance that parties that stand in an industrial relationship may properly engage in a dispute about any subject matter that pertains to that relationship – and that it is for the legislature to decide whether or not to invest the tribunal with the capacity to prevent and settle such disputes by conciliation and arbitration. This, in turn, helped to highlight the reality that if industrial parties chose to dispute in relation to a given subject matter, it served little practical purpose to determine that that subject matter stood outside the realm of arbitral disputes. Arguably, the fact that a given issue could not form the subject matter of an arbitral dispute might make disputation in relation to that issue less likely, because such disputation had been "delegitimated". More prosaically, a restrictive approach to the permissible subject matter of dispute simply served to put the parties beyond the reach of the umpire.

One of the most vigorous proponents of the view that matters of "managerial prerogative" stood outside the realm of arbitrable disputes was Barwick CJ. For example, in *Tramways No 2* his Honour put the matter thus:

> Whilst it is a truism that industrial disputes and awards made in their settlement may consequentially have an impact upon the management of an enterprise and upon otherwise unfettered managerial discretions, the management of the enterprise is not itself the subject matter of an industrial dispute.[57]

On the facts of that case, the High Court unanimously came to the view that it was not possible to have an arbitrable dispute over whether tram or bus services operated by a two-man crew should be

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[56] *Australian Tramway Employee's Association v Prahran & Malvern Tramways Trust* (1913) 17 CLR 680, 702. In this case the majority of the Court determined that a dispute about whether union members could wear a union badge on their watchchains whilst on duty was a dispute as to an industrial matter. Note also the expansive approach adopted by the majority in *Federated Clothing Trades v Archer* (1919) 27 CLR 207 (a demand that all garments made by respondent employers should carry a label identifying the actual manufacturer of the garment was found to be "industrial" in character).

[57] *The Queen v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1966) 115 CLR 443, 451. To the same effect, see also his Honour's observations in *R v Flight Crew Officers' Industrial Tribunal; Ex parte Australian Federation of Air Pilots* (1971) 127 CLR 11, 20.

converted to one-man operation. The Australian Tramway and Motor Omnibus Employees' Association had formulated its demands in this way, following an earlier majority decision of the High Court to the effect that a demand that all trams and buses operated by the respondents be manned by both a driver and a conductor and that no existing two-man tram or bus operation be converted to one-man operation without the consent of the union or an order of the Commission did not constitute an "industrial" matter in the requisite sense.[58]

Following the decision in the 1966 Case, the Union reformulated its claim yet again. This time, it demanded that employees should not be required to drive trams or buses without the assistance of a conductor. By a majority of 3:2 the High Court determined that this demand *did* operate to create an arbitrable dispute.[59] Just two years later, in *Gallagher*, the Court had to determine whether an arbitrable dispute could arise from a demand that the crew of a ship called the *Cellana* should include the three cooks claimed by the relevant union or the two proposed by the ship-owner. In a unanimous judgment, the Court stated that:

> We should have thought that it was beyond argument that a dispute on such a subject matter is an industrial dispute and that it clearly relates to the relations between employer and employees and to work done or to be done by employees.[60]

The twin concepts of managerial prerogatives and the requirement that the subject matter of a dispute should bear directly upon the relations of employers and employees permeated decisions of the High Court for many years. This resulted in a broad range of matters being adjudged to be beyond the reach of the tribunal. In addition to shop trading hours[61] and manning levels on buses, trams and aeroplanes,[62] they included: compulsory unionism,[63] occupational superannuation,[64] use of

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[58] *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne & Metropolitan Tramways Board* (1965) 113 CLR 228 (*Tramways No 1*).

[59] *Melbourne & Metropolitan Tramways Board v Horan* (1967) 117 CLR 78 (*Tramways No 3*). For a critical analysis of the *Tramways* decisions, see Maher & Sexton 1972: 111-14.

[60] *The Queen v Gallagher; Ex parte Commonwealth Steamship Owners' Association* (1968) 121 CLR 330, 335. The Court comprised Kitto, Taylor, Menzies, Windeyer and Owen JJ. Of these, two (Kitto and Owen JJ) had dissented in *Tramways No 1*, whilst two (Taylor and Menzies JJ) had been in the majority in that case. Taylor, Menzies and Owen JJ had been members of the Court in *Tramways No 2*. Menzies and Owen JJ had been part of the majority in *Tramways No 3*, whilst Taylor J had dissented in that case.

[61] In addition to *Clancy*, see *R v Kelly; Ex parte State of Victoria* (1950) CLR 64.

[62] See *Tramways No 1*, *Tramways No 2*, and *Australian Federation of Air Pilots v Flightcrew Officers Industrial Tribunal* (1968) 119 CLR 16. The logic of the position adopted by Barwick CJ in this latter would have the effect that occupational health and safety of employees might not constitute an industrial matter.

[63] *R v Wallis; Ex parte Employers' Association of Wool Selling Brokers* (1949) 78 CLR 529; *R v Findlay; Ex parte Victorian Chamber of Manufactures* (1950) 81 CLR 537 – cf *R v Gaudron; Ex parte Uniroyal Pty Ltd* (1978) 141 CLR 204. For comment on these decisions see Mitchell 1986, 1987, 1988; Weeks 1995.

[64] *R v Hamilton Knight; Ex parte Commonwealth Ship Owners' Association* (1952) 86 CLR 283. Although the

outworkers,[65] reinstatement of dismissed employees,[66] decisions on compulsory redundancy of airline pilots,[67] and direct deduction of trade union dues.[68] However, just as there were many examples of restrictive interpretations of either or both of the statutory definition of industrial matter or of section 51(xxxv), there were also many instances, especially in the 1970s, where the Court evinced a preparedness to adopt a more expansive approach than had been evident in cases such as the *Tramways* trilogy.[69] Nevertheless, by the early 1980s there was a clear need for a reassessment of an extensive and confusing body of learning on the industrial matter requirement –as with the requirement that for a dispute to be arbitrable the parties must be engaged in an industry.[70]

(iii) "What the two English words in their ordinary meaning conveyed to ordinary persons"

From a number of decisions in the 1970s and early 1980s it was clear that members of the High Court were becoming increasingly uncomfortable with the "veritable Serbonian bog of technicalities" in which the interpretation of the term "industrial dispute" was then mired.[71] For example, in *Darvall*

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decision is commonly cited as authority for the proposition that occupational superannuation could not constitute an "industrial matter", this may be to overstate the matter. This is because only two members of the Court (McTiernan and Williams JJ) expressly based their decision on the proposition that occupational superannuation could not constitute an "industrial matter". Two others (Webb and Kitto JJ) determined that it could constitute an industrial matter, whilst two (Dixon CJ and Fullagar J) based their decision on the fact that as the legislation then stood, awards could not operate for a period of more than five years. This would have meant that in many instances the award which created an entitlement to a superannuation payment would no longer be operative by the time the benefit became payable.

[65] *R v Judges of the Commonwealth Industrial Court; Ex parte Cocks* (1968) 121 CLR 313 – cf *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470, 477 (per Jacobs J).

[66] *R v Gough: Ex parte Meat and Allied Trades Federation (Australia)* (1969) 122 CLR 237; *R v Flight Crew Officers' Industrial Tribunal; Ex parte Australian Federation of Air Pilots* (1971) 127 CLR 11; *R v Portus; Ex parte City of Perth* (1973) 129 CLR 312.

[67] *R v Flight Crew Officers' Industrial Tribunal; Ex parte Australian Federation of Air Pilots* (1971) 127 CLR 11 – cf *R v Coldham; Ex parte Fitzsimons* (1976) 137 CLR 153.

[68] *R v Portus; Ex parte ANZ Group* (1972) 127 CLR 353 – cf *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96, discussed below.

[69] See for example: *R v Commonwealth Conciliation and Arbitration Commission: Ex parte Transport Workers' Union of Australia* (1969) 119 CLR 529 (demarcation disputes); *R v Coldham; Ex parte Fitzsimons* (1976) 137 CLR 153 (establishment and maintenance of a seniority list for airline pilots and its application in relation to promotion and redundancy); *R v Moore; Ex parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470, 477 (per Jacobs J) (terms upon which contractors might be engaged on a mine construction site); and *R v Gaudron; Ex parte Univoyal Pty Ltd* (1978) 141 CLR 204 (preference in employment for union members).

[70] For more detailed studies of the industrial matter concept, see Creighton, Ford & Mitchell 1993: ch 18; Pittard & Naughton 2003: 458-86.

[71] This colourful metaphor was employed by Higgins J (in the Commonwealth Court of Conciliation and Arbitration) in the aftermath of the decision in the second *Whybrow Case* – see *Australian Boot Trade Employees Federation v*

all members of the Court seemed somewhat frustrated by the fact that the applicant association of university teachers had chosen to try to establish that universities were engaged in activities that could properly be regarded as ancillary or incidental to industry, rather than seeking to reassert the authority of the approach adopted by Griffith CJ and O'Connor J in *Jumbunna*.[73]

In the following year, in the *Social Welfare Case*[74] the Court was unanimous in sweeping away a line of authority dating back to the decision in *State Teachers* in 1929.[75] In doing so, it affirmed the correctness of the approach expounded by Griffith CJ and O'Connor J in *Jumbunna*, and by Higgins J in the *Municipal Employees Case*[76] and in the *Insurance Staffs Case*.[77] Their Honours had no doubt that:

> The words ['industrial disputes'] are not a technical or legal expression. They have to be given their popular meaning – what they convey to the man in the street. And that is essentially a question of fact.[78]

They continued:

> It is, we think, beyond question that the popular meaning of 'industrial disputes' includes disputes between employees and employers about the terms of employment and the conditions of work...We reject any notion that the adjective 'industrial' imports some restriction which confines the constitutional conception of 'industrial disputes' to disputes in productive industry and organised business carried on for the purpose of making profits. The popular meaning of the expression no doubt extends more widely to embrace disputes between parties other than employer and employee, such as demarcation disputes, but just how widely it may extend is not a mater of present concern.[79]

Whybrow & Co (1910) 4 CAR 1, 42 – cf *Attorney-General (Queensland) v Riordan* (1998) 192 CLR1, 39-48 (per Kirby J).

The Queen v McMahon; Ex parte Darvall (1982) 151 CLR 57.

Loc. cit., 60-61 (per Gibbs CJ), 65-66 (per Mason J), 73-74 (per Murphy J) and 74-75 (per Brennan J).

The Queen v Coldham; Ex parte Australian Social Welfare Union (1983) 153 CLR 297. The Court comprised Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ.

State School Teachers' Association of Australia v Victoria (1929) 41 CLR 569.

Federated Municipal and Shire Council Employees' Union of Australia v Melbourne Corporation (1919) 26 CLR 508, 572.

Australian Insurance Staffs' Association v Accident Underwriters' Association (1923) 33 CLR 517 528-29.

(1983) 153 CLR 297, 312.

Loc. cit., 312-13.

This last observation clearly indicated that there was still some unfinished business in terms of the permissible subject matter of industrial disputes, despite the radical reassessment of the position relating to the range of persons who could engage in such disputes. Even here, however, the High Court did not discard the established doctrine in its entirety:

> It has been generally accepted...that the power conferred by s 51(xxxv) is inapplicable to the administrative services of the States...The implications which are necessarily drawn from the federal structure of the Constitution itself impose certain limitation on the legislative power of the Commonwealth to enact laws which affect the States (and vice versa). The nature of those limitations was discussed in *Melbourne Corporation v The Commonwealth*,[80] *Victoria v The Commonwealth* (the *Pay-roll Tax Case*)[81]...If at least some of the views expressed in those cases are accepted, a Commonwealth law which permitted an instrumentality of the Commonwealth to control the pay, hours of work and conditions of all State public servants could not be sustained as valid, but...the limitations have not been completely and precisely formulated and for present purposes the question need not be further examined.[82]

The question was "further examined" three years later in *Re Lee*,[83] where the Court unanimously rejected arguments put by the State of Queensland to the effect that State and private school teachers were not engaged in an "industry" in the relevant sense, and that teachers in State schools were involved in the administrative services of a State or in activities that were inherently a State activity. The approach adopted by the Court in that case meant that it was not necessary for it to express any decided view as to the existence or extent of the exclusion from the reach of the conciliation and arbitration system of employees of a State engaged in the administrative services of that State. Nevertheless, the members of the Court did see fit to express some preliminary views on this issue. For example:

> There is...much to be said for the proposition that, assuming that there is no discrimination against a State or singling out...the exercise of the arbitration power in the ordinary course of events will not transgress the implied limitations on Commonwealth legislative power. The exercise by the [the Australian Conciliation and Arbitration] Commission of its authority with respect to the employment relationship between a State and its employees in the course of settling an interstate industrial dispute appears to fall within s 51(xxxv). Although the purpose of the implied limitations is to impose some limit on the exercise of Commonwealth power in the interest of preserving the States as constituent elements in the federation, the implied limitations must be read to the express provision of the Constitution.[84]

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[80] (1947) 74 CLR 31.

[81] (1971) 122 CLR 353.

[82] (1983) 153 CLR 297, 313.

[83] *Re Lee; Ex parte Harper* (1986) 160 CLR 430.

[84] *Loc. cit.*, 453 (per Mason, Brennan and Deane JJ).

In *SPSF*,[85] the Court again took the view that it was not necessary to pronounce upon the nature and extent of the implied limitation in the case then before it.[86] However, the Court was finally called upon to express a decided view on this issue in *Re AEU*.[87]

This case arose out of a wide-ranging challenge by the State of Victoria (supported by several other States) to various aspects of federal industrial relations legislation as it applied to the State public sector in Victoria. The Court reaffirmed the preliminary position expressed in *Re Lee*, and in doing so identified two practical impacts of the implied limitation upon the operation of the federal system.[88] First:

> It seems to us that critical to that capacity of a State [ie the capacity to function as a government] is the government's right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds. An impairment of a State's rights in these rights in these respects would, in our view, constitute an infringement of the implied limitation. On this view, the prescription by a federal award of minimum wages and working conditions would not infringe the implied limitation, at least if it takes appropriate account of any special functions or responsibilities which attach to the employees in question.[89]

In other words, federal regulation of core terms and conditions of State employees would not of itself run foul of the implied limitation, but regulation of the numbers and identity of such employees would not be within the Federal power. However, the Court went on to identify a second category of State employees whose core terms and conditions could not be subject to any measure of federal regulation:

> In our view, also critical to a State's capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged. Hence, ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges would clearly fall within this group. The implied limitation would protect the States from

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[85] *Re State Public Services Federation; Ex parte Attorney-General (WA)* (1993) 178 CLR 249.

[86] This case arose out of some rather vague and highly inflated claims in a log of claims served upon the Governments of Western Australia and a number of other States. The case was decided on the basis that the Union's demands constituted a claim for pay increases as determined by the AIRC, and that as such they were not capable of giving rise to a genuine interstate dispute between the parties.

[87] *Re Australian Education Union; Ex parte State of Victoria* (1995) 184 CLR 188.

[88] A majority comprised of Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ delivered joint reasons. Dawson J dissented, essentially on the ground that he did not consider that an industrial dispute between a State and its employees could possess the necessary element of interstatedness to fall within the jurisdiction of the tribunal.

[89] (1995) 184 CLR 188, 232.

> the exercise by the [Australian Industrial Relations] Commission of power to fix minimum wages and working conditions in respect of such persons and possibly others as well.[90]

The net effect of these decisions is that the only employees who fall outside the reach of the conciliation and arbitration power is a somewhat imprecisely defined group of senior State public servants and office holders and, in respect of certain issues, some less senior employees of the States. It remains to consider the range of matters in relation to which the federal tribunal may exercise powers of conciliation and arbitration.

It will be recalled that in *Social Welfare* the High Court had expressly reserved the question of the extent to which the conciliation and arbitration power would extend to disputes between parties other than employer and employee, "such as demarcation disputes". By implication, it had also reserved reconsideration of the "industrial matter" concept. Manifestly however, the existing decisional law in this area could not long survive a reversion to a broader view of the concept of "industrial dispute" defined by reference to what the "man in the street" would understand by the term.[91]

That this was indeed the case was evident from two 1984 decisions concerning the powers of the (then) Victorian tribunal. First, in the *Federated Clerks Case*,[92] a majority of the High Court determined that the concept of "industrial matter" as used in the *Industrial Relations Act* 1979 (Vic) could encompass a demand for the insertion in an industrial instrument of a clause requiring notification and consultation in advance of technological change, where that change might have "material effects", including "termination of employment, the elimination or diminution of job opportunities, promotional opportunities, job tenure or the use of skills, the alteration of hours of work, and the need for retraining or transfer of employees to other work locations." In the course of his reasons, Mason J clearly signalled that at least some members of the Court were prepared to countenance a reconsideration of the notion that matters of managerial prerogative fell outside the realm of industrial matters:

> Whether the concept of management or managerial decisions can be sustained as an absolute independent criterion of jurisdiction...is an important question that may require future consideration...The prospect of industrial tribunals regularly reviewing business policy decisions made by employers, and thereby controlling the economy to a substantial extent, is indeed a daunting one. On the other hand, the popular understanding of an industrial dispute extends to any dispute between employees and employers that may result in the dislocation of industrial relations...What is more, reflection on the serious impact on the community of industrial dislocation suggests that the scope and purpose of statutes regulating conciliation and arbitration and industrial relations extend to the conferment of jurisdiction on industrial tribunals in relation to industrial disputes in their broadest conception.[93]

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[90] *Ibid.*

[91] *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297, 312.

[92] *Federated Clerks Union of Australia v Victorian Employers Federation* (1984) 154 CLR 472.

As will appear presently, the foreshadowed reconsideration did not take long in coming. Further evidence of its imminence was furnished by the decision in the second of the 1984 Victorian cases, *Slonim v Fellows*.[94] That case arose out of a decision by the Chairman of a Conciliation and Arbitration Board, subsequently affirmed by the Full Court of the Supreme Court of Victoria, that the Board did not have the capacity to deal with a dispute between a trade union and an employer concerning the reinstatement of a member of the union who had been dismissed by the employer. The High Court unanimously found that such a dispute did relate to an industrial matter in the relevant sense, although the Court also expressed some reservations as to whether there could be an arbitrable dispute about reinstatement between a dismissed employee and their former employer, since by definition the employer/employee nexus would have been broken by the dismissal.[95]

Further erosion of the notion that decisions concerning termination of employment and reinstatement fell outside the realm of arbitrable matters came with the decision in *Ranger Uranium*[96] although the importance of ensuring that claims in this area are made in proper form is clearly evidenced by *Wooldumpers*.[97]

Meanwhile, any doubt as to whether claims for payment into an occupational superannuation fund could constitute an industrial matter was put to rest by the decision in *Manufacturing Grocers*.[98] In the course of its decision, the High Court had this to say about the need for a "relevant connection" between the subject matter of a purported dispute and the relationship of employer and employee:

> For present purposes, it is sufficient to say that a matter must be connected with the relationship between an employer in his capacity as an employer and an employee in his capacity as an employee in a way which is direct and not merely consequential for it to be

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[93] *Loc. cit.*, 491.

[94] (1984) 154 CLR 505.

[95] *Loc. cit.*, 514 (per Wilson J).

[96] *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656.

[97] *Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Victoria) Ltd* (1989) 166 CLR 311. See also *Re Boyne Smelters Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees of Australia* (1993) 177 CLR 446; *Re Printing and Kindred Industries Union; Ex parte Vista Paper Products Pty Ltd* (1993) 67 ALJR 604.

[98] *Re Manufacturing Grocers' Employees Federation (Australia); Ex parte Australian Chamber of Manufactures* (1986) 160 CLR 341. It should be noted that the demands in this instance were rather less ambitious than in *R v Hamilton Knight; Ex parte Commonwealth Steamship Owners' Association* (1952) 86 CLR 283, which is discussed at note 64, *supra*. In *Re Amalgamated Metal Workers Union of Australia; Ex parte Shell Co of Australia Ltd* (1992) 174 CLR 345, the High Court determined that the identity and form of superannuation schemes into which superannuation payments should be made was a matter that pertained to the employment relationship in the relevant sense. On the other hand, as noted earlier, the Court in *Re Finance Sector Union of Australia; Ex parte Financial Clinic (Vic) Pty Ltd* (1993) 178 CLR 352 adopted a restrictive view of the capacity to make award provision in respect of superannuation contributions on behalf of non-union members.

an industrial matter capable of being the subject of an industrial dispute.[99]

These observations constituted the starting point for the Court's rejection of managerial prerogatives as an inherent restriction on the jurisdiction of the tribunal in *Re Cram*.[100] That case arose out of a dispute in the mining industry over manning levels and recruitment. The Colliery Proprietors' Association argued that such matters could not properly be made the subject of an industrial dispute because it did not directly affect the relationship between employer and employee as such, rather it is a dispute about the policy and procedure to be adopted by the employer in the management of his business enterprise and thus falls within the scope of managerial prerogatives." [101] In a joint judgment, the High Court decisively rejected this argument:

> we reject the suggestion...that managerial decisions stand wholly outside the area of industrial disputes and industrial matters. There is no basis for making such an implication. It is an implication which is so imprecise as to be incapable of yielding any satisfactory criterion of jurisdiction...[102]

The Court was not unmindful of the concerns expressed by O'Connor J in *Clancy* about the jurisdiction of the tribunal being extended "to the regulation and control of businesses and industries in every part." Their Honours acknowledged that these observations "probably echoed" what was received doctrine at an earlier time." However:

> Over the years that climate of opinion has changed quite radically, perhaps partly as a result of the extended definition of 'industrial matters' in s 4 of the *Conciliation and Arbitration Act* and partly a result of a change in community attitudes to the relationship between employer and employee...No doubt our traditional system of industrial conciliation and arbitration has itself contributed to a growing recognition that management and labour have a mutual interest in many aspects of the operation of a business enterprise. Many management decisions, once regarded as the sole prerogative of management, are now correctly seen as directly affecting the relationship of employer and employee and constituting an 'industrial matter'.[103]

This did not mean that the cautionary note sounded by O'Connor J in 1904 should be disregarded entirely. On the contrary, whilst managerial prerogative did not go to the jurisdiction of the tribunal:

> ...it is an argument why an industrial tribunal should exercise caution before it makes an award in settlement of a dispute where that award amounts to a substantial interference

[99] *Loc. cit.*, 353.

[100] *Re Cram; Ex parte New South Wales Colliery Proprietors' Association Ltd* (1987) 163 CLR 117.

[101] *Loc. cit.*, 133.

[102] *Loc. cit.*, 136.

[103] *Loc. cit.*, 135.

> with the autonomy of management to decide how the business enterprise shall be efficiently conducted. The evident importance of arming such tribunals with power to settle industrial disputes capable of disrupting industry is a powerful reason for refusing to read down the wide and general definition of 'industrial matters' in the Commonwealth and State Acts by reference to any notion of managerial prerogatives as such.[104]

By the late 1980s, therefore, it appeared that the integrity of the approach to the definition of "industrial disputes" adopted by Griffith CJ and O'Connor J in *Jumbunna* had effectively been restored. With a limited exception in respect of senior State public servants, no group of employees was placed beyond the reach of the system of conciliation and arbitration by reason only of the nature of the work they performed or of their employer's business. Furthermore, the range of matters in relation to which parties could legitimately engage in disputation was to be constrained, not by artificial constructs such as the managerial prerogative doctrine, but rather by the need for an appropriate degree of connection to the employment relationship, and by what the Parliament considered could appropriately be the subject of regulation through conciliation and arbitration.

The importance of this last proposition is neatly illustrated by the decision in *Alcan*.[105] In that case, the High Court determined that although it was now clear that there was no constitutional impediment to award provision concerning direct debit of trade union dues, at any rate where the employee concerned had authorised the deduction,[106] the fact that the legislature had not changed the definition of "industrial matter" since the decision in *Portus*[107] must be taken to evince an intention that the matter should remain outside the realm of arbitrable matters. Even more importantly, the *Workplace Relations and Other Legislation Amendment Act* 1996 renamed and amended the former *Industrial Relations Act* 1988. Among the most significant of the amendments effected by that measure was the introduction of what is now section 89A of the *Workplace Relations Act* 1996. In simple terms, this means that the AIRC now has power to make arbitrated awards only in relation to a list of 20 "allowable award matters". To a large extent, these allowable matters mirror the range of matters that were traditionally regarded as falling outside the scope of "managerial prerogative", and thus to be within the jurisdiction of the tribunal.[108] Put differently, matters of managerial prerogative have once again effectively been put beyond the reach of the award-making powers of the federal tribunal, having clearly been recognised to be within its constitutionally permissible jurisdiction only in 1987. This time the exclusion is by statute, rather than interpretation of section 51(xxxv). Obviously, if the legislation were to be changed again, the

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[104] *Loc. cit.*, 136-37.

[105] *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96.

[106] The Court did not express any decided view as to whether deductions which had not been authorised by the employee fell within the scope of section 51(xxxv), but clearly had some doubts on the matter – *loc. cit.*, 104.

[107] *The Queen v Portus; Ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353.

[108] For an unsuccessful challenge to the validity of the removal of provisions dealing with non-allowable matters from existing awards see *Re Pacific Coal Pty Limited; Ex parte Construction, Forestry, Mining & Energy Union; Construction, Forestry, Mining & Energy Union v Commonwealth* (2000) 203 CLR 346.

state of constitutional authority would presumably remain that set out in *Clancy* and *Alcan*.

4. The Separation of Powers Doctrine and the Law of Conciliation and Arbitration

It is clear from the opening words of section 51 of the Constitution that the legislative powers conferred upon the Federal Parliament under that section must be exercised subject to the other provisions of the Constitution – express and implied. The "implied limitation" that constrains the jurisdiction of the federal tribunal in relation to certain categories of employees engaged in the administration of the States furnishes an interesting example of the impact of an implied constitutional principle of general application upon the operation of the system of conciliation and arbitration. An even more dramatic illustration of this impact is provided by the doctrine of separation of powers as applied by the High Court (in 1956) and the Judicial Committee of the Privy Council (in 1957) in the *Boilermakers Case.*[109]

Prior to 1919, members of the Commonwealth Court of Conciliation and Arbitration were appointed for fixed, renewable terms of seven years. In *Alexander's Case,* [110] the High Court cast doubt upon whether it was permissible in constitutional terms for the judicial power of the Commonwealth to be vested in a tribunal, the members of which did not enjoy judicial tenure. This resulted in the 1904 Act being amended in 1919 to provide that judges of the Commonwealth Court of Conciliation and Arbitration had the same security of tenure as the members of all other courts established under Chapter III of the Constitution. There the matter rested until 1956.

Boilermakers arose out of a challenge to the power of the Commonwealth Court of Conciliation and Arbitration to include provisions in awards banning the taking of industrial action, and then to impose fines for failure to observe those same orders. The Boilermakers' Society argued that enforcement of the bans clauses involved the exercise of a judicial power of the Commonwealth, and that it was not constitutionally permissible for those powers to be vested in a body that also exercised arbitral functions. This challenge was upheld by the High Court by a majority of 4:3. In the course of this decision, the majority said:

> It is difficult to see what escape there can be from the conclusion that the Arbitration Court...is established as an arbitral tribunal which cannot constitutionally combine with its dominant purpose and essential functions the exercise of any part of the strictly judicial power of the Commonwealth. The basal reason why such a combination is constitutionally inadmissible is that Chapter III does not allow powers which are foreign to the judicial power to be attached to the courts created by or under that chapter for the exercise of the judicial power of the Commonwealth.[111]

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[109] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HC) and *Attorney-General (Commonwealth) v The Queen* (1957) 95 CLR 529 (PC).

[110] *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

[111] (1956) 94 CLR 254, 289 (per Dixon CJ, McTiernan, Fullagar and Kitto JJ). The dissentients were Williams, Webb and Taylor JJ.

Various members of the High Court have suggested from time to time to time that *Boilermakers* may have been incorrectly decided and/or that it introduced an unnecessary rigidity that might need to be reconsidered. Of particular interest in this regard are the observations of Barwick CJ in the *BLF Case*:

> The principal conclusion of the *Boilermakers' Case* was unnecessary...for the effective working of the Australian Constitution or for the maintenance of the separation of the judicial power or for the protection of the independence of courts exercising that power. The decision leads to excessive subtlety and technicality in the operation of the Constitution without...any compensating benefit. But none the less and notwithstanding the unprofitable inconveniences it entails it may be proper that it should continue to be followed. On the other hand, it may be thought so unsuited to the working of the Constitution in the circumstances of the nation that there should now be a departure from some or all of its conclusions.[112]

Nevertheless, in recent years, the High Court has on several occasions reaffirmed that the principle of separation of powers is a fundamental tenet of the Constitution.[113] It has struck down decisions of industrial tribunals which were adjudged to have stepped over the line of what was constitutionally permissible by reason of the *Boilermakers*' principle.[114]

The Commonwealth's immediate response to the decision in *Boilermakers* was to legislate retrospectively to validate decisions handed down by the Commonwealth Court of Conciliation and Arbitration over the previous decades, which had technically been rendered invalid by the decision of the High Court. The Commonwealth also moved to separate the judicial and non-judicial functions of the Court of Conciliation and Arbitration. The former were initially vested in the Commonwealth Industrial Court. In 1976 they were transferred to the newly-established Federal Court of Australia.[115] In 1993 these powers were again transferred, this time to the Industrial Relations Court of Australia. However, in 1996 they were returned to the Federal Court of Australia, where they presently reside. In accordance with invariable federal convention, none of the Commonwealth Court of Conciliation and Arbitration, the Commonwealth Industrial Court or the Australian Industrial Court were abolished whilst there remained any member of the Court who had not resigned or died in office. Consistently with this convention, the Industrial Relations Court of Australia remains in being, even though its jurisdiction is now vested in the Federal Court.

In 1956 the non-judicial powers were vested in the Commonwealth (later Australian) Conciliation

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[112] *The Queen v Joske: Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1974) 130 CLR 87, 90. See too Mason J, 102. See also *R v Joske; Ex parte Shop Distributive and Allied Employees Association* (1976) 135 CLR 194. For comment see Lane 1981.

[113] See for example *Harris v Caladine* (1991) 172 CLR 84; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1997) 189 CLR 1; *Re Wakin; Ex parte McNally* (1999) 198 CLR 511.

[114] See for example *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 143 CLR 140.

[115] For comment on this phase in the history of the judicial power see McCallum 1992.

and Arbitration Commission, where they remained until that body was abolished in 1988, and replaced by the AIRC.[116]

It is not easy to assess the practical impact of the application of the *Boilermakers* principle in the context of the law of conciliation and arbitration. Of course, there was an immediate and direct impact in terms of the restructuring of the tribunal. But beyond that it is difficult to express any very definite view. In part, this stems from the fact that it is impossible precisely to define what constitute judicial as opposed to non-judicial functions.[117] Nevertheless, it does seem reasonable to suppose that the power to enforce legislation and definitively to pronounce upon its meaning are core elements of the judicial function. The same might be said for making a definitive determination of the rights and duties of parties vis-a-vis each other, although this adjudicative function inevitably merges into the quasi-legislative function of creating new rights through processes of conciliation and arbitration.

As indicated, the entire *Boilermakers* episode stemmed from a challenge to the capacity of the Commonwealth Court of Conciliation and Arbitration to enforce its own decisions. Manifestly, the newly created Conciliation and Arbitration Commission lacked the power to do this. There are some who would argue that the standing of the tribunal was diminished in consequence. On the other hand, the Commonwealth Industrial Court was invested with extensive powers of enforcement, and it might equally be said that the effective demise of those powers in the aftermath of the Clarrie O'Shea episode in 1969 had a rather greater effect upon the standing of the institutions of the system than the separation of dispute-resolution and enforcement after 1956. Nevertheless, had the enforcement powers been vested in a tribunal that was rather more in tune with the sensitivities and nuances of industrial relations, the O'Shea debacle might have been avoided.[118]

There is little reason to suppose that the loss of the power to interpret awards has had any great impact upon the functioning of the federal industrial tribunal. Only a very small number of cases involving the interpretation of awards have come before the courts over the years. Instead, it has been common practice for such matters to be brought before the Commission, which then determines what the award *ought* to mean in light of the representations of the parties, and then proceeds to give effect to its decision, where necessary, by varying the instrument in the appropriate manner. In a polity governed by the rule of law, it is inevitable that the AIRC will regularly be required to give meaning not only to awards but to statutes (including its own constituent statute) and to the Constitution itself.

The most vexed issues that arise in this area concern the line between adjudication on existing rights

[116] This apparently innocuous change generated significant controversy in consequence of the decision of the government of the day not to appoint one of the members of the Australian Conciliation and Arbitration Commission, Justice Staples, to the new tribunal. See Kirby 1989, 1990.

[117] Perhaps the best-known attempt to describe the judicial function is to be found in the judgment of Griffith CJ in *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357. See also more recent decisions such as *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 378 (per Kitto J); *Attorney-General (Commonwealth) v Breckler* 197 CLR 83 at 111 [42-47] (per Gleeson CJ, Gaudron, McHugh, Hayne, and Callinan JJ), 124-31 [78-95] (per Kirby J).

[118] For detailed accounts of the O'Shea incident see Sykes & Glasbeek 1972: 551-52; d'Alpuget 1977: 232-35; Hutson 1983: 264-80; Hancock 1985: 59-61. On the "paradox" this incident created for the federal system, see Creighton 1991.

and the creation of new ones. Just how fine the line between the two can be is illustrated by the following passage from the decision of the High Court in *Ranger Uranium*:

> A finding that a dismissal is harsh, unjust or unreasonable involves the finding of relevant facts and the formation and expression of a value judgment in the context of the facts so found. Although findings of fact are a common ingredient in the exercise of judicial power, such findings may also be an element in the exercise of administrative, executive and arbitral powers...So too with the formation and expression of value judgments.
>
> In our view the fact that the Commission is involved in making a determination of matters that could have been made by a court in the course of proceedings instituted under...the Act does not ipso facto mean that the Commission has usurped judicial power, for the purpose of inquiry and determination is necessarily different depending on whether the task is undertaken by the Commission or by a court. The purpose of the Commission's inquiry is to determine whether rights and obligations should be created. The purpose of a court's inquiry and determination is to decide whether a pre-existing legal obligation has been breached, and if so, what penalty should attach to the breach.[119]

5. Future Directions

The industrial conciliation and arbitration power in section 51(xxxv) of the Australian Constitution was the product of a very particular set of historical circumstances. It seems safe to assume that most of those who supported the inclusion of section 51(xxxv) in the Constitution, and probably all of those who opposed its inclusion, envisaged that the power to legislate in reliance upon this provision should be used, if at all, only in highly exceptional circumstances such as the disputes of the 1890s.

The reality has proved rather different. From its first sitting, the Parliament evinced an intention that the power be utilised to a substantial extent, and the system established in reliance upon that power, together with tariff protection and the "White Australia" policy, became one of the three pillars of social policy in Australia for the greater part of the first century of Federation. The Commonwealth's expansionary ambitions were also evidence by a number of unsuccessful attempts to extend the reach of the power by constitutional amendment.[120]

The High Court was initially inclined to adopt a restrictive approach to the interpretation of section 51(xxxv), and of legislation enacted in reliance upon it. This was especially evident during the early years of the 20th century, when the Court was comprised of justices who had been involved in the debates leading to the adoption of the Constitution, a majority of whom were particularly sensitive about the need to maintain the "federal balance". Nevertheless, even during this phase in its history, the High Court handed down a number of decisions that sowed the seeds of the later dominance of

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[119] (1987) 163 CLR 656, 665-66.

[120] There were attempts at such reform in 1911, 1913, 1919, 1926, 1944, 1946 and 1973. For further discussion of these endeavours, see Frazer 2001.

the federal system of conciliation and arbitration. The most important of these was *Jumbunna*,[121] which not only legitimated the legislative provisions that provided the basis for the registration and operation of organisations of employers and employees, but also endorsed a view of the concept of an "industrial dispute" that subsequently provided a basis for federal regulation of almost all aspects of the employment relationship and in respect of a very large cohort of the Australian workforce.

Following significant changes in its size and composition in 1913, the High Court adopted a more consistently expansive approach to the interpretation of section 51(xxxv), and of the *Commonwealth Conciliation and Arbitration Act* 1904. In certain instances, this entailed overruling some of the earlier restrictive interpretations.[122] In others it involved breaking new ground.[123] The result was that by 1935 the federal system of conciliation and arbitration was well on its way to becoming the dominant force in social and economic regulation that it remained until almost the end of the 20th century.

Just as the Court handed down "expansionary" decisions during its early "restrictive" period, so it continued to adopt "restrictive" interpretations of aspects of section 51(xxxv) and/or the 1904 Act even during its more expansive phase. In large measure this reflected a continuing tension between those members of the Court who were concerned to preserve the "federal balance" and those who took the view that the regulation of work relations as an integral part of regulation of the national economy, and that, as such, it should be subject to national regulation. It also reflected a tension between those who took an expansive view of the range of matters that could properly be the subject matter of contention between employees, employers and their respective organisations, and those who took a more restrictive approach to such issues.

Despite such tensions, the system evolved in such a way that by the outbreak of World War II it constituted the basis for the regulation of the core terms and conditions of employment of the great majority of the Australian workforce – whether through direct coverage by the federal tribunal, or though flow-on in the State systems.

Yet, by the time the High Court seemed at last to be willing and able to adopt a consistent view of the nature and extent of the conciliation and arbitration power under the Constitution, the traditional system was becoming increasingly unfashionable. In particular, from the late 1980s onwards there was increasing pressure for a move away from determination of terms and conditions of employment through centralised processes of third party conciliation and arbitration in favour of direct negotiation of terms and conditions at the level of the enterprise. These pressures have resulted in significant changes to the legislative framework – notably in 1993 and 1996. To some extent the reaction, evident in the legislation introduced by successive governments of differing political complexions, may have reflected the dynamic of global economic forces as they impacted upon Australia, and a belief that the highly regulated system of conciliation and arbitration, eventually endorsed by the High Court, was now out of harmony with the needs of the Australian economy and the best interests of employers and employees alike.

[121] *Jumbunna Coal Mine No liability v Victorian Coal Miners' Association* (1908) 6 CLR 309.

[122] See for example, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[123] See, eg *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528; *Metal Trades Employers' Association v Amalgamated Engineering Union* (1935) 54 CLR 387.

The reasons for this shift of emphasis are beyond the scope of this chapter. But the emergence of enterprise bargaining has most assuredly had a profound impact upon the use to which the conciliation and arbitration power is now put, and the use to which it is likely to be put in the foreseeable future.

As noted earlier, the federal system of conciliation and arbitration was originally conceived as a support mechanism for collective bargaining, with arbitrated outcomes being imposed upon the parties only where collective bargaining, assisted by conciliation where appropriate, proved incapable of preventing or settling the differences between the parties. Gradually, conciliation and arbitration became the norm. But it is important to appreciate that they never entirely displaced collective bargaining – rather, collective bargaining assumed forms which do not conform to the traditional North American or (to a lesser extent) European conception of that phenomenon.[124] The changes of the last fifteen years have seen a reversion to collective bargaining as the centre-piece of the system, with conciliation and arbitration as a kind of default or "safety net".[125] In many respects, these legislative changes have reflected, and further stimulated, modifications that were already occurring in a changing marketplace.

The early attempts to encourage enterprise bargaining - such as those contained in sections 112-117 of the *Industrial Relations Act* 1988, and their replacement in Division 3A of Part VI of the 1988 Act - all drew upon the conciliation and arbitration power for their constitutional underpinning. However, the *Industrial Relations Reform Act* 1993 represented a radical break from the past in this respect. Whilst the principal enterprise bargaining stream still relied mainly upon the conciliation and arbitration power, a new stream of "enterprise flexibility agreements" drew upon the corporations power in section 51(xx) of the Constitution, whilst provisions recognising (for the first time in federal law) a limited right to strike drew, in part, upon the external affairs power in section 51(xxix).[126]

This shift away from reliance upon the conciliation and arbitration power gained further momentum with the passage of the *Workplace Relations and Other Legislation Amendment Act* in 1996. As noted earlier, this measure renamed the 1988 Act as the *Workplace Relations Act* 1996. It further consolidated the shift to enterprise bargaining, and introduced an individualised bargaining option in the form of Australian Workplace Agreements (AWAs).[127] It is still possible to enter into certified agreements to prevent or settle interstate industrial disputes.[128] However, the great majority of agreements are now made between corporations and registered unions or between corporations

[124] See further Creighton, Ford & Mitchell 1993: 858-62; Creighton 2003 – cf Isaac 1958; Laffer 1958; Niland 1978.

[125] This shift of emphasis is neatly encapsulated in the Principal Object of the current version of the Federal legislation as set out in section 3 of the 1996 Act.

[126] For a brief summary of the legislative changes of the 1990s concerning enterprise bargaining see Creighton & Stewart 2000: 20-22, 148-50. For more detailed analysis see Mc Callum 1993; Naughton 1994; Pittard 1997; McCarry 1998. On protected industrial action see McCarry 1994, 1997. On the Constitutional validity of these provisions see *Victoria v Commonwealth* (1996) 187 CLR 416. For international perspectives see McCallum 1994; Creighton 1997; Kirby 2002.

[127] WR Act, Part VID. For comment see Coulthard 1997, 1999; Stewart 1999; Creighton & Stewart 2000: 174-87. See also Roan, Bramble & Lafferty 2001; Fetter 2002; Mitchell & Fetter 2002.

and their employees under Division 2 of Part VIB of the WR Act. The provisions relating to AWAs also rely for their constitutional validity upon the corporations power.

The year 1996 also saw another major development in the evolution of the federal system of industrial regulation. For the first time one of the States, Victoria, referred a significant part of its capacity to legislate with respect to industrial relations to the Commonwealth in reliance upon section 51(xxxvii) of the Constitution. So far, no other State has followed this lead. However, the Victorian referral clearly has the effect that for that jurisdiction it is not necessary to draw upon the conciliation and arbitration, corporations or external affairs power as a basis for federal regulation of referred matters.[129] In respect of Victoria, subject to the Constitution, the Federal Parliament enjoys both referred State and federal legislative powers.

It would be erroneous to suppose that the conciliation and arbitration power has been rendered redundant by these legislative and economic changes. Awards made in reliance upon that power still play a crucial role in the federal industrial relations system, whether as the basis for the no-disadvantage test which must be satisfied by every certified agreement or AWA,[130] or as the basis for regulating terms and conditions of employment for those employees who for one reason or another are not covered by a certified agreement or an AWA. Important issues of social policy, and safety net wage increases, are still dealt with through test cases in the AIRC.[131] Furthermore, the federal tribunal still plays an important role in the day to day operation of the industrial relations system – for example by means of conciliation to facilitate the making of certified agreements.

Nevertheless, it seems clear that laws enacted in reliance upon the conciliation and arbitration power will never resume their former dominant role in the regulation of work relations in Australia.[132] Yet, it is equally clear that the history of the national industrial relations tribunal over the first century of its existence has been one of remarkable resilience, persistence and adaptability. That history has reflected the expanding concept of Australian nationhood; the stable and changing features of the applicable federal legislation; the evolving constitutional doctrines of the High Court concerning the relevant heads of legislative power; the interpretative principles of constitutional law to be applied in fathoming the depths of these powers; the alterations that have occurred in the national and international economies; the changing educational and training levels of the Australian workforce; fluctuating levels of union membership; increasing challenges to the very nature of work; and differing political fashions.

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[128] See WR Act, Part VIB, Division 3.

[129] For comment on the Victorian referral see Kollmorgen 1997.

[130] See *Workplace Relations Act* 1996, sections 170LT(2), 170VPB, 170VPC, 170X-170XF.

[131] See for example *Reasonable Hours Case*, AIRC, 23 July 2002, PR 072002; *Living Wage Case 2002*, AIRC, 9 May 2002, PR 002002.

[132] For overviews and assessments of the traditional system, and the continuing role of conciliation and arbitration, see: Creighton 1999: 645-56 and 2000; Kirby 2001. For (premature) obituaries see Mitchell & Rimmer 1990; Vranken 1994; Dabscheck 2001.

There seems to be no doubt that the national industrial relations tribunal will continue to adapt and change both in its functions and in its methods of operation. After a century, the impediments to such adaptation and change now seem less likely to be constitutional in character and more likely to be the emergence within the economy and the institutions of federal government, of a different vision for the role of the tribunal in its second century.

If the history of the first century is any guide only two things can be said of the future with a fair degree of certainty. First, that there will continue to be a need for a national tribunal of some kind to supplement and modify the outcomes of unregulated market forces. And secondly, that the alteration of the established functions of the tribunal and the accretion of new ones, cannot accurately be predicted in a rapidly changing world of economic, social and technological innovation.[133]

[133] Kirby 2002, 575-76.

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