RESTORING THE FRONTIERS OF AN UNRULY PROVINCE: INTERGOVERNMENTAL IMMUNITIES AND INDUSTRIAL DISPUTES

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I. THE SOCIAL WELFARE UNION CASE

In 1959 Dixon C.J. contrasted two examples of employment.[1] On the one hand, his Honour considered employees like lift attendants and office cleaners. Demands upon their employers by such employees about their wages and conditions of work would be demands of an industrial character. It would not make any difference to the character of the demand that the employee worked for a private enterprise employer like, say, General Motors' Holden Pty Ltd or was employed by the State government in one of its own buildings such as a land tax office. On the other hand, an officer of the State employed in assessing a State land tax would not be engaged in work of an industrial character. Such an employee "stood outside the whole world of productive industry and organized business".[2]

Therein lies the problem that has bedevilled the attempts of the Commonwealth Government to regulate the nation's industrial relations. Since 1906, successive High Court benches have wrestled with the conundrum of providing the Commonwealth with powers to preserve the national economy from disruption by work-related disputes and, at the same time, providing adequate protection for the States from Commonwealth interference.

If the Commonwealth is to regulate industrial relations effectively, it must attempt to embrace within its jurisdicton all employees performing work of a similar nature. Otherwise, the disuniformity in the conditions of employment which would result from having independent authorities regulating the same workers would disrupt rather than stabilize industrial relations. But, because the Constitution establishes a federal system of government, the High Court has also perceived a need to protect the ability of the States to act independently within the residue of constitutional power conferred on them. The rise of "big government" has brought these two objectives into conflict.

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[1] *Reg.* v. *Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers* (1959) 107 C.L.R. 208, 234-5, the *Professional Engineers'* case.

[2] Ibid.

The Commonwealth Parliament is empowered to make laws with respect to ". . . Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state".[3]

Pursuant to the "industrial disputes" power the Commonwealth has established the Conciliation and Arbitration Commission.[4] The extent of the Commission's coverage of the Australian workforce is vital to how effectively it operates to reduce industrial disruption. The Commission is the only tribunal determining wage rates and working conditions on a national basis. Hence, it is essential that the Commission should be the paramount authority in the Australian system of industrial regulation.[5]

Australia is not composed of a number of fragmented and isolated economies. Federation and technological improvements in communications have combined to integrate the States and Territories into a national economy. Many of the problems that beset one region of the country require solution across the nation. Developments in one State will have repercussions nationally. The responses to these problems must be co-ordinated. Since State bodies are independent and concerned primarily with local needs, they are likely to adopt conflicting approaches.[6]

The basic determinant of the proceedings which may be brought before the Commission is what the term "industrial" in the "industrial disputes" power comprehends. Through the device of the "paper dispute", it is fairly simple to satisfy the requirement that a dispute exists.[7] Since most participants before the Commission are organized on a federal basis, to extend the dispute "beyond the limits of any one state" is also straightforward.[8]

For a dispute to have the necessary industrial quality it must possess two characteristics.[9] First, the dispute must be between parties who are in an industrial relationship. Secondly, the parties must be in disagreement about industrial matters like wage levels and working conditions.

On 9 June 1983, the Full Bench of the High Court handed down the decision in the *Social Welfare Union* case.[10] The case continued the heavy centralist trend developed in the High Court over recent years and proved to be a landmark decision on what will constitute an industrial relationship sufficient to give a dispute the industrial character required by the Constitu-

[3] The Constitution of the Commonwealth of Australia s. 51 (xxxv). This power is hereafter referred to as the "industrial disputes" power.

[4] The Commission. *The Conciliation and Arbitration Act* (Cth) 1904, as amended, Parts II and III.

[5] For the importance of a strong, centralised system of wage fixation to the Commonwealth government's economic policies: Commonwealth Government, *The Economic Outlook* cited in "Caution: Recovery at Work" the *Age* 1984, p. 18, col. 7.

[6] E.g. the Victorian Government's settlement of the Nursing dispute in 1984 is expected to have repercussions on funding and staffing arrangements of hospitals Australia-wide: Mark Metherell, "$14m Staff Agreement Ends Nurses' Dispute" the *Age*, 17 August 1984, p. I.

[7] See J. J. Macken, *Australian Industrial Laws: The Constitutional Basis* (2 edn, 1980) 50-2.

[8] See below part II.

[9] Macken, 64-74.

[10] *Reg.* v. *Coldham; Ex parte the Australian Social Welfare Union* (1983) 47 A.L.R. 225.

tion. Yet, at the same time, the High Court has provided the potential for an intriguing and previously unsuspected federalist implication.

The Australian Social Welfare Union has sought to obtain an award covering project officers employed by the Community Youth Support Scheme. This scheme was a Commonwealth project. It was designed to enhance the employability of young unemployed through programs to develop the basic job skills and maintain the morale of the young unemployed. The project officers were employed by locally organized committees to manage the day to day running of the Scheme at that local level.

The High Court, in an unanimous and joint judgement,[11] rejected the approach predominant during the previous sixty-five years and formulated an interpretation based on the seminal *Jumbunna* case of 1908[12] and the purpose of the "industrial disputes" power.

The view which was refected was founded on narrow and technical conceptions of what constituted an industry. To qualify as industrial under this test, the work concerned had to be an adjunct to the world of productive industry and organized business.[13]

The narrow and technical approach was discarded for several reasons. First, the refusal by subsequent decisions to follow the initial, broad interpretation adopted in the *Jumbunna* case was not justified by any disclosed reasoning.[14] Secondly, the rejection of that original approach had not resulted in a settled interpretation of the "industrial disputes" power.[15] Finally, a broad interpretation based on popular usage of the term was considered better suited to the interpretation of a constitutional instrument than a narrow and technical approach.[16] Such a broad meaning would also accord more readily with the object of the "industrial disputes" power which was to enable the Commonwealth to settle disputes over which no single State had complete control.[17]

Hence, the High Court considered that:

> " 'industrial disputes' includes disputes between employees and employers about the terms of employment and the conditions of work. Experience shows that disputes of this kind may lead to industrial action involving disruption or reduction in the supply of goods or services to the community."[18]

[11] Gibbs C.J., Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ.
[12] *Jumbunna Coal Mine N.L.* v. *Victorian Coal Miners' Association* (1908) 6 C.L.R. 309, see below Part II.
[13] See below Parts III-V.
[14] *Social Welfare Union* case (1983) 47 A.L.R. 225, 233.
[15] Id. 234.
[16] Id. 235, 236-7.
[17] Id. 237
[18] Id. 235

Finally, the High Court decided that the tautological definitions of "industry" and "employer" and "employee"[19] were not intended to restrict the *Conciliation and Arbitration Act* from extending its application consistent with the full ambit of the constitutional power.[20]

In fact, the definition of "industry" in the Act was inserted in 1911 to overcome a High Court decision which barred the registration under the Act of craft-based unions like a union representing engine drivers.[21]

Through its ruling in the *Social Welfare Union* case, the High Court has decided that the industrial character of a dispute is determined primarily by the nature of the relationship between the parties to the dispute. Where the relationship between the parties is that of employer and employee, prima facie there will be an industrial dispute. This is in direct contrast to the, until then, dominant test. Under the rejected approach the industrial character depended on either the character of the work to be performed by the worker or the nature of the activity in which the employer was engaged.[22]

However, the High Court did not endeavour to determine the complete ambit of the "industrial disputes" power. It indicated two strands of possible development. First, the High Court did not doubt that the "industrial disputes" power would extend to include disputes between parties not in the employment relationship – for example, it would include demarcation disputes.[23]

Secondly, the High Court reserved for later consideration the question of the relations between a State or a State authority and its employees, especially those engaged in the provision of administrative services to the State.[24] It was suggested that, since the powers conferred in section 51 of the Constitution were granted expressly "subject to the Constitution", the federal nature of the Constitution may limit the extent to which the Commonwealth could use those powers to affect the States.

So, returning to the two examples posed by Dixon C.J. in the *Professional Engineers'* case, both examples will have the necessary industrial character to activate the "industrial disputes" power after the *Social Welfare Union* case. However, the industrial character may be negated by a consideration of a secondary aspect when a State or State agency is the employer. Depending on the nature of the State employee's work function, the "industrial disputes" power may be precluded from operating. This happens not because the work

[19] *Conciliation and Arbitration Act.* s.4(1); "employee" and "employer" mean respectively "any employee in any industry" and "any employer in any industry" while "industry" includes "(a) . . . calling of employers; (b) . . . vocation of employees; and . . . ."

[20] *Social Welfare Union* case (1983) 47 A.L.R. 225, 237-8.

[21] *Federated Engine Drivers and Firemen's Association of Australasia* v. *Broken Hill Pty Co. Ltd* (1911) 12 C.L.R. 398 and see 61 Commonwealth *Parliamentary Debates* (C.P.D.) 1139-43.

[22] e.g. the *Professional Engineers'* case (1959) 107 C.L.R. 208.

[23] *Social Welfare Union* case (1983) 47 A.L.R. 225, 236.

[24] Ibid.

is not industrial, but from the application of a theory of intergovernmental immunity to stay the use of the Commonwealth power.

This is the crux of the matter. It is my contention that the *Social Welfare Union* case indicates the unstated reason for the rejection of the views expressed in the *Jumbunna* case[25] and the subsequent unsettled interpretation of the term "industrial disputes". With the rejection of the intergovernmental immunities doctrines of the Griffith High Court, later benches of the High Court were confronted with the problem of adequately protecting the independent existence of the States from Commonwealth interference and, at the same time, allowing to the Commonwealth full use of the powers granted to it by the Constitution. When interpreting the "industrial disputes" power, therefore, the High Court rejected an interpretation based on the natural and popular usage of the term "industrial disputes" and resorted to an intricate and artificial analysis. This approach was soundly entrenched because the cardinal decision rejecting the implied immunity of instrumentalities was itself a case on the "industrial disputes" power.[26]

I intend to examine the development both of the High Court's interpretation of the term "industrial disputes" and of its use of implications drawn from the federal nature of the Constitution. Prior to the *Social Welfare Union* case four distinct phases in the High Court's interpretation of "industrial disputes" are evident. These phases are linked to changes in the intergovernmental immunities aspect. It is my thesis that the term "industrial disputes" is interpreted more broadly parallel to periods when the High Court is more willing to resort to federalist implications as a general tool of constitutional interpretation. Correspondingly, a narrow, technical approach results when the High Court is not so inclined.

Secondly, drawing together the threads of this analysis, I propose to examine what may be included within any immunity attaching to a State from the "industrial disputes" power.

II. THE IMPLIED IMMUNITY OF INSTRUMENTALITIES

The first phase of the High Court's interpretative stance approximates to what may loosely be called the pre-*Engineers'* case era. It is the period when constitutional thinking was dominated by the intellectual approach of Griffith C.J., Barton and O'Connor JJ. Chronologically, it runs from 1904 to 1919.

During this period a strong intergovernmental immunity, the doctrine of implied immunity of instrumentalities, flourished. During the same period, the High Court adopted a broad, purposive interpretation of the "industrial

[25] e.g. the *State School Teachers'* case, below Part III.

[26] The *Engineers'* case *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129.

disputes" power. This phasal analysis will indicate that the issue of Commonwealth interference with State independence provides the nexus between these rules of interpretation.

Parliament Confronts the Problem

When Parliament was debating the Bill which eventually became the *Conciliation and Arbitration Act* 1904, (the Act),[27] the High Court's approach to intergovernmental questions was unknown.[28] In Committee, Parliament was immediately confronted with the problem of State public servants. The Deakin Ministry proposed that the Bill would not regulate disputes "relating to employment in the public service of the Commonwealth, or of a State, or to employment by any public authority under the Commonwealth or a State".[29] Mr Fisher, on behalf of the Labour Party, proposed an amendment which would include such disputes within the Bill's ambit.[30] When the amendment succeeded, the Ministry resigned.[31] Lord Northcote, the Governor-General, requested Mr Watson to form the first Commonwealth Labour Ministry.

Mr Deakin had eloquently put the case for those who objected to applying the Bill to State public servants. First, such an application would be unconstitutional. Secondly, even if it were constitutional, it would be politically unwise. Both objections arose because the measure threatened the very basis of federalism.

In Deakin's view the federal system was an attempt to reconcile opposing forces. On one hand, were the centrifugal forces tending towards disunity – States' rights; on the other, the centripetal forces drawing towards the centre of the union – towards "not union but unity". "In the poise and balance of the two lay the very essence of the life of a Federal Constitution."[32] The preservation of that poise and balance was the mark of a true Federalist. He went on to say:

> "How is it that this arbitration scheme approaches near to the vital problem? . . . . This was intended to be an absolutely Federal Constitution; I do not say that it is perfectly Federal. We deliberately departed from that intention and inserted provisions, especially financial, which may in the future destroy that balance of which I have spoken. But the main intention of the Constitution and the spirit of the whole creation was Federal – that the States should remain in their integrity, except so far

[27] Mr Deakin introduced the second reading on 22 March, 1904; 18 C.P.D., 762 et seq. Royal Assent was granted on 15 Dec 1904.

[28] The decisions of *D'Emden* v. *Pedder* (1904) 1 C.L.R. 91 and *Deakin and Lyne* v. *Webb* (1904) 1 C.L.R. 585 were handed down in February and November respectively. Neither addressed the question of Commonwealth power to affect the States.

[29] Clause 4 – "industrial disputes". 18 C.P.D. 1043.

[30] Ibid.

[31] 19 C.P.D. 1243-4. cf. J. A. La Nauze, *Alfred Deakin,* (1965), 362-8.

[32] 18 C.P.D. 777-8.

as they were limited by the Constitution, and that the Commonwealth would enjoy no more than was specifically given to it; in that lies the very essence of our form of government."[33]

The interference which would destroy the States' independence was threefold. First, a State, like a corporation, is an abstract legal person and so can act only through natural persons, its agents and employees. If, for their remuneration and conditions of work, its employees depend on some body not subject to the State, the State loses a vital control over its employees. Moreover, that control is lost to a tribunal created by the central government — the very authority with which the State is, in a sense, in competition for power. Hence, the State's independence must be compromised.

The second threat is related to the first. Since an award would bind the State to pay a certain wage, the enforcement of that award would amount to compelling a State Parliament to vote appropriation.[34] No greater interference could be conceived because the very foundation of the concept of responsible government is the principle that no payment be made from the revenue fund without distinct parliamentary authorization.

The third ground depended on the particular form of the "industrial disputes" power. It was argued that a dispute between a State and its employees could never "extend beyond the limits of any one state".[35] That is, any dispute could only be between employees in one State and an employer in that State.

To take these arguments in reverse order, the argument against "interstateness" overlooks the possibility that a State may wish to provide services beyond its own borders. The promotion of tourism is one possibility. The argument that a dispute in two states was two separate disputes had been advanced by those seeking to deny the inclusion of the "industrial disputes" power in the Constitution.[36] Of greater significance, the High Court subsequently decided that an employee organization with membership in only one state could be registered under the Act.[37] Such a body could combine with similar organizations in other States and cause an interstate industrial dispute which it was the purpose of the "industrial disputes" power to prevent.[38] Admittedly, the High Court only considered this question in connexion with private enterprise.

In relation to the second danger, Deakin's opponents simply denied that an award would compel a State Parliament to make an appropriation. Parlia-

[33] Ibid.

[34] Id. 781. cf. *Bill of Rights* 1689 declaration 4; *Auckland Harbour Board* v. *R.* [1924] A.C. 318, 326-7 per Viscount Haldane.

[35] Id. 777 per Mr Deakin, 1096-7 per Mr Reid.

[36] Australian Federal Convention, 1 *Debates: Melbourne,* (1898), 188 per Sir John Downer, 191-3 per Mr Symon, 213-4 per Mr Barton, 199-200 per Mr O'Connor.

[37] The *Jumbunna* case (1908) 6 C.L.R. 309.

[38] Id. 313-5 per Higgins J., as President of the Court of Conciliation and Arbitration; 332 per Griffith C. J.; 341-2 per Barton J. 367 per O'Connor J. and 371-4 per Isaacs J.

ment was not bound to satisfy the debts of the Crown. It did so from honour and its sense of responsibility to its public obligations.[39]

Later, the High Court decided that the power to make an award binding was separate from the power to enforce that award. The general rule is that the Commonwealth has no power to force a State Parliament to appropriate moneys. The exception relates to the special case of the *Financial Agreement* under section 105 A of the Constitution.[40]

On this question, the potential effect of section 78 of the Constitution may have been overlooked. Section 78 empowers the Commonwealth Parliament to make laws "Conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power". A court's ability to enforce its orders by the sanction of contempt is a vital attribute of the judicial power.[41] Of course, it is only in extraordinary circumstances that a State has refused to pay its debts.

The appropriation argument, if valid, can only apply to the actual public service. It does not explain an immunity for instrumentalities like Electricity Commissions which do not depend on parliamentary appropriations for their operational funding.

As to the first threat, the response was blunt. The High Court, not the Parliament, decided the extent of the powers granted by the Constitution.[42] It was the duty of members of the Commonwealth Parliament, as representatives of the Commonwealth, to protect Commonwealth interests and preserve their own power intact. Safeguarding States' rights was the province of the States.[43]

Then, it was urged that every argument in favour of legislating over private enterprise applied with even greater conviction to State employees. State immunity would discriminate against the private employer, rendering the latter uncompetitive. Nor was anything so inimical to industrial peace as unequal pay for the same work.[44] Further, disputes in State undertakings were often more disruptive of society than those involving private enterprise. The honourable members had the example of a disastrous railway strike before them.[45] In modern times we have only to look at the effects of disputes involving the State Electricity Commissions. These factors will be magnified as the State extends its participation in the economy.

Furthermore, it is not the Commonwealth government directly interferring with the independence of the States. The tribunal arbitrating the disputes

[39] e.g. 18 C.P.D. 1036 per Mr Higgins and 1092 per Mr Hughes.

[40] The *ARU* case, *Australian Railways Union* v. *Victorian Railways Commissioners* (1930) 44 C.L.R. 319; the *Garnishee* case, *New South Wales* v. *Commonwealth (No. 1)* (1932) 46 C.L.R. 155.

[41] C. Howard, *Australian Federal Constitutional Law*, (2 edn, 1972) 73, 183. For s. 78 cf. *Commonwealth* v. *New South Wales* (1923) 32 C.L.R. 200 per Higgins J.

[42] 18 C.P.D. 1057 per Mr Watson, 1207 per Mr Crouch, 1225 per Mr Higgins.

[43] Ibid.

[44] Id. 1207-9 per Mr Crouch, 1227-8 per Mr Higgins.

[45] Id. 1033 per Mr Higgins.

is not, and was not, a creature of the Commonwealth government like, for example, an executive department. Its position is, and was, similar to the independence of the judiciary from the executive.[46]

Finally, Deakin's speech contains the seeds of its own refutation. It begs the question. The issue of to what extent the States are sovereign and independent cannot be answered by relying on the federal character of the Constitution. The precise federal character of the Australian Federation can only be determined by examining the distribution of powers which the Constitution effects. Given the form which it takes, this depends on the nature and scope of the powers conferred on the Commonwealth.

The High Court and Intergovernmental Immunities

The Parliament having included State employees within the ambit of the Act,[47] the battle shifted to the High Court and its construction of the Constitution.

Commonwealth power to affect the States was the direct issue in the *Railway Servants'* case.[48] The New South Wales railway employees sought registration as an organization pursuant to the Act. The States of New South Wales and Victoria challenged the application of the Act to States and their instrumentalities. The specific grounds of attack were the three heads already referred to. In the view the High Court took it was unnecessary to consider the "interstateness" aspect or the compulsory appropriation issue.

Having made it clear at the outset that the issue was to a large extent the effective control of the State railways,[49] the High Court, borrowing from United States authority,[50] used the doctrine of reserved powers to establish that the State was immune from the application of Commonwealth power.[51]

The reserved powers doctrine requires Commonwealth legislative power to be read down in order to preserve the maximum sphere of operation for the States.[52] Within the sphere reserved to the States, "the State is as sovereign and independent as the general government".[53] Hence the principle enunciated in *D'Emden* v. *Pedder*[54] that a State could not affect the Commonwealth in the exercise of its authority applied equally in reverse when the issue was the Commonwealth regulation of the States. This was a necessary implication based on self-preservation because "any government, whose

[46] *Conciliation and Arbitration Act* 1904 ss. 6, 7, 14, and 99.
[47] s. 4(1) "industry".
[48] *Federated Amalgamated Government Railway and Tramway Service Association* v. *The New South Wales Railway Traffic Employees' Association* (1906) 4 C.L.R. 488. This case is the last reported before the appointment of Isaacs and Higgins JJ. to the bench.
[49] Id. 532-3.
[50] *Collector* v. *Day* 11 Wall. 113 (1870).
[51] *Railway Servants'* case 4 C.L.R. 488, 537-8.
[52] *R.* v. *Barger* (1908) 6 C.L.R. 41, *Peterswals* v. *Bartley* (1904) 1 C.L.R. 497.
[53] *Railway Servants'* case 4 C.L.R. 488, 537 citing *Collector* v. *Day* 11 Wall. 113, 127 per Nelson J.
[54] (1904) 1 C.L.R. 91, 111.

means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government".[55]

The High Court considered that the regulation of the terms and conditions of the employment of railways' servants was an obvious interference with the control of railways.[56]

Finally, a State-run railway was a State instrumentality within the meaning of the rule. The High Court emphatically rejected any distinction based on the governmental or trading character of the activity. Such a rule was incapable of formulation because there was no authority, certainly not a court, competent to determine what functions were appropriate for the State to undertake.[57]

However, in contradiction of this statement, it did find railways to be governmental in character.[58] The construction and maintenance of roads and the means of communication were a primary function of government. Further, in the peculiar situation of all the Australian colonies in 1900, railways were in fact regarded as a governmental function. At the time of Federation the total mileage of railways in the Commonwealth was 13,557.5 miles. Of this total, 12,577.5 miles were State-run.[59]

This ambivalent approach was exposed in connection with the position of municipal corporation. When exercising trading functions, like the supply of electricity, such bodies were not protected by the immunity.[60] But, protection was to be extended to performance of governmental functions by municipalities.[61]

The brief reasoning of the High Court is subject to question on two counts. First, should the principle in the *D'Emden* case ever have been imported into the Australian Constitution? Secondly, assuming that the *D'Emden* case was correct, ought it operate *e converso* against the Commonwealth?

D'Emden had been charged with a breach of the *Stamp Duties Amendment Act* (Tas.) 1902. This Act required him to pay stamp duty on the receipt which he was obliged by the *Audit Act* (Cth) 1901 to give in return for his salary as Deputy Postmaster-General of Tasmania. Pursuant to sections 52 (ii) and 69 of the Constitution, the postal and telegraphic services were under the exclusive control of the Commonwealth.[62]

The High Court considered that it was a matter of public notoriety that many of the framers of the Constitution were familiar with the Constitu-

[55] *Railway Servants'* case 4 C.L.R. 488, 538 citing *Collector* v. *Day* 11 Wall. 113, 127.
[56] Ibid.
[57] Id. 539.
[58] Ibid.
[59] (1908) 1 *Year Book Australia* 552-6.
[60] The *Engine Drivers* cases, *Federated Engine Drivers' Assoc. of Australasia* v. *Broken Hill Pty. Co. Ltd.* (1911) 12 C.L.R. 398, (1913) 16 C.L.R. 245.
[61] The *Municipalities'* case, *Federated Municipal and Shire Employees Union of Australia* v. *Melbourne Corporation* (1919) 26 C.L.R. 508 per Griffith C. J. and Barton J. (dissenting).
[62] 1 C.L.R. 91, 109.

tions of both the United States and Canada and also with the judicial exegesis of those Constitutions. Therefore, "it was not an unreasonable inference" that similar provisions should receive similar interpretation.[63]

Next, the High Court traced and accepted a line of United States Supreme Court decisions which entrenched the concept of "co-ordinate federalism" in the Constitution.[64] That is, within the ambit of its authority, the Union and each of its constituent States were sovereign. Consequently, the conferral of power on one sovereign entity entailed a right to exercise that power completely free from interference by another government. Simply, "a right of sovereignty subject to extrinsic control is a contradiction in terms".[65]

With respect, the application to the Australian Constitution of doctrines gleaned from the United States Constitution is open to question. Both documents establish a similar constitutional framework, and in this the former is based on the latter. However, there are marked departures in specific provisions and in historical antecedents.

The United States Constitution was drafted over a period of five months.[66] Its authors had no modern precedents to draw on.[67] It conferred on the Union Congress a very limited number of powers.[68] Nor does it contain a clause guaranteeing the supremacy of federal laws over "concurrent" State Laws.

In contrast, the Australian Constitution was seven years in the making.[69] The founding fathers had four modern examples to draw on.[70] The powers granted are greater in number and more precisely defined.[71]

A consequence of the very general nature of the United States Constitution was that it left issues such as intergovernmental relations almost unaddressed. Perhaps its authors, like some of their Australian counterparts,[72] expected that the Senate, the States' House, would protect the States against undue interference by the national legislature.[73] Within this context the justices of the Supreme Court have undertaken a role more akin to statesmen than to that considered appropriate for judges in the Anglo-Australian tradition.[74] It may be noteworthy that in the United States the original doctrine, of Union

[63] Id. 112-3.
[64] L. Zines, *The High Court and the Constitution*, (1980), 1-14.
[65] *D'Emden* v. *Pedder* (1904) 1 C.L.R. 91, 112-6.
[66] e.g. 22 *Encyclopaedia Britannica*, (1962), 755-6.
[67] G. Sawer, "Implication and the Constitution," (1949) 4 *Res Judicatae* 15, 85, 87-8.
[68] U.S. *Constitution* Art. 1, s. 8.
[69] e.g. J. A. La Nauze, *The Making of the Australian Constitution*, (1972).
[70] The U.S.A., Canada, Switzerland and Germany: R. R. Garran, *The Coming Commonwealth*, (1897), 18-9.
[71] e.g. s.51(xiii) banking, (xiv) insurance, (xx) corporations, (xxxv) industrial disputes and note s. 109.
[72] e.g. R. R. Garran, op. cit., 30-2.
[73] cf. Alexander Hamilton, James Madison and John Jay, *The Federalist*, No. 62.
[74] G. Sawer, op. cit., 87; H. B. Higgins, 18 C.P.D. 1036, 1226; "McCulloch v. Maryland in Australia" (1905) 18 *Harv. L. R.* 559, 567-9.

immunity from the states, was formulated by Marshall C.J., who was appointed by a "lame duck" nationalist administration in the face of a States' sovereignty reaction.[75]

Assuming that the principle of the *D'Emden* case was correct, it did not follow as a necessary implication that the principle should apply to Commonwealth law affecting the States. The States' inability to bind the Commonwealth may rest on the superior position of the Commonwealth in the federation. That is, the Constitution, although absoutely federal in character, is not perfectly so.

The High Court accepted that the States lacked authority in areas conferred exclusively on the Commonwealth.[76] Within the areas of its exclusive legislative power, the Commonwealth must be able to prescribe State conduct. So, Commonwealth laws can affect the States in their operations. One simple example is the national postal system.

In areas where Commonwealth legislative competence is concurrent with the States, Commonwealth legislation renders the State law inoperative.[77] This provision is in direct conflict with a federalist implication because rendering a State law inoperative affects or fetters the State powers. To avoid this, throughout this period, the High Court insisted on a very restricted construction of what constituted "inconsistency".[78]

The foundation of the reciprocal immunity doctrine is the principle of reserved powers. The proposition that express grants of power are to be construed by reference to what has been reserved to the States is somewhat extraordinary.[79]

However, in some situations the High Court itself refused to apply the principle of reserved powers. Because the defence power was a paramount power, Griffith C.J. considered that reserved State rights must yield to Commonwealth laws made under that power.[80] Presumably, section 114 converts the concurrent power, section 51 (vi), into an exclusive power. But, co-ordinate federalism buttressed by the express prohibition on the taxation of State property (also contained within section 114) did not prevent the subjection of the States to Commonwealth customs duties. States' immunity would render the exclusive Commonwealth power[81] nugatory. Section 114 was side-stepped by the device advanced by the High Court that the duty was levied on the act of importation, not on the property.[82]

[75] cf. 14 *Encyclopaedia Britannica*, (1962), 969.

[76] The *D'Emden* case (1904) 1 C.L.R. 91, 109, 111, 119.

[77] Constitution s. 109.

[78] The impossible to obey both laws' test: *Australian Boot Trade Employees' Federation* v. *Whybrow & Co. Ltd.* (1910) 10 C.L.R. 266.

[79] e.g. the criticism that it is akin to determining the extent of a specific gift in a will by first ascertaining the extent of the residue: *R.* v. *Barger* (1908) 6 C.L.R. 41, 84 per Isaacs J.

[80] *Farey* v. *Burvett* (1916) 21 C.L.R. 433, 441 *in arguendo*.

[81] Constitution s. 90.

[82] *R.* v. *Sutton* (the *Wire Netting* case), *A.-G. (N.S.W.)* v. *Collector of Customs* (the *Steel Rails* case) (1908) 5 C.L.R. 789.

The "industrial disputes" power can, like the defence and customs power, be characterized as a paramount power. If, as the High Court did,[83] a purposive approach is adopted towards the required "interstate" quality, such a dispute falls solely within Commonwealth power. For no State can effectively resolve the whole dispute and section 109 of the Constitution would render a State's partial attempt inoperative.

Furthermore, section 51 and its ancillary provisions appear to envisage a dichotomy between those matters confined within one State's territory and those which are more general. For examples of the latter, look to placita (xiii) and (xiv). State banking and insurance operations which *extend beyond the limits* of the State concerned are included within the Commonwealth's legislative authority. Unlike the "industrial disputes" power, the express inclusion of the State function is necessary because the general power conferred covers such operations taking place within a State except the State function. Yet, where the subject matter is confined solely within the limits of one State, Commonwealth power is conditional on that State's consent.[84]

Finally, the High Court considered that taxation was but a specific instance of interference,[85] it was not until seventy years later that the United States extended its doctrines beyond taxation.[86] This development appears to have been relatively short-lived following the decisions handed down in subsequent cases.[87] The doctrine appears to have degenerated into a haphazard application of subjective judicial evaluations.[88]

The Jumbunna Case

Having referred briefly to the *Jumbunna* case,[89] I turn now to its relevance to the meaning of the term "industrial".

In an attempt to cut costs Victorian coal-mine owners had sought to reduce wages. In reply the miners began to unionize. The owners embarked on a program of unionist harassment. The miners then sought federal protection by registering under the Commonwealth *Conciliation and Arbitration Act* 1904. The mine owners challenged the registration in the High Court. They contended that the Act was *ultra vires* the Commonwealth because it included provisions relating to the incorporation of registered bodies.[90] Further, they argued that such a single State association could never participate in an "interstate" dispute. The High Court rejected both contentions.

As part of their second contention the mine owners had argued that the

[83] The *Jumbunna* case (1908) 6 C.L.R. 309.
[84] e.g. Constitution s. 51(xxxiii), (xxxiv) and (xxxvii).
[85] *Railway Servants'* case (1906) 4 C.L.R. 488, 538.
[86] *National League of Cities* v. *Usery* 426, U.S. 833 (1976).
[87] *Hodel* v. *Virginia Surface Mining and Reclamation Association* 452 U.S. 264 (1981) and M. J. Phillips, "The Declining Fortunes of National League of Cities v. Usery," (1983) *Am. Bus L. J.* 89.
[88] M. J. Phillips, op. cit., 101-15.
[89] (1908) 6 C.L.R. 309.
[90] The equivalent provisions are now in Part VIII of the Act.

definition of industry in the Act went further than the power conferred by the Constitution. The Act, it was submitted, extended to any kind of employment whereas the Constitution was confined to employment connected directly or indirectly with production and manufacture.[91] Griffith C.J., O'Connor and Isaacs JJ. dismissed the contention. The act extended only to what was granted by the Constitution and the Constitution covered the general employment relationship. Barton and Higgins JJ. did not consider the question.

Griffith C.J. said:

> "An industrial dispute exists where a considerable number of employees engaged in some branch of industry make common cause in demanding from or refusing to their employers (whether one or more) some change in the condition of employment which is denied to them or asked of them."[92]

Later, his Honour defined industry

> "The term 'industry' should be construed as including all forms of employment in which large numbers of persons are employed the sudden cessation of whose work might prejudicially affect the ordinary operations of civil life.[93]

O'Connor J. first noted that:

> "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 . . . ."[94]

His Honour, after referring to dictionaries and statutes, considered that the words were used both in the narrow sense which the mine owners contended for and in a broader sense, that of disputes between master and workmen in relation to any kind of labour.[95]

His Honour adopted the broader definition as the more appropriate. Where the requisite "interstateness" existed, there was no violation of any prohibition in or provision of the Constitution.[96] Secondly, the wider sense corresponded with the purpose of the power. Disputes of the necessary "two-state" quality were not confined to the manufacturing sector.[97] Finally:

> "it must always be remembered that we are interpreting a Constitution broad and general in its terms intended to apply to the varying conditions which the development of our community must involve."[98]

[91] *Jumbunna* case (1908) 6 C.L.R. 309, 365 per O'Connor J.
[92] Id. 332.
[93] Id. 333.
[94] Id. 365.
[95] Id. 366.
[96] Ibid.
[97] Ibid.
[98] Id. 367-8.

Isaacs J. also adopted a purposive approach. If anything, His Honour's formulation extends further than that proposed by his brethren:

> "But the power under 51 (xxxv) extends over the whole range of Australian industry in the largest sense without qualifications, wherever, by reason of the numbers engaged in it and the area of its distribution, it does or may give rise to a dispute extending beyond the limits of any one State, and thereby, in a manner beyond the control of any single State, disorganize the general operations of society or interfere with satisfaction of public requirements in relation to the service interrupted."[99]

Contrary to the argument put by the mine owners, his Honour thought that the Act may define industry more narrowly than the constitutional meaning. Referring to section 4 (1) of the Act, Isaacs J. said:

> "If the occupation so described is one in which persons are employed for pay, hire, advantage, or reward, that is, as employees, then . . . it is an industry within the meaning of the Act."[100]

However, his Honour did not adopt this interpretation.

Two aspects of the High Court's definition of industrial dispute stand out. First, there is the emphasis placed on large numbers. No doubt that emphasis reflects the period's low level of technical development relative to today. To create the kind of social disruption which would extend beyond the limits of a State such large numbers were necessary. The true focus of the High Court's concern was that disruption. In modern life, we are familiar with the ability of small numbers to dislocate society. If examples be needed, they exist in the transport industries and the power-generating stations.

The second aspect is the focus on the employment relationship. The type of work performed was not relevant. The industrial character was supplied by the employer-employee relationship. Only Isaacs J. may have gone futher.

Focussing on the employment relationship has one major drawback. Prima facie, it excludes the self-employed — the independent contractor. Such an exclusion may be a recipe for industrial upheaval where contracting out is a real alternative to employment. This is evident in the transport industry with its division between fleet operatives and the owner-driver, and in the piecework contracts of outworkers in the textile industry.

Thus, the *Jumbunna* case was a clear statement of principle by three of five judges that the "industrial disputes" power was to be interpreted in light of the mischief it was intended to remedy and so, at the least, extended to disputes between employers and employees which would disrupt the flow of goods and services to society.

However, underlying the decision in the *Jumbunna* case is a crucial distinction between that case and the *Railway Servants'* case. The *Jumbunna* case was exclusively concerned with private enterprise employing manual

[99] Id. 370.
[100] Ibid.

labourers. The *Railway Servants'* case involved only the employees of a State government operation.

The concept of co-ordinate federalism arose to prevent one government within the federal system from usurping the powers and functions of another government within the system. The *Railway Servants'* case made the issue of the implied immunity of instrumentalities the primary investigation in any enquiry into the constitutional validity of an enactment. Hence, a definition of "industrial disputes" which comprehended most operations of private enterprise was permissible because the adoption of the implied immunity of instrumentalities and the limitations of the "industrial disputes" power prevented any direct interference with the States by the Commonwealth. First, the immunity doctrine excluded any employees of a State or its agencies from direct Commonwealth regulation. Secondly, the express "interstate" requirement of the power confined Commonwealth intervention to disputes over which the States were individually powerless.

The importance of the immunity doctrine to the broad interpretation of the "industrial disputes" power accepted in this period is reinforced by consideration of the convoluted definitions of the power which followed the rejection of the immunity doctrine.

III. THE ENGINEERS' CASE AND ITS ERA

The second phase in the High Court's approach to intergovernmental immunities and the "industrial disputes" power involves the triumph of the vision of Federation conceived by Isaacs and Higgins JJ. over co-ordinate federalism. The period dawned in 1919 but was already waning by 1929. It was characterized by an apparently complete rejection of the two doctrines of reserved powers and implied immunity of instrumentalities. Corresponding to this shift, there was a retreat from the broad interpretation of the "industrial disputes" power. This retreat was accompanied by the paradox of an extension of Commonwealth power to cover State government employees.

The Engineers' Case

The principal decision during this period was the *Engineers'* case.[101] Among the 844 employers claimed to be in dispute with the union were the West Australian Minister for Trading Concerns and two agencies under his control. These employers claimed immunity from the Commonwealth Act on the ground that they were State instrumentalities. Brusquely rejecting a proposed distinction between "trading" and "governmental" functions the High Court gave leave to challenge any earlier decision.[102] So, the issue

[101] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.
[102] Sir Robert Menzies, *Central Power in the Australian Commonwealth*, (1967), 37-9.

posed clearly for decision was the States' immunity from the "industrial disputes" power.

In the majority's opinion[103] the existing doctrine was too uncertain in application. It was not based either on the terms of the Constitution or on the principles of the common law underlying the Constitution. Instead the decisions depended on "implications drawn from what is called the principle of "necessity", that being itself referable to no more definite standard than the personal opinion of the Judge who declares it".[104]

Next, the majority outlined the principles it would use to approach the interpretation of the Constitution. These did not differ from the rules applied in the *Railway Servants'* case.[105] The Constitution is an Imperial statute. The court was to ascertain the intention of Parliament from the express language used and the state of the law when the statute was enacted. Resort to the context and scheme of the Act was permissible.

As the Constitution conferred selected or enumerated powers on the Commonwealth the language of that conferral defined the ambit of the power. The "industrial disputes" power was conferred in terms wide enough to include disputes to which a State was party. And there was nothing within the Constitution which prevented its application to the States.[106]

The respondents had sought to defend their position by reference to the concept of co-ordinate federalism as enshrined by the doctrines of reserved powers and implied immunity of instrumentalities.

The United States case law from which these rules were derived was rejected. The rejection was not based on a specific comparison of the two constitutions. Rather, it followed from the Australian Constitution's status as an enactment of the Imperial Parliament. As such, it was imbued with two all-pervading qualities – responsible government and the indivisibility of the Crown.[107]

The majority considered the specific principles underlying co-ordinate federalism. It had been argued that reserved powers and the immunity of instrumentalities were implications necessary to protect a sovereign authority from external interference.[108] The basis for the suggested necessity was fear of the abuse of its powers by one government to the detriment of others in the federal system.

The majority replied that abuse of legislative powers was a political consideration. It was not suited to judicial examination nor was such examination necessary. The all-pervading principle of responsible government enabled the Australian people to control the national Parliament "by ordinary constitu-

[103] Knox C.J. , Isaacs, Rich and Starke JJ., Higgins J. concurring.
[104] *Engineers'* case (1920) 28 C.L.R. 129, 142.
[105] See *Railway Servants'* case (1906) 4 C.L.R. 488, 534 and *Engineers'* case (1920) 28 C.L.R. 129, 149-50 and at 162 per Higgins J.
[106] *Engineers'* case (1920) 28 C.L.R. 129, 154.
[107] Id. 146-7.
[108] Id. 151.

tional means".[109] Hence, co-ordinate federalism was rejected because it required reference to vague external factors. Whether a legislative power included the ability to interfere with a State or the Commonwealth, as the case may be, required reference only to the specific terms of the grant of power to discover its express or necessarily implied meaning.[110]

Gavan Duffy J., in dissent, held that section 107 of the Constitution preserved all State powers intact except those exclusively conferred on the Commonwealth or expressly withdrawn from the States' competence. Therefore, the "industrial disputes" power, as part of section 51, could not affect the exercise of a State's constitutional power.[111]

This textual basis for the reserved powers doctrine was rejected by the majority. Section 107 was subordinate to section 109. The latter section rendered any State law inoperative wherever it conflicted with Comonwealth law.[112] It was on this ground that *D'Emden* v. *Pedder*[113] could be justified.

Finally, the indivisibility of the Crown enabled the Commonwealth to bind the Crown in right of a State. The *Commonwealth of Australia Constitution Act* (Imp.) 1900 dealt with the exercise of the sovereign functions throughout Australia. Hence, from its very nature, it bound the one Crown. The enactment in question expressly extended to industry carried on by a State.[114]

The majority opinion poses some difficulty. Although the rejection of the co-ordinate federalism approach is clear, the reasons profferred are confusing.

The basic charge against earlier authority was its reliance on non-constitutional and non-legal criteria. Yet, the two major pillars of the new orthodoxy, responsible government and the oneness of the Crown, are considerations equally extraneous to the Constitution. Furthermore, their relevance can be queried.

An oblique reference only is made in the Constitution to responsible government.[115] In addition, it is not immediately apparent that the Westminister system controls the executive and abuse of power better than the United States' system. Indeed, one factor behind the exclusion of the executive from the legislature in the United States was the American revolutionaries' opinion that in the United Kingdom the executive had by patronage and influence overawed the legislature.[116] Within the Westminister system the rise of strict

[109] Id. 152.
[110] Id. 144-5, 155.
[111] Id. 174.
[112] Id. 154-5.
[113] (1904) 1 C.L.R. 91.
[114] *Conciliation and Arbitration Act* 1904-18, s. 4(1) "industrial dispute". *Engineers'* case (1920) 28 C.L.R. 129, 152-4.
[115] S. 64 provides that Ministers of the Crown will be or become members of Parliament within 3 months of their appointment.
[116] United States Constitution, Art. 1, s. 6. Alexander Hamilton, James Madison and John Jay, *The Federalist*, No. 76 and J. Derry, *English Politics and the American Revolution* (1976), 14-20, 25.

party discipline creates more room for doubt. Furthermore, the Supreme Court has modified the effect of implications by reference to the political process as a safeguard.[117]

It has also been the modern trend to accentuate the separation of the Crown into national and State aspects.

The significant factor about the *Engineers'* case was not that it created new methods of interpretation. The Griffith High Court used the same tools and, at times, with similar effect.[118] However, the majority in the *Engineers'* case applied those rules from a different viewpoint. Instead of being a compact between the States,[119] the Constitution was a "compact between the whole of the people of Australia".[120] To Griffith C.J., Barton and O'Connor JJ., it was a necessary implication from the terms of the Constitution that mutual non-interference between the Commonwealth and the States should prevail. However, by 1920 circumstances had combined to forge a national entity from what had been an association of independent provinces.[121] The *Engineers'* case was at once the legal recognition of this change and the catalyst for its continued development.

The Retreat from the Jumbunna Case

At the same time as this profound change occurred a significant alteration may be perceived in the industrial character required for the "industrial disputes" power.

Apparently, as late as 1919, a majority of the High Court still adhered to the principles expounded in the *Railway Servants'* case.[122] In the *Municipalities* case two questions were considered. First, was a municipality when exercising its inherently governmental functions an instrumentality of the State? It had already been decided that in respect of their trading functions they were not.[123] Secondly, if the municipality was not protected by the immunity, were its employees capable of engaging in an "industrial dispute"?

The employees in question were involved in making, repairing, cleaning and lighting public streets. They performed functions no different to those performed by any manual labourers, whoever employed them.

A majority of the bench answered the first question in the negative.[124] A

[117] R. Sackville, "The Doctrine of Immunity of Instrumentalities in the United States and Australia", (1969) 7 M.U.L.R. 15, 17, 35; S. H. Kadish, "Judicial Review in the High Court and the United States Supreme Court," (1959) 2 M.U.L.R. 4, 9-10.

[118] e.g. the *Wire Netting* case, the *Steel Rails* case (1908) 5 C.L.R. 579.

[119] *Railway Servants'* case (1906) 4 C.L.R. 488, 534.

[120] *Engineers'* case (1920) 28 C.L.R. 129,142.

[121] The *Payroll Tax* case, *Victoria* v. *Commonwealth* (1971) 122 C.L.R. 353, 395-6 per Windeyer J.

[122] *Municipalities* case, *Federated Municipal and Shire Employees' Union of Australia* v. *Melbourne Corporation* (1919) 26 C.L.R. 508, 517 per Barton J., 536 per Higgins J.

[123] *Federated Engine Drivers' and Firemen's Assoc. of Australasia* v. *Broken Hill Pty Co. Ltd* (1911) 12 C.L.R. 398, (1913) 16 C.L.R. 245.

[124] *Municipalities* case (1919) 26 C.L.R. 508, 526-8 per Isaacs and Rich JJ., 538-41 per Higgins J. 542 per Gavan Duffy J. and Powers J.; Griffith C.J. and Barton J. dissenting.

different majority answered yes to the second question.[125] To do so the majority found that the activity in question need not be connected with a profit-making purpose to clothe it with the necessary industrial character.

Although the immunities doctrine still held sway, the case signalled the beginning of the second phase. Since the functions in question were actually conferred pursuant to State enactments, the actual decision marks a sharp curtailment of the immunities doctrine. To accomplish this the reasons bear a strong similarity to the approach taken in the *Engineers'* case in that there is a singular aversion to United States authority and heavy reliance on English case law.[126] Also, the change in the approach to the meaning of "industrial" is significant. The subsequent exposition of this change indicates that its primary stimulus was the question of Commonwealth regulation of State employees.

The shift in the High Court's interpretation of the industrial quality is signalled by the peculiar form the hearing of the case took. The court considered the immunities question first. Then, it determined whether the dispute was industrial or not.

Throughout this period, three separate interpretations may be discerned. The most generous interpretation of the industrial character was largely a continuation of the views expressed in the *Jumbunna* case.[127]

Higgins J. was the chief advocate of this approach. It seems probable that his Honour's main associate on the Court of Conciliation and Arbitration, Powers J., also espoused this line. Powers J. complicates his opinions by apparently approving the reasons of Isaacs and Rich JJ., who advance a meaning to the term "industrial" contrary to that favoured by Higgins J.[128]

Higgins J. focused on the fact that in the Constitution the words used were "industrial disputes" and not "disputes in industry".[129] This phrase was not a technical expression, but depended for its meaning on common usage.[130] His Honour rejected the contention that the activity needed to be for a purpose of profit to constitute an industrial activity.[131] The popular conception of the phrase clearly included persons engaged in manual labour.[132] So, it was neither necessary nor desirable to attempt an exhaustive definition of an amorphous term in popular usage. But, Higgins J. did proceed to offer some additional guidance:

"But if it be necessary to define further the expression 'industrial disputes',

[125] Id. 553-5 per Isaacs and Rich JJ., 576 per Higgins J., 588 per Powers J.; Griffith C.J. not sitting.

[126] Id. 526 per Isaacs and Rich JJ., 539-40 per Higgins J.

[127] See above Part II.

[128] For Powers J.: *Municipalities* case (1919) 26 C.L.R. 508, 588 and the *Insurance Staff's and Bank Officials'* case, *Australian Insurance Staff's Federation* v. *Accident Underwriters' Assoc.; Bank Officials' Assoc.* v. *Bank of Australasia* (1923) 33 C.L.R. 517, 535.

[129] Id. 573.

[130] Ibid.

[131] Id. 574.

[132] Id. 574-5.

> then, looking to the current use of the phrase and leaving out of sight disputes such as demarcation disputes, I should say that the expression includes, at all events, a dispute between an employer and an employee as to their reciprocal rights and duties . . . . and we have no right to limit the meaning of the words to manual disputes . . . ."[133]

Eventually, his Honour was forced to accept a restriction on this wide proposition.[134]

In contrast, Barton J. proposed the most restrictive test. His Honour agreed that the words "industrial disputes" were to be read in their popular sense.[135] Although, like Griffith C.J. in the *Jumbunna* case, his Honour considered that an "industrial dispute is a dispute in an industry".[136] What constituted an industry was a significant departure from the *Jumbunna* case. Of the two relevant meanings suggested by the dictionaries, the broad view favoured in the *Jumbunna* case was rejected because it described industry generally and not *an* industry. Therefore, the industrial character required that "the employment must be in a particular form or branch of productive profit; as a trade or manufacture".[137] The mine owners had put this view unsuccessfully in the *Jumbunna* case.[138]

His Honour also considered that non-manual labourers may be comprehended within the power. But those performing work "otherwise than merely manual", for example clerks, would be characterized as industrial by the nature of their employer's undertaking.[139] For such employees, as Gavan Duffy J. suggested, to be industrial required "an undertaking or undertakings carried on for the purpose of gain and wholly or mainly by means of manual labour".[140]

Two comments may be made. First, the restriction that the undertaking be for productive profit was implicit in the *Jumbunna* case. The main employers at that time not conducting business for profit were governmental operations which were protected from Commonwealth regulation by the immunities doctrine when the operations were carried on by a State.

Secondly, the dissent of Barton and Gavan Duffy JJ. indicates a shift of focus from the nature of the relationship between the disputants to the nature of the work involved. The *Jumbunna* case concerned only manual labourers. Yet, the opinions in that case do not suggest a restriction to manual labourers. Of course, given the low level of technology relative to today, most undertakings would probably involve a high manual labour component.

The restriction appears to result from fear that otherwise the "industrial

[133] Id. 575.
[134] See below, the *Harbour Trust* case.
[135] Id. 545.
[136] Id. 546.
[137] Id. 547.
[138] (1908) 6 C.L.R. 309, 365 per O'Connor J.
[139] *Municipalities* case (1919) 26 C.L.R. 508, 548.
[140] Id. 584.

disputes" power may extend to disputes "between doctors and lodges, between lawyers and their clients, between clergymen and their congregations".[141] However, it is doubtful that the popular usage of the term would extend so far. In addition, the relationship of the professional to his client is more like that of the retailer to his customer than of the retailer to his employees. The latter is akin to the relationship between, say, a solicitor and his staff.

The second approach based on the concept of "industry" was that of Isaacs and Rich JJ. Isaacs J.'s judgement is particularly interesting. In the *Jumbunna* case, his Honour had suggested that the Act was not as extensive as the constitutional provision.[142] The joint opinion of Isaacs and Rich JJ., however, proposed a test even more restricted than that suggested earlier for the Act. Furthermore, this was based on the interpretation of the Constitution, not of the Act.[143]

In contrast to Barton J.'s analysis, the joint judgement rejected "mere etymology" as a basis for definition. Instead, it turned to contemporary economic historians and official records – primarily English.
From this survey, the judgement suggested that:

> "industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation."[144]

And later:

> "It implies that 'industry', to lead to an industrial dispute, is not, as the claimant contends, merely industry in the abstract sense, as if it alone affected the result, but it must be acting and be considered in association with its co-operator 'capital' in some form . . . ."[145]

Industry in the abstract sense signified the labour of the employee.[146] Isaacs and Rich JJ. considered that the undertaking need not be for the pursuit of profit.[147]

The retreat from the *Jumbunna* case is exposed by the *Insurance Staffs' and Bank Officials'* case. The two claimant associations represented clerical employees of insurers and banks. Awards as to wages and conditons of employment were sought and the employers claimed that the dispute was not industrial within the meaning of the Constitution or the Act.

[141] Id. 574 per Higgins J.
[142] (1908) 6 C.L.R. 309, 370.
[143] Contrast the approach taken by Starke J. as a Deputy-President of the Court of Conciliation and Arbitration in *Public Service Commissioner* v. *Government Service Women's Federation* (1920) 14 C.A.R. 794, 796 rejecting an application by State employees in the Treasury, Land and Law Departments.
[144] *Municipalities* case (1919) 26 C.L.R. 508, 554.
[145] Id. 555.
[146] *Jumbunna* case (1908) 6 C.L.R. 309, 375.
[147] *Municipalities* case (1919) C.L.R. 508, 565.

Higgins J. had simply relied on the employment relationship to constitute the required industrial character.[148]

Previously, Isaacs and Rich J.J., in separate opinions, had without difficulty included journalists in industry.[149] Rich J. wryly observed that such matters were supposed to have been settled by the *Municipalities* case.[150] However, insurance and bank clerks required a modification of the primary test. Banking and insurance fell within the constitutional power not because they were industries, but because they were an "indispensable portion of the general industrial mechanism – they provide for industry one essential commodity: capital".[151]

The context of its creation links the economic model to the question of States' public servants. The link is reinforced in the *Harbour Trust* case.[152] It becomes crucial in the *State School Teachers'* case.[153]

In the *Harbour Trust* case, State Port Authorities objected to the inclusion of their employees in an award covering marine employees generally. The majority[154] held that a State is not exempt where a private individual would not be, so a State is not immune merely because it conducts an operation without a purpose of profit-making. However, the activity of the State still had to be in its real character industrial.[155]

In light of this requirement, Higgins J. was prepared, somewhat reluctantly, to confine the "industrial disputes" power to "non-governmental" functions of the State. That is, his Honour excluded those functions such as "legislative, executive and judicial functions, without which a constitutional State cannot be conceived, functions which are essential and inalienable".[156] This limitation contrasts sharply with the body of his Honour's opinion which adheres to the broad view.[157] It also accords with a view expressly rejected by his Honour in the *Engineers'* case.[158] It can only be reconciled with the restriction on the industrial character imposed by the majority.

The *State School Teachers'* case concerned an attempt by teachers in government-run schools of Victoria and Tasmania to obtain an award under the Commonwealth system. The case is a clear rejection of both the broad view and the economic approach and plainly reveals the intergovernmental relations basis of the issue. Of particular significance is the parting of Isaacs and Rich JJ.

[148] (1923) 33 C.L.R. 517, 529.
[149] *Proprietors of Daily News Ltd* v. *Australian Journalists' Assoc.* (1920) 27 C.L.R. 532.
[150] Id. 548.
[151] *Insurance Staffs' and Bank Officials'* case (1923) 33 C.L.R. 517, 527.
[152] *Merchant Service Guild* v. *Commonwealth Steamship Owners' Assoc. No. 2* (1929) 28 C.L.R. 436.
[153] *Federated State School Teachers' Assoc. of Australia* v. *Victoria* (1929) 41 C.L.R. 569.
[154] Knox C.J., Isaacs, Rich and Starke JJ.
[155] (1920) 28 C.L.R. 436, 448-9.
[156] Id. 454.
[157] Id. 451-2.
[158] (1920) 28 C.L.R. 129, 171.

Rich J. declared that the court was engaged in a hopeless attempt to settle decisively the meaning of "industrial disputes".[159] His Honour considered that there was no justification either in the natural meaning or the judicial explanation of the words to include within their ambit the relation of a State to its teachers. There was no co-operation between capital and labour.[160] Nor was teaching an indispensible adjunct of production. Education could not be described as "a part of the community industrially organized with a view to the production and distribution of wealth".[161]

Yet, Isaacs J. found the required co-operation between capital and labour.[162] From their context, those terms meant simply the co-operation of the employer and the employee. In his Honour's view, the context was the historical clash between the employed and their employers for a greater share in the services provided by their co-operation.[163]

In the *Jumbunna* case, Isaacs J. had dealt with two concepts of the term "industry", one of which involved both the employer and the employed.[164] However, his Honour's explanation appears to conflict with the modification of the economic test required by the *Insurance Staffs' and Bank Officials'* case.

Isaacs J. did not intend the "industrial disputes" power to extend to all employees of the State. Like Higgins J. before him, his Honour separated governmental activities into two classes. The first could never be industrial. It consisted of the "primary and inalienable" functions of government which "are impossible of performance by private individuals, and appertain solely to the Crown in its regal character".[165] The second class consisted of functions "ordinarily or primarily the subject of private individual enterprise".[166] These were undertaken voluntarily by the government and were subject to regulation under the "industrial disputes" power.

The majority opinion rejected both the broad view advanced in the *Jumbunna* case and the economic test as too wide.[167] The *Jumbunna* concept was indicted because, in their Honours' opinion, it ignored the use of the word "industrial" in the composite expression "industrial disputes" in the Constitution.[168] The economic view was rejected because "the Constitution is not a thesis in economics".[169]

Knox C.J. and Gavan Duffy J. had consistently asserted in previous cases that to be industrial an undertaking needed to be founded mainly on manual

[159] (1929) 41 C.L.R. 569, 590.
[160] Id. 591.
[161] Id. 592.
[162] Id. 582.
[163] Id. 577-8.
[164] (1908) 6 C.L.R. 309, 370.
[165] *State-School Teachers'* case (1929) 41 C.L.R. 569, 584.
[166] Id. 585.
[167] Id. 574 per Knox C.J., Gavan Duffy and Starke JJ.
[168] Ibid.
[169] Id. 573.

labour.[170] Starke J. had previously formulated an approach similar to the economic test.[171]

To the majority, the provision by the State of a public system of education was not an industry.[172] It did not resemble an ordinary trade or business. It was not concerned in the production or distribution of wealth. There was no co-operation of capital and labour because the scheme was imposed on the public by law.

Significantly:

> "a private person could no more carry on this system of public education than he could carry on His Majesty's treasury or any of the other executive departments of Government; and if he were authorized to do so, which is almost inconceivable, he would no more carry on an industry than the State does now."[173]

From the point of view of the teachers, their activity could not be described as industrial because their occupation had "impressed on it the character of the activity in which it is exercised".[174]

On the approach of the majority, the industrial quality was considered from two points of view. Both related to the nature of the work involved. It was necessary to examine the character of the undertaking carried on by the employer and also the nature of the activity in which the employee was engaged. In this case the character of the employer was decisive. The sheer size of the undertaking rendered it impossible of performance by a private individual. The scope of modern corporations and the magnitude of the modern private education sector would appear to belie this factor.

Moreover, although rejecting the economic test, the majority did rely on it to a small degree. In doing so, whether the consumers have any choice appears to have been confused with the co-operation between those providing the service. Purchasers of electricity and gas also have State schemes imposed on them, yet employees of such schemes have the necessary industrial character.[175]

While there was some dispute about additional requirements, it is a common thread in all the opinions of this case that to be industrial the activity must at least be capable of performance by private enterprise. This thread can be traced back to the *Municipalities* case and the *Harbour Trust* case.

The problem with such a test is that opinions differ as to which functions are appropriate to performance by private action. Furthermore, such a class is not immutably fixed. In Australia, circumstances have rendered railways

[170] *Insurance Staffs' and Bank Officials'* case (1923) 33 C.L.R. 517, 523, 533.
[171] Id. 536.
[172] *State School Teachers'* case (1929) 41 C.L.R. 569, 575.
[173] Ibid.
[174] Ibid.
[175] e.g. see the Municipal Officers Association award covering the S.E.C.V. (1976) 174 C.A.R. 785.

and postal services governmental undertakings. This has not always been the experience of the United Kingdom or of the United States. Power supply and telecommunications are in a similar position. In addition, governments of whatever political persuasion find, and will continue to do so, a need to assume more and more functions. The provision of insurance – third party automobile accident coverage, minimum medical coverage and, prospectively, workers' compensation – are ready examples.

The rather surprising restriction accepted by Higgins J. in the *Harbour Trust* case indicates that the restrictive interpretations based on the term "industry" were a response to a perceived need to protect certain State operations from Commonwealth regulation. This need was accentuated by the demise of the immunities doctrine and reinforces the connexion between the "industrial disputes" power and questions of intergovernmental relations. The *ad hoc* nature of the response is indicated by the number of cases during the period.

IV. FEDERALIST IMPLICATIONS REVIVED

The year 1929 also witnessed the death of H.B. Higgins while still on the bench. Owen Dixon K.C., as he then was, was appointed to the vacancy. In addition, Powers J. retired. Sir Isaac Isaacs, who attained the Chief Justiceship in 1930, resigned in 1931 to become Governor-General. Evatt and McTiernan JJ. were appointed to the vacancies. The thinking of the High Court underwent a subtle change. This shift culminated in 1947 with the reintroduction of implications drawn from the federal nature of the Constitution. The re-emergence of the doctrine of intergovernmental immunities was to a certain extent reflected in the interpretation of the "industrial disputes" power.

The Retreat from the Engineers' Case

In the *State banking* case[176] a Commonwealth law which did not violate any express prohibitions of the Constitution was struck down as *ultra vires*. The *Banking Act* (Cth) 1945 effectively required States and their agencies, including local government bodies, to conduct their banking business either with their own State Bank or the Commonwealth Bank. Not all the States had their own banks. Nor was the Commonwealth Bank bound to perform the business of any customer, but it was subject to direction by the Commonwealth government. Hence, the will of the Parliament of a State was potentially subject to Commonwealth control.[177]

All five judges who invalidated the law started from the one basic premise – "The Constitution is based upon and provides for the continued co-

[176] *Melbourne Corporation* v. *Commonwealth* (1947) 74 C.L.R. 31.
[177] Id. 54 per Latham C.J.

existence of Commonwealth and States as separate governments, each independent of the other within its own sphere."[178] From this foundation three distinct approaches developed.

The first approach required a characterization of the true subject matter of law. If in substance it was a law with respect to a subject matter not conferred on the Commonwealth, the law was bad. Where a law was really legislation about a State or State functions *as such,* it would be invalid. This result was a necessary implication from the foundation proposition of independence within the federal system. The fact that a law singled out the State or its agency, as here, indicated that the law was in substance about the exercise of State functions. Therefore, the law was *ultra vires.*[179]

The two remaining approaches also drew implications from the federal nature of the Constitution. On both approaches, the inability of one government to deprive another government within the system of the powers committed to it or to restrict the exercise of those powers was inherent in the federal character.[180] The difference was in the extent of the inability.

Dixon J. confined this inability to Commonwealth laws which discriminated against or singled out the States and thereby placed special burdens on the exercise of their powers or the fulfilment of functions belonging to them.[181] This narrow limitation followed as a consequence of the States' inferior position within the system to the Commonwealth — the Commonwealth being stronger as a government of enumerated powers which take legislative precedence.[182] Hence, "except in so far as under its legislative power it may be able to alter the legal system, a State must accept the general legal system as it is established."[183]

Rich and Starke JJ. considered that laws of general application may also be invalidated. Discriminatory laws were but an example of unwarranted intervention. What was proscribed was substantial curtailment of or interference with the exercise of one government's constitutional power by another government within the system.[184]

Subsequently the Commonwealth enacted a general law nationalizing the private banks.[185] The attempt failed through non-compliance with sections 51 (xxxi) and 92 of the Constitution. Rich J., in a joint opinion with Williams J., ignored an argument that the law substantially interfered with the constitutional powers of the States. Starke J. distinguished the case on the

[178] Id. 55 per Latham C.J.; 65-6 per Rich J.; 70, 74 per Starke J.; 81-2 per Dixon J.; 99 per Williams J.
[179] Id. 61-2 per Latham C.J., 99 per Williams J.
[180] Id. 66 per Rich J., 74 per Starke J., 81 per Dixon J.
[181] Id. 81-2.
[182] Id. 82-3.
[183] Id. 84.
[184] Id. 65-6 per Rich J.; 74-5 per Starke J.
[185] *Banking Act* (Cth) 1947, *Bank of N.S.W.* v. *Commonwealth*, the *Bank Nationalization* case (1948) 76 C.L.R. 1.

grounds that the States were not subject to a particular direction as in the *State Banking* case.[186]

The possible limitation of express Commonwealth legislative powers arose once more in the *Payroll Tax* case.[187] The case involved the pernicious taxation power. The *Pay Roll Tax Act* (Cth) 1941-1967 imposed a levy of 2.5 *per centum* on all wages paid or payable by an employer. "Employer" included the Crown in right of a State. There was an insignificant exemption for the employers of teachers in private schools.

Barwick C.J., McTiernan and Owen JJ. considered that the law was in substance a law with respect to taxation. There was nothing in the provisions of the Act nor any discrimination to indicate that it was in fact a law in respect of the States or the exercise of their functions.[188]

Windeyer J. who adopted the discrimination test also held that the law was valid.[189]

Despite the *Bank Nationalization* case, and despite the imprecision of the proposed test, three judges accepted the Rich – Starke formulation.[190] However, in this case the necessary interference with a State's right to exist or to function was absent.[191]

The "true characterization" approach had rejected the two other views because they imported unexpressed limitations into the Constitution.[192] The inclusion of express prohibitions against discrimination[193] emphasized the lack of a general prohibition.[194] Further, it was possible to envisage laws which validly discriminated against the States.[195] The wider test was rejected because it was vague and subjective in nature.[196]

But the "true characterization" approach is also unsound. A law may not always be classified as a law with respect to just one subject matter. As Dixon J. noted, the *Banking Act* was a law with respect to banking and also with respect to the States.[197]

All three approaches require the implication that the States in the exercise of their functions are to be independent from Commonwealth control. The efficacy of the federal system logically demanded it.[198]

The word efficacy shows that the judges were concerned with the practical operation of the federal system rather than with what the Constitution

[186] Id. 325-6.
[187] *Victoria* v. *Commonwealth* (1971) 122 C.L.R. 353.
[188] Id. 383 per Barwick C.J., 385 per McTiernan J., 405 per Owen J.
[189] Id. 404.
[190] Id. 392 per Menzies J., 411 per Walsh J., 424 per Gibbs J.
[191] Ibid. per Menzies J., 411-3 per Walsh J., 425 per Gibbs J.
[192] Id. 381, 383 per Barwick C.J.
[193] Constitution: ss. 51(ii), 99.
[194] *State Banking* case (1947) 74 C.L.R. 31, 61 per Latham C.J.
[195] Id. 99-100 per Williams J.
[196] Id. 61 per Latham C.J.
[197] Id. 79.
[198] Id. 83 per Dixon J.

actually created. The *Engineers'* case did not forbid the drawing of implications,[199] it did confine making them to explain the meaning of ambiguous words. Such explanations were limited to propositions found within the Constitution itself or to common usage of the term itself.[200]

The Constitution does not guarantee the continued existence of the States as political entities. It requires their existence as geographical areas and provides certain limited safeguards for the States while they continue to exist.[201] And none of the Court considered that the *Banking Act* violated the specific restriction expressed in section 51 (xiii) of the Constitution.

Its uncertain application reveals that such a political implication is not appropriate to the judiciary. The Commonwealth may use its taxing power to tax at a level which excludes State taxation.[202] Similarly, the power conferred by section 96 of the Constitution can be used to persuade the States to adopt programs desired by the Commonwealth.[203]

To distinguish these applications of Commonwealth power on the grounds that the law is non-coercive is unreal. When considering the practical efficacy of the system, the economic consequences must be the paramount consideration. Moreover, if these cases were unsound in principle, it is irrelevant that the matter is not *res integra*.[204] The High Court has never considered itself absolutely bound by its own precendents. The *Engineers'* case is an example. Dixon C.J. furnishes examples too.[205]

Finally the implication in the *State Banking* case is akin to the reserved powers doctrine. Yet even that earlier implication did not apply to local government.[206]

Industrial Disputes and the Two-Tiered Test

Given the uncertain approach to questions of intergovernmental relations generally, it is not surprising that it is difficult to discover a uniform approach to the "industrial disputes" power. This difficulty is reinforced by the nature of the test the High Court purported to apply. The Court did not evolve a systematic analysis but preferred a factual examination of the nature of the work in question. However, it is possible to discern different emphases in approach.

During the Second World War the Commonwealth attempted to use the defence power to regulate industrial disputes which did not extend beyond the limits of one State. This attempt simply required that the dispute be

[199] (1920) 28 C.L.R. 129, 155.
[200] Id. 150, 152, 161-2.
[201] G. Sawer, "Implications and the Constitution," 4 *Res Judicatae* 15, 18-9.
[202] The *Uniform Tax* cases, *South Australia* v. *Commonwealth* (1942) 65 C.L.R. 373, *Victoria* v. *Commonwealth* (1956) 99 C.L.R. 575.
[203] Ibid.
[204] *Victoria* v. *Commonwealth* (1956) 99 C.L.R. 575, 609 per Dixon C.J.
[205] cf. Ibid. and *Commonwealth* v. *Cigamatic Pty Ltd* (1962) 108 C.L.R. 372.
[206] *Municipalities* case (1919) 26 C.L.R. 508.

industrial within the sense of the "industrial disputes" power. Pursuant to Commonwealth legislation the Victorian Public Service Association obtained for its members an award from the Commonwealth Court of Conciliation and Arbitration. The Association represented the manual, clerical and professional employees of the Crown in right of the State. The State of Victoria challenged the constitutionality of the award.[207]

Relying on the *State School Teachers'* case, the High Court unanimously ruled that, as a general class, the employees could not engage in industry.[208]

The next case concerned a specific class of public servants. In the *Professional Engineers'* case,[209] the union sought a Commonwealth award covering all employees holding the qualifications of a professional engineer. An award was made which covered certain State employees but not others. The union sought the inclusion of those excluded. The States challenged any inclusion of their employees.

McTiernan J. provided a lone dissent. His Honour did so on the ground that members of the learned professions could never be described as "industrial" workers.[210]

The remaining judges,[211] considered that professional engineers could engage in industrial disputes. The majority applied a version of the two-tiered test suggested by the *State School Teachers'* case and Barton J. in the *Municipalities* case.[212]

First, the nature of the work to be performed by the employee required consideration.[213] There was no *prima facie* reason why the work of professional engineers should not be described as industrial.[214] Professional engineers were closely linked to industry. They were concerned in the control of manual labourers — who are *prima facie* industrial — and also in the production, maintenance and distribution of material things.[215]

Secondly, the undertaking of the employer could supply the industrial character if the undertaking was organized "for some productive purpose or some purpose of transportation or distribution".[216] The thing produced could be tangible or intangible.

[207] The *Public Servants'* case, *R* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria; Victoria* v. *Commonwealth* (1942) 66 C.L.R. 488.

[208] Id. 502 per Latham C.J., 511 per Starke J., 519-20 per McTiernan J., 529 per Williams J. with Rich J. substantially agreeing.

[209] *R.* v. *Commonwealth Conciliation and Arbitration Commission; Ex parte the Association of Professional Engineers, Australia* (1959) 107 C.L.R. 208.

[210] Id. 249-50.

[211] Dixon C.J. with whom Fullagar and Kitto JJ. agreed, Taylor and Windeyer JJ. Menzies J. did not sit having been counsel in earlier proceedings; R.J. O'Dea, "Some features of the Professional Engineers' Case", (1962) 4 J.I.R. 90, 95.

[212] See above Part III.

[213] *Professional Engineers'* case (1959) 107 C.L.R. 208, 236-7 per Dixon C.J., 261 per Taylor J., 268-9 per Windeyer J.

[214] Id. 237.

[215] Id. 236-7 per Dixon C.J., 268-9 per Windeyer J.

[216] Id. 236, 238-41 per Dixon C.J. 261 per Taylor J., 267 per Windeyer J.

The States raised the governmental character of their operations to negative any industrial quality. This was expressly rejected, especially any distinction based on the "inalienable and essential" functions of government. When a government, acting according to its powers, undertook an activity it was necessarily exercising governmental functions. Any further classification was subjective and uncertain, depending on varying historical and political factors.[217]

The difference between the approach of Isaacs J. and the views expressed in the *Professional Engineers'* case appears to be one of formulation rather than substance. Although the *Professional Engineers'* case emphasized that it was the nature of the employee's activities and not the nature of the employer's undertaking which caused the non-industrial classification, the employee's activity had to be directed to an end usually associated with private enterprise.[218] Whether the activities are described as the executive functions of government or as the provision of bare administrative services is not a matter of significant practical importance. The type of employee excluded from the "industrial disputes" power is in each case similar.[219]

The holding of professional qualifications was not itself sufficient. The work actually performed by the employee had to be industrial in character. The Chief Justice excepted from Commonwealth legislative competence employees providing "bare administrative services".[220] Taylor and Windeyer JJ. would exclude engineers engaged in policy formulation.[221]

Finally, the High Court considered that, although the Act only applied to an industrial dispute in an industry carried on by a State, the circular definition of "industry" in the Act was meant to embrace the whole constitutional field.[222]

The final case of this period concerned state-run firefighting services. In *Pitfield* v. *Franki*[223] the States objected to an attempt to register an association representing the officers (both fire fighting and staff) of their fire services. The *Conciliation and Arbitration Act* (Cth) 1904-1969 required the employees to be "in connection with or in any industry" or "engaged in an industrial pursuit".[224] This was regarded as synonymous to the constitutional test.

Barwick C.J. delivered the leading opinion. Owen J. expressly concurred[225] and McTiernan J. undertook a substantially similar analysis.[226]

[217] Id. 234-5, 238-9 per Dixon C.J., 260-1 per Taylor J. 272-6 per Windeyer J.
[218] i.e the production and distribution of goods and services.
[219] *Professional Engineers'* case (1959) 107 C.L.R. 208, 234, 245 per Dixon C.J., 269, 271 per Windeyer J. and *State School Teachers'* case (1929) 41 C.L.R. 569, 584-7 per Isaacs J.
[220] Id. 240, 245.
[221] Id. 260, 270.
[222] Id. 241-4 per Dixon C.J., 260 per Taylor J., 270 per Windeyer J.
[223] (1970) 123 C.L.R. 448.
[224] S. 132.
[225] *Pitfield* v. *Franki* (1970) 123 C.L.R. 448, 467.
[226] Id. 461-3.

First, the fire fighting authorities were not engaged in an industry. Although the service could be provided by private enterprise and then would be industry,[227] here it was not. The authorities were statutory bodies providing a service on behalf of the government to the community as a whole, not just to industry. Hence, they could not be described as industrial nor as properly indispensable to industry like banking and insurance.[228]

The employees could not be described as engaged in industrial work.[229] Their work involved knowledge and skill beyond that required of a mere manual labourer. Furthermore, the work was not productive of commodities or instrumental in the distribution of goods.

Menzies J. also disallowed the registration. His Honour was impressed by the very close connection of the authorities to the State governments.[230] The officers' skill rendered them more than manual labourers. Like the police, the work was the provision of a community service and thus was not industrial.[231]

The reliance of these judges on the statutory basis of the fire fighting authorities is surprising considering that the previous case law concerned undertakings set up by statute for the community welfare. In addition, since the *Professional Engineers'* case, it is difficult to explain why non-manual workers cannot be engaged industrially.

Walsh J. dissented. His Honour held that the case law required a generous approach to the term industry.[232] The work of the employees was *prima facie* industrial because, when looked at in totality, the work was more like manual work than mental or intellectual work.[233] This finding was reinforced by the fact that the work was of a type which could be carried on by employers engaged in industry. It would be too restrictive not to recognize that fire fighting was an indispensable portion of the general industrial mechanism merely because some part of the activity was directed to the protection of private life and property.[234]

It is perhaps advisable to be a little cautious in drawing conclusions from this era. The different benches were applying the same test based on the majority judgement in the *State School Teachers'* case, which could well be included in this period. This test was heavily dependent on the particular facts of the case in question. As Menzies J. observed, the result was largely a matter of impression.[235] However, in comparing the *Professional Engineers'* case to the decision in *Pitfield* v. *Franki,* it is possible to detect

[227] Id. 458.
[228] Ibid.
[229] Ibid.
[230] Id. 465.
[231] Id. 467.
[232] Id. 470.
[233] Id. 471.
[234] Id. 472-3.
[235] Id. 467.

a different emphasis in approach which may support the general thesis that the restrictions on what constitutes the "industrial" quality reflect the High Court's willingness to draw federalist implications from the structure of the Constitution.

In the *Professional Engineers'* case the majority took the position that the work involved was industrial unless shown to be otherwise. In the words of Dixon C.J., "there is no prima facie reason why the work of the profession should be considered to stand apart from the wide conception of what is 'industrial'.[236] The fact that such work was industrial when employed by private enterprise was virtually conclusive. The *Professional Engineers'* case focuses primarily on the employees' duties. Both Dixon C.J. and Windeyer J., who delivered the main opinions, also supported a general federalist implication.[237]

While Barwick C.J., McTiernan and Owen JJ., who espoused the "true characterization" approach and rejected the federalist implication[238] held that the nature of the employer's undertaking was paramount. It was for the employees to show the requisite industrial quality and the non-industrial finding was made despite the fact that private enterprise fire fighting business would be industrial. Furthermore, McTiernan J. would restrict industrial pursuits to those involving mainly "blue collar" labour.[239]

In stark contrast to Barwick C.J.'s approach is that of Walsh J. His Honour accepted the existence of a federalist implication and also supported a wide interpretation of the industrial character. Walsh J. focused strongly on the nature of the employees' duties. The position of Menzies J., who supported the federalist implication too, is probably explained by his Honour's perception of a very close relation between fire fighting authorities and their State governments.

V. STRAINING THE NARROW INDUSTRY–BASED CONCEPT

From 1975 onwards there is a marked change in the High Court's interpretation of the industrial character required by the "industrial disputes" power. Prior to the adoption of a broad purposive interpretation in the *Social Welfare Union* case the High Court stretched to its limits the narrow concept of industry based on involvement in the production and distribution of commodities. The relationship of this shift to developments in the field of intergovernmental immunities is only revealed at the close of this fourth period.

During this period three lines of general approach are apparent. The first,

[236] *Professional Engineers'* case (1950) 107 C.L.R. 208, 237-8.
[237] See above, this Part, The Retreat from the Engineers' case.
[238] *Payroll Tax* case (1971) 122 C.L.R. 353, 375, 382-3.
[239] *Professional Engineers'* case (1959) 107 C.L.R. 208, 249-50. cf. *Insurance Staffs' and Bank Officials'* case (1923) 33 C.L.R. 517, 523 per Knox C.J., 533 per Gavan Duffy J.

continuing from *Pitfield* v. *Franki*[240] adopts a very restricted view of what constitutes industry. Its proponents also adhere to the "true characterization" test of the validity of Commonwealth laws.

The two remaining views favour a far more liberal interpretation. This preference culminates in the *Social Welfare Union* case. They are distinguishable from each other, first, by the breadth of the implication each would draw from the federal nature of the Constitution, and secondly, prior to the *Social Welfare Union* case, in the way that the implication would operate.

The Federalist Implication

The clash between the centralist tendencies and the centrifugal forces of federalism is clearly exposed in the *Dam*'s case.[241] Tasmania through its Hydro-Electricity Commission (the H.E.C.) intended to build a dam for the purposes of power generation. The dam would inundate a wilderness area listed by the World Heritage Committee. To prevent the dam's construction the Commonwealth enacted legislation. It invoked, as its legislative authority, *inter alia*, the external affairs power to enforce an international Convention which was said to prevent violation of the wilderness area and also the corporation's power to control the actions of the H.E.C. Tasmania argued that the natural, wide meaning of these powers for which the Commonwealth contended would subvert the distribution of legislative powers affected by the Constitution.

The High Court unanimously accepted that a legislative power conferred on the Commonwealth was subject to an implied restriction deduced from the federal character of the Constitution. Disagreement arose on the extent of that implication. The judges constituting the majority[242] focused specifically on the enactment in question and its particular operation. However, the minority[243] were extremely concerned by the potential application of the constitutional power.

The first casualty of the conflict was the "true characterization" test. A complex enactment could well range over a number of different subjects and still remain related to a subject matter over which the Commonwealth had competence. It was a fallacy based on the dissimilar position of the Canadian federation that a law needed to be characterized as about one topic to the exclusion of all others.[244]

To the majority, the federal nature of the Constitution gave rise to an "implied prohibition forbidding the Commonwealth from imposing some

[240] (1970) 123 C.L.R. 448.
[241] *Commonwealth* v. *Tasmania* (1983) 46 A.L.R. 625.
[242] Mason, Murphy, Brennan and Deane JJ.
[243] Gibbs C.J., Wilson and Dawson JJ.
[244] The *Dam*'s case (1983) 46 A.L.R. 625, 712-3 per Mason J., 736 pr Murphy J., 755 per Wilson J., 768 per Brennan J., 814-5 per Deane J.

special burden or disability upon a State or from inhibiting or impairing the continued existence of a State or its capacity to function.[245]

Murphy J. does not in terms identify the prohibition. However, his Honour's acceptance of a limited States' immunity can be deduced.[246] Certainly, his Honour does not accede to the minority proposition advanced in the *Dam*'s case.[247]

Mason J. spoke generally of a requirement of "a substantial interference with the State's capacity to govern, an interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system.[248] His Honour did suggest that the area of operation, in this case of land, covered by the Commonwealth proscriptions may be decisive.[249]

Brennan J. thought it was necessary to discriminate between a Commonwealth law which diminished the powers of the State government and a law which impeded the process by which a State's powers are exercised. The former law would be valid. This situation occurred every time a law was made by the Commonwealth pursuant to a concurrent head of power. Examples of the latter type of law, included restrictions on the executive, legislative or judicial arms of a State government – for instance, forbidding the use of a State Parliament House. Laws of this description would be invalid.[250]

With respect, the formulation of Mason J. is to be preferred. Although less certain in precise operation, it allows examination of the substantive effect of a law. In comparison, the distinction between laws which restrict the power of a State and laws which attack the machinery of the State is rather tenuous. A State without power to command its subjects – that is, to make laws – cannot be regarded as a political entity. It may be envisaged that the Commonwealth could use one or more of its powers to subsume vast amounts of those areas traditionally within the purview of the States. The external affairs power is particularly apposite. Under modern trends external affairs may render any matter to be no longer of purely domestic concern.

This potential distortion, even shattering,[251] of the distribution of powers between Commonwealth and States was the basis of a much broader implication on the part of the minority judges.[252] The implication was not delineated with any precision. But, the consequences for the "federal balance" of the "traditional distribution of powers" led not to a specific prohibition.

[245] Id. 694, 703 per Mason J., 765-7 per Brennan J., 801-2 per Deane J. cf. *Victoria* v. *Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 41 A.L.R. 71, 118 per Mason J.

[246] Id. 728; *Victoria* v. *B.L.F.* (1982) 41 A.L.R. 71, 127 and *Gazzo* v. *Comptroller of Stamps (Vict.)* (1982) 149 C.L.R. 227, 255.

[247] Id. 726-7.

[248] Id. 703.

[249] Id. 705.

[250] Id. 767.

[251] Id. 692 per Mason J.

[252] Id. 669 per Gibbs C.J., 752 per Wilson J., 841 per Dawson J.

Instead, it warranted a more limited construction of the constitutional power than the natural meaning of the express terms accorded.[253]

Despite the protestations of the minority to the contrary, the majority clearly saw this attempt to construe the express grant of power by reference to an unspecified residue of powers as a revival of the banished doctrine of reserved powers.[254] Additionally, the argument was bad in that it did not pay due regard to the inclusion of the external affairs power in that federal balance.[255]

The actual operation of the broader implication should also be noticed. It would not halt the transfer of power to the central government. It would merely impede the shift. Hence, even the proponents of the "federal balance" recognized that the express distribution of powers undermined the suggested balance.

The "Industrial Disputes" Power

Contemporaneously with the *Dam*'s case, the *Social Welfare Union* case rejected completely the narrow interpretation of the "industrial disputes" power introduced by the *Municipalities* case. The revolution was not unheralded. Throughout this period judges declare a preference for a more general test based on the views expressed in the *Jumbunna* case. Secondly, the cases adopt a more liberal approach to the industry concept which strains the very limits of previous exposition.

These facets are clearly illustrated in the *Credit Societies'* case.[256] Credit Unions were characterized as providing only a minute proportion of loan capital directly to the manufacturing and vending sectors; Something in the order of 0.05 *per centum* of total loan capital. By far the bulk of credit union business was concentrated on the provision of consumer finance. The Australian Bank Officials' Association applied to extend its membership coverage to the employees of credit unions. The Clerk's Union, which had considerable muscle at the State level[257] and which represented such workers in Victoria, Queensland and Western Australia, objected. In the High Court, the Clerks' Union claimed that such workers were not engaged in an industry as required by the Constitution.

Mason J. considered that "credit unions constitute an industry possessing the "industrial" character to which s. 51(xxxv) refers".[258] Therefore, since the statutory definition of industry did not transgress the constitutional limits, the Clerks' Union failed.[259]

[253] Stephen J. adopted a similar position in his pivotal judgement in *Koowarta* v. *Bjelke-Petersen* (1982) 39 A.L.R. 417, 450-3.

[254] Id. 692-4 per Mason J., 726-7 per Murphy J., 766 per Brennan J., 802 per Deane J.

[255] Ibid.

[256] *Reg.* v. *Marshall; Ex parte Federated Clerks Union of Australia* (1975) 132 C.L.R. 595.

[257] R. McCallum and R. Tracey, *Cases and Materials on Industrial Law in Australia*, (Butterworths, Melbourne, 1980), 48.

[258] *Credit Societies'* case (1975) 132 C.L.R. 595, 608.

[259] Id. 609; Gibbs, Stephen and Jacobs JJ. expressly agreed with Mason J.

After the *State School Teachers'* case and the *Professional Engineers'* case, to be industrial the Constitution did not require that the activity in question be essential or indispensable to the production, distribution or transportation of commodities. It would suffice if the activity was only ancillary or incidental to such operations.[260]

The necessary connexion was found in two factors. First, despite the small scale of such loans, the provision of finance to the manufacturing and distributive sectors was incidental to such operations. Secondly, comsumer finance stimulated production because it increased the community's overall capacity to purchase. This, too, would suffice.[261]

Mason J. concluded his opinion by expressing a personal preference for a purposive approach along the lines suggested by Griffith C.J. and O'Connor J. in the *Jumbunna* case. His Honour particularly did not wish to be taken as supporting the refinements of Isaacs and Rich JJ.[262]

In dissent, McTiernan J. noted that the *State School Teachers'* case had rejected the views of Griffith C.J. and O'Connor J.[263] His Honour focused on the minute scale of the loan capital generated by credit unions. On such a scale it could not cause the kind of dislocation envisaged by Griffith C.J.[264] Nor could it properly be called indispensable to industry.[265] Moreover, the motives and objects of such societies were not reconcilable to the concept of industry. Credit unions were not formed to generate profit but to promote mutual helpfulness and so only provided low cost loans to consumers.[266]

His Honour's reliance on the motives of credit societies is questionable. The *Municipalities* case and the *Harbour Trust* case had decided that a purpose of profit-making was unnecessary for the industrial character. However, the opinion of the majority is a long advance on at least some of the views expressed in the *Insurance Staffs' and Bank Officials'* case. Isaacs, Rich[267] and Starke JJ.[268] all stressed the provision of finance to the operations of capital. Similarly, although not concerned with government employees, the *Credit Societies'* case is a significant departure from *Pitfield* v. *Franki*, the case about firefighters. The latter case had excluded from the concept of "industry" an operation which was indispensable, not just incidental, to industry because of that operation's State governmental associations.

Finally, it should be emphasized that potential development of credit union business was also a relevant factor. Mason J. was struck by the rapid and

[260] Id. 608.
[261] Ibid.
[262] Id. 608-9.
[263] Id. 601.
[264] *Jumbunna* case (1908) 6 C.L.R. 309, 333.
[265] *Credit Societies'* case (1975) 132 C.L.R. 595, 601.
[266] Id. 602-3.
[267] (1923) 33 C.L.R. 517, 527.
[268] Id. 536.

continuous growth in the numbers of credit unions and his Honour's projection that such rapid growth was likely to continue.[269]

The two cases following the *Credit Societies'* case are crucial. They fall on opposite sides of the line dividing industrial activities from non-industrial activities. Yet each is very similar. In addition, the two cases reveal that the more liberal interpretation of this period actually embraces two separate approaches.

The *ATOF* case[270] concerned a dispute between the New South Wales Commissioner for Motor Transport and his clerical and administrative employees. The Australasian Transport Officers' Federation sought a Commonwealth award for such employees. The prosecutor challenged the Commonwealth's jurisdiction on the grounds that the employees were not industrial. The Commissioner and his department had three primary functions – a) the registration of motor vehicles and the licensing of their users; b) promotion of traffic safety; and c) collection of taxes and charges levied in connection with motor vehicle use. Most of the funds so raised financed the department's administration, the provision of traffic facilities, payments for road construction and contributions to the compulsory motor vehicle insurance scheme.

Gibbs J., with whom Barwick C.J.[271] and Stephen J.[272] agreed, expressed preference for a test based on the views expressed by Griffith C.J. and O'Connor J. in the *Jumbunna* case. However, his Honour did not consider that all employees could be classified as industrial workers.[273] His Honour then examined the question in light of currently accepted doctrines.

The relevant question was whether the activities of the department or its employees could properly be described as ancillary or incidental to the transportation and distribution of commodities.[274] They could not. His Honour considered that the necessary connexion was a question of degree. Here the connexion was too remote and indirect. The operations could not be distinguished from that of the Treasury even though the funds raised by the department were applied to special purposes closely connected with transport.[275] In particular,

> "The tasks of licensing, and registration, and formulating rules for the governance and safety of traffic, also cannot be described as industrial. They are bare administrative functions, such as could not be performed in industry under our system."[276]

Jacobs and Murphy JJ. both dissented. Jacobs J. aligned himself with the

[269] *Credit Societies'* case (1975) 132 C.L.R. 595, 605.
[270] *Reg.* v. *Holmes; Ex parte Public Service Association (N.S.W.)* (1977) 140 C.L.R. 63.
[271] Id. 67 as to the non-industrial nature of the dispute.
[272] Id. 78.
[273] Id. 74.
[274] Id. 77.
[275] Ibid.
[276] Ibid.

comments made by Mason J. in the *Credit Societies'* case concerning the *Jumbunna* case.[277] His Honour stressed the fact that the employees in question were not engaged in the assessment of taxes. They simply facilitated the work of the assessors. The employees performed work like that performed by persons regarded as being in "industry" and so the work was industrial in character.[278] That is, ordinary clerical work was industrial.[279]

On the other hand, Murphy J. ruled that reliance on large numbers of employees and the focus on the employment relationship rendered the *Jumbunna* case outmoded.[280] His Honour found that "industrial disputes" refers to work disputes and covers disputes concerning the entry into and termination of the work relationship as well as those concerning remuneration and other conditions of work.[281]

The workers in issue were clearly comprehended.

The *ATOF* case was distinguished in *Reg.* v. *Cohen; Ex parte Motor Accidents Board (Tas.).*[282] The Australian Insurance Employees' Union sought a Commonwealth award for the prosecutor's employees. The prosecutor objected on the grounds that the dispute was not industrial in character. The prosecutor was a statutory body carrying out a statutory scheme for the provision of insurance and compensation for motor accidents.

Barwick C.J. dissented on the basis that the Board's activities were not commercial and thus it was not carrying on an insurance business. It neither sold nor entered into insurance contracts. It administered a compulsory, statutory scheme designed to replace commercial activity.[283]

The leading judgement of the court was delivered by Mason J. His Honour held that part of the Board's activities involved indemnifying contributors for motor accidents. This constituted insurance.[284] So, there was an industrial dispute because the business of insurance was ancillary or incidental to industry and so industrial in character.[285] His Honour contrasted this case with the *ATOF* case in which the majority thought that the activities in question were "outside the whole world of productive industry and organized business".[286]

Stephen J. stressed that his agreement depended on the distinction between the two cases. That is, the *ATOF* case concerned functions which could not be performed in industry under our system.[287] Similarly, Aickin J. consi-

[277] Id. 79.
[278] Id. 80-1.
[279] Id. 86.
[280] Id. 90.
[281] Id. 89.
[282] (1979) 141 C.L.R. 577 per Gibbs, Stephen, Mason, Murphy and Aickin JJ.; Barwick C.J. dissenting.
[283] Id. 580-1. cf. *Credit Societies'* case (1975) 132 C.L.R. 595, 601-3 per McTiernan J.
[284] Id. 587-9.
[285] Id. 590.
[286] Ibid.
[287] Id. 582.

dered that the instant case was very close to the line dividing the industrial from the non-industrial as disclosed by the *ATOF* case.[288]

In comparing the two cases, it is difficult to see much, if any, difference in the degree of connexion to "industry". Modern methods for the production and distribution of commodities are as inconceivable, if not more so, without the complex of transport regulation and facilities provided by the department as without the cushion of motor accident insurance.

The significant factor according to many judges was the inability of "industry under our system" to perform the functions of the department of Motor Transport in the *ATOF* case. The suggested distinction recalls the discrimination between "trading" and "inalienable and essential" governmental functions of Higgins and Isaacs JJ.[289]

But if, as Jacobs J. indicated,[290] the employees were only engaged in tasks which clerks by whomever employed could perform – not, for example, tax assessment – what difference was there between the department's employees and those of the Motor Accidents Insurance Board? Why could not workers in industry perform those same tasks?

Moreover, it is questionable whether the work of clerks should be described as neutral in character as Gibbs J. did.[291] Technological advances during this century have resulted in a vast increase in the proportion of "white collar" employees in the workforce.[292]

These cases illustrate the different approaches to the interpretation of the word "industrial" which flow from the different conceptions of intergovernmental immunities.

Consistently with their espousal of the "true characterization" test, Barwick C.J. and McTiernan J. propose the most restricted meanings for industry and industrial. Each rejects the contention that these cases involve industrial disputes.

Although the remaining judges of the period support a more liberal interpretation of the "industrial disputes" power, the extent of that interpretation is not uniform. This in turn reflects the diversity of approaches to the implication based on the federal nature of the Constitution. It is only in the two cases concerning State government employees that this division becomes apparent.

The *ATOF* case reveals a more cautious extension of the term industry than that suggested by the *Motor Accidents Insurance Board* case.

First, the result in the *ATOF* case is very close. Gibbs and Stephen JJ. are joined in the majority by Barwick C.J. who consistently adopts a very

[288] Id. 592.
[289] See Part III: The *Harbour Trust* case and *State School Teachers'* case.
[290] *ATOF* case, (1977) 140 C.L.R. 63, 80-1.
[291] Id. 75.
[292] R.D. Lansbury, "White Collar and Professional Employees in Australia: Reluctant Militants in Retreat" in G.W. Ford, J.M. Hearn and R.D. Lansbury (eds), *Australian Labour Relations Readings*, (3 edn, 1980), 100.

narrow interpretation of "industry". In contrast, Jacobs and Murphy JJ. regularly support a positive extension of the industrial concept.

Secondly, in the *Motor Accidents Insurance Board* case Mason J. refers to the *ATOF* case in careful terms which may suggest less than whole-hearted approval for the result in that case.[293] Furthermore, the tone of his Honour's opinion does not convey the same note of caution underlying the judgements of Stephen and Aicken JJ. His Honour also delivers the leading decision in those cases which liberalise the industry concept.

The third factor to be considered is the breadth of the implication proposed by the judges. As the *Dam*'s case and the *Koowarta* case indicate, Gibbs, Stephen and Aickin JJ. recognize a broad implication based on the "federal balance" of the Constitution. Yet, Mason and Murphy JJ. adhere to a much narrower proposition.

A further distinction between the two approaches is the manner in which the implication operates. In both the *Dam*'s case and the *ATOF* case the "federal balance" acts to confine the actual meaning of the term to be interpreted. However, Murphy J. rejected any restriction placed on the meaning of industrial. His Honour preferred to consider, first, whether the dispute was industrial, and secondly, whether Commonwealth power should be limited by the operation of an intergovernmental immunity.[294] The *Social Welfare Union* case appears to adopt this analysis.[295]

While Jacobs J. does not deliver an opinion on the implication issue, his Honour strongly identifies himself with the approach of Mason J. in the *Credit Societies'* case.[296] His Honour is also prepared to investigate the governmental versus industry dichotomy more closely than the majority in the *ATOF* case.

Following the *Motor Accidents Insurance Board* case the High Court found private friendly societies to be industrial in character.[297] The Court simply held that the societies were engaged in "carrying on insurance business and that their functions are not "bare administrative functions" carried on by a governmental organization . . . ."[298] No question of State immunity arose, the friendly societies were carrying out policies pursuant to Commonwealth legislation.

The final case before the *Social Welfare Union* case reinforced the judicial discontent with the narrow industry-based test. An association representing University staff, including academics, applied for registration in the Commonwealth system. In the absence of any attempt to revive the *Jumbunna*

[293] (1979) 141 C.L.R. 577, 590.
[294] *ATOF* case (1977) 140 C.L.R. 63, 90.
[295] (1983) 47 A.L.R. 225, 236.
[296] *ATOF* case (1977) 140 C.L.R. 63, 79.
[297] *Reg.* v. *Holmes; Ex parte Manchester Unity Independent Order of Oddfellows in Victoria* (1980) 147 C.L.R. 65.
[298] Id. 72 per Mason J.; Stephen, Aickin and Wilson JJ. agreeing. At 73 Murphy J. adhered to his decision in the *ATOF* case.

case the High Court considered the *State School Teachers'* case conclusive and rejected the application.[299]

VI. AFTER THE SOCIAL WELFARE UNION CASE

As the analysis in the preceding parts has borne out, there is a relationship between the question of intergovernmental immunity and the High Court's interpretation of the "industrial disputes" power. In periods when the High Court is more willing to draw implications from the federal nature of the Constitution it is more likely to favour a broad meaning of the word "industrial".

The *Social Welfare Union* case did not provide an exhaustive definition of the term "industrial disputes". The case decided that "industrial disputes" *includes* "disputes between employees and employers about the terms of employment and the conditions of work".[300] There has been an indication that what constitutes a contract of employment may receive a fairly liberal treatment.[301] Further, the High Court considered that the phrase would extend more widely to include, at least, demarcation disputes.[302] Possibly, the phrase may even extend to comprehend the relation of entrepreneurs to their independent contractors, that is, to contracts for services not just of service.[303] Such an extension is contrary to earlier authority,[304] but would accord with the purposive interpretation of the "industrial disputes" power reaffirmed in the *Social Welfare Union* case.[305]

However, leaving aside such potential developments, the High Court indicated that the "industrial disputes" power may not cover all persons with employee status. While the proposed formulation would clearly include within the ambit of the power all persons employed by private enterprise, the court expressly reserved for subsequent decision the problem of State public servants, especially those engaged in providing "bare administrative services".

It is important to realize that the *Social Welfare Union* case only rejected the reasoning underpinning the earlier cases.[306] It did not overrule the actual decision in each case. So, the use of the "industrial disputes" power to regulate the industrial demands of State governmental employees may be limited by the demands of intergovernmental relations in our federal system.

[299] *Reg.* v. *McMahon; Ex parte Darvall* (1982) 42 A.L.R. 449; esp. 450, 453 per Gibbs C.J., 454-5 per Mason J., 459 per Murphy J., 462 per Brennan J.

[300] (1983) 47 A.L.R. 225, 235.

[301] *Independent Schools' Staff Association* v. *Canberra C.E.G.G.S.*, Conciliation and Arbitrtation Commission (Cohen J.) noted in *Federal Industrial Laws Service*, (1984), 5214.

[302] *Social Welfare Union* case, (1983) 47 A.L.R. 225, 236.

[303] cf. *ATOF* case (1977) 140 C.L.R. 63, 89 per Murphy J.

[304] *Reg.* v. *Commonwealth Industrial Court; Ex parte Cocks* (1968) 121 C.L.R. 313.

[305] cf. also *Federated Clothing Trades of the Commonwealth of Australia* v. *Archer* (1919) 27 C.L.R. 207.

[306] i.e the cases following *Municipalities* case.

The question that remains is how the federalist implication will affect the employment relationship as a determinant of the industrial character of a dispute when the workers are employees of a State or State instrumentality.[307]

From a review of the cases both expounding general constitutional principles and interpreting the "industrial disputes" power specifically, several overall trends may be perceived. The major trend is the development of the constitutional approach to intergovernmental immunities. Under the Griffith High Court the concept of co-ordinate federalism required that all employees of government be exempt from any regulation by another and distinct government within the system. However, the express terms of the Constitution and the very object of that instrument – to facilitate the forging of a national policy from an association of individual colonies – and the practical development of the system enshrined in the Constitution soon rendered so complete an immunity unworkable. Once the concept of absolute non-interference between the separate governments of the federation was breached, because the Constitution operates by conferring specific powers on the Commonwealth and leaving the undefined residue to the States, there has been a continuous clash between giving free rein to the express Commonwealth powers and the perceived need to preserve the States as independent policies within the federal system. Gradually, the areas of States' protection have been reduced until, following the *Dam*'s case, a law within Commonwealth legislative competency will not be invalidated unless that law significantly threatens the continued existence or functioning of a State.[308]

It was part of the reaction against the complete exclusion of State employees by the implied immunity of instrumentalities doctrine coupled with the need to protect the vital operations of a State from Commonwealth interference that influenced many judges to seek a distinction between functions appropriate only to government and those capable of performance by private individuals. Hence, the resort to expressions like "trading" functions, "the inalienable and essential" functions of government,[309] "the bare administrative services of government",[310] and the emphasis on "industry under our system".[311]

The general trend of restricting the States' immunity from Commonwealth authority may be discerned in the field of the "industrial disputes" power. To determine whether the necessary industrial character exists in the con-

[307] Howevever, before the full potential of the *Social Welfare* case can be realized, it may be necessary to amend the *Conciliation and Arbitration Act* and the instruments created under it. These still reflect the old concepts based on what is an industry and an industrial pursuit: cf. e.g. *Re the Association of Professional Engineers and the University of Melbourne*, Conciliation and Arbitration Commission (Alley J.) noted in *Federal Industrial Laws Service*, (1984), 2137.

[308] See above Part V.

[309] See above Part III, *State School Teachers'* case.

[310] See above Part IV, *Professional Engineers'* case.

[311] See above Part V.

stitutional sense, the High Court has often had to reconcile two conflicting objectives. The first objective is to resolve work-related disputes over which no single State has complete legislative authority. The perceived need to protect the States' independence from interference by the Commonwealth is the second objective.

The first objective requires that all employers and all employees engaged in a dispute should be included in the resolution of that dispute. If not, then the dispute has not been settled completely. For example, union solidarity may require all employees to continue striking in support of their colleagues who were excluded from the resolution. Moreover, anamolies in payment or working conditions are one sure source of industrial disruption. That is, with all other things being equal, if employer A is paying higher wages to his, say, miners than employer B pays his own miners, industrial conflict is likely. The background to the *Jumbunna* case illustrates employer A's response in attempting to regain his competitive edge.[312] B's employees also have a strong incentive to agitate for a "flow on" of the benefits accruing to their colleagues employed by A.

The objective of completely resolving a dispute may clash directly with the second objective. This will occur whenever some of the workers engaged in the dispute are employed by a State or a State agency.

The argument for excluding the employees of a State from the "industrial disputes" power is simple. Control over the working conditions of State employees is an interference with that State's ability to execute its policies. If such control exists, inevitably it will be exercised. First, if a government is to affect its policies it must have power. And it will use whatever powers are available to achieve its ends.[313] Secondly, ultimate political responsibility vests in that power which has the paramount legislative competence.[314]

Overall, the conflict between these two objectives has seen the subordination of States' protection to the dispute-resolution requirement. In cases which have had a significant connexion to work or workers in private enterprise or to work already recognized as industrial the employees of the State have been characterized as industrial too.

The *State Public Servants'* cases concerned a general class of employees which by definition excluded the employees of private enterprise. The *Professional Engineers'* case is in stark contrast. In that case the High Court had to consider not the State Public Services as an entire class, but a specific section of those services. That section was defined by reference to a general occupational standard. Furthermore, the union made its application in respect of all employees regardless of who their employer was. A decisive factor was

[312] See R. McCallum and R. Tracey, *Cases and Materials on Industrial Law in Australia*, (1980), 8.

[313] For an attempt to overcome the shortcomings of s. 51 (xxxv) by the taxation and customs and excise power see *Ex Parte H. V. McKay* (the *Harvester* case) (1907) 2 C.A.R. 1; *R.* v. *Barger* (1908) 6 C.L.R. 41.

[314] See e.g. the *Dam*'s case (1983) 46 A.L.R. 625, 752 per Wilson J.

the involvement of professional engineers in the supervision of manual labourers.

In the *Railway Servants'* case and *Pitfield* v. *Franki*, the public sector was vastly greater in magnitude than any comparable services provided by private individuals. State School teachers, too, outnumbered their privately employed counterparts. These cases were held to be non-industrial. In contrast to these cases are the *Engineers'* case and the *Harbour Trust* case. The privately employed workers outnumbered those employed by the States. The *Municipalities* case is also very important. The union represented only local government employees. However, the union's membership performed manual labouring tasks no different to those performed by any number of manual labourers whether employed by government or private enterprise. The task-orientated focus enabled the High Court to bring the union within the reach of the "industrial disputes" power and so achieve the dispute-resolution objective. But, it would also allow the court to afford sufficient protection to the States.[315] Presumably, it is on this basis that railway servants are encompassed within the Commonwealth system following the *Engineers'* case.

Likewise, the *ATOF* case can be seen as concerning employees without counterpart in private undertaking while the *Motor Accident Insurance Board* case involved employees engaged in activities already considered industrial. Significantly, the latter case occurred at a time when a substantial part of the insurance business is carried on by private enterprise.

However, as the *Social Welfare Union* case indicates, if any occupations are excluded from Commonwealth regulation, it is not because they are not industrial but because the regulation of those employees' wages and conditions of work by the Commonwealth is perceived to threaten the continued existence or functioning of a State. Therefore, when the employer is a State or State instrumentality, it may be necessary to examine the nature of the employee's work before including that employee within the ambit of the "industrial diputes" power.

The simplest solution would be to allow all employees of a State to apply for Commonwealth coverage. Such a position could circumvent the problem of multiple jurisdictions separately dealing with aspects of the one situation – a malady inherent in any federal constitution. It would also accord with other constitutional developments. For example, the Commonwealth may levy tax on both a State and its employees[316] although taxation is at least as such an interference with the State's independence as a power to regulate wages. It should also be remembered that neither the State nor its employees are automatically included in the Commonwealth system. Not all of a State's employees are unionized.[317] Furthermore, the employees will only have an

[315] See above Part III.

[316] *Payroll Tax* case (1971) 122 C.L.R. 353.

[317] e.g. the Public Service Associations of Victoria and New South Wales do not seek to cover officers of the first division of the services. See Milton Derber, "State Government Management-Union Relations in Victoria and New South Wales," (1977) 19 J.I.R. 366, 372-3.

incentive to resort to the Commonwealth system if they are not receiving reasonable treatment within the State system.[318]

However, such a solution is unlikely. With the possible except of Higgins J.,[319] judicial opinion has been solidly against such an unlimited operation of the "industrial disputes" power.

Therefore, some restriction on the application of the "industrial disputes" power is probable. Before attempting to consider its extent a note of caution is necessary. The range of governmental activity is not fixed. Governments are ever extending their operations to undertake new functions. Also, the decision in any case cannot be divorced from the circumstances that produce the issue. In attempting to give meaning to such vague concepts, a court must consider the interaction of social, economic and political factors. The development of the law at the time the case is raised will be of particular importance. For example, the decision in the *ATOF* case would have been reached with greater difficulty had that case followed the *Motor Accidents Insurance Board* case rather than preceded it.

Nevertheless, it is possible to identify some fields of activity in which the federalist implication may be invoked. It is reasonable to assume that any activity already characterized as industrial within the constitutional meaning will not be re-categorized as non-industrial following the *Social Welfare Union* case.

The *Social Welfare Union* case is the most recent in a period when the High Court has been disposed towards an expansive reading of the "industrial disputes" power and is the result of judicial frustration with the refinements on a narrow definition of industry.

Furthermore, except pursuant to the defence power, the inclusion of an activity within Commonwealth power is generally less likely to be reversed than exclusion of an activity from Commonwealth regulation. In the industrial relations field this process can be seen in the *Engineers'* case reversal of the *Railway Servants'* case and the whittling down of the *State Public Servants'* case by the *Professional Engineers'* case and the *Motor Accidents Insurance Board* case. As a broad constitutional development the trend is evidenced in taxation,[320] grants,[321] and the far reaching resurrections over the past twenty years of the corporations' power[322] and the external affairs' power.[323] Hence, especially since the *Engineers'* case, there is an ongoing

[318] The refusal of State Public Service Boards to negotiate with the Association of Professional Engineers was a major factor in that Association's campaign for a national award: R.J. O'Dea, "Some features of the Professional Engineers' case," (1962) 4 J.I.R. 90, 105.

[319] It should be remembered his Honour never directly considered the question and preferred to exclude hypothetical situations from his opinions: see esp. *Municipalities* case (1919) 26 C.L.R. 508, 574.

[320] *Fairfax* v. *F.C.T.* (1965) 114 C.L.R. 1 and *R.* v. *Barger* (1908) 6 C.L.R. 41.

[321] cf. esp. *Victoria* v. *Commonwealth* (1956) 99 C.L.R. 575, 609-11.

[322] Commencing with *Strickland* v. *Rocla Concrete Pipes Ltd* (1971) 124 C.L.R. 468.

[323] Contrast *R.* v. *Burgess; Ex parte Henry* (1936) 55 C.L.R. 608 to *Koowarta*'s case (1982) 39 A.L.R. 417 and the *Dam*'s case (1983) 46 A.L.R. 625.

process transferring legislative authority from provincial interests, the States, to the central government of the Commonwealth.

On this assumption, the areas of State activity potentially exposed to the "industrial disputes" power following the *Social Welfare Union* case include state school teachers, university staff, firemen, police, workers in the health and emergency services such as nurses and ambulance crew, and the clerical and administrative employees of the executive departments of government — for example, the departments of Premier, Treasury, Law, Public Works, Transport Regulation and Titles Offices.

Taking State school teachers first, it cannot be said that a State will cease to exist or function properly if the Commonwealth is enabled to regulate teachers' remuneration and work conditions through the "industrial disputes" power. Teaching functions may be distinguished from the ordinary administrative functions of a civil servant. The fact that some teachers perform both teaching and administrative work is no reason to exclude them.[324] In addition, some 30 *per centum* of all practising school teachers are employed by private and not state schools.[325] Admittedly this proportion is slightly lower than the ratio in the late 1920s.[326] The major factor militating against the exclusion of teachers from the "industrial disputes" power is the change in the source of funding for education since 1929. At the time of the *State School Teachers'* case the Commonwealth did not provide funds for education. By 1981, however, of the States' total expenditure on education one third was provided by the Commonwealth.[327]

A similar funding argument applies to nursing and related services. The majority of funds provided to hospitals and health services come from the Commonwealth.[328] The manual nature of much of the work and the significant private sector involvement in hospitals and health care are additional reasons to include such employees within the Commonwealth system. The implementation of schemes like Medicare and the national repercussions of disputes in hospitals about staffing and funding levels are strong arguments towards the major financier of such services assuming responsibility for the terms and conditions of work of health employees.[329]

As far as the employees of universities are concernced, the same funding of education argument applies. Those who are engaged in teaching are really no different to school teachers.[330] Those engaged in research work are akin to the position of professional engineers. The administrative and manual

[324] *Motor Accidents Insurance Board* case (1979) 141 C.L.R. 577, 587-9 per Mason J.
[325] (1981) 67 *Year Book Australia* 281.
[326] See (1928) 21 *Year Book Australia* 442 and 454, (1929) 22 *Year Book Australia* 429 and 441, and (1930) 23 *Year Book Australia* 310 and 314.
[327] (1981) 67 *Year Book Australia* 600-1 and 634.
[328] Ibid.
[329] See: Mark Metherell, "$14m Staff Agreement Ends Nurses' Dispute", The *Age*, 17 August 1984, p. 1.
[330] *Reg.* v. *McMahon; Ex parte Darvall* (1982) 42 A.L.R. 449.