COMMENTS

LEGAL RIGHTS, SUBJECT MATTERS AND INCONSISTENCY: ANSETT TRANSPORT INDUSTRIES (OPERATIONS) PTY. LTD. v. WARDLEY

For some time there has been uncertainty as to the relevance of the subject matter of Commonwealth and State legislation in determining questions of inconsistency between them, although surprisingly the matter has been raised in the cases on only a few occasions. In *Ex parte McLean,*[1] Dixon J. (as he then was) suggested that at least where inconsistency is alleged to result from the incompatibility of a State law and a Commonwealth award the subject matter of the former might be critical,[2] but the suggestion has not been developed in later cases.[3] Occasionally, brief remarks have appeared, usually dismissing the relevance of subject matter considerations or, at least, of "characterization".[4] In *Ansett Transport Industries (Operations) Pty. Ltd.* v. *Wardley*[5] this question finally rose to real prominence and was subjected to genuine judicial debate, if only among three of the six members of the bench.[6] The primary significance of the case lies in the judgment of Stephen J. In its use of the concept of subject matter, the judgment poses questions of theoretical importance both to inconsistency in particular and to general constitutional doctrine, questions which merit careful examination.[7] The purpose of this comment is to justify this assessment, although it only briefly suggests some of the implications which flow from it.

The case concerned the consistency of certain provisions of the Equal Opportunity Act, 1977 (Vic.), forbidding discrimination on the basis of sex or marital status, with the Airline Pilots Agreement, 1978. The latter, certified under s.28 of the Conciliation and Arbitration Act, 1904 (Cth.) and thereby assuming the same effect for all purposes of the Act as an award, recorded terms of settlement of matters in dispute between Ansett and the Australian Federation of Air Pilots after service of a log of claims by the latter on 24 July, 1978.

The defendant, Mrs. Wardley, had waged a protracted campaign, resisted by Ansett, for employment as a trainee pilot. Ansett objected to her sex, and was clearly in breach of s.18(1) of the Victorian Act. In an originating summons removed into the High Court from the Victorian Supreme Court pursuant to s.40 of the Judiciary Act, Ansett sought declarations that the relevant provisions of the State Act did not apply to it in determining whether to employ the defendant, in determining the terms of any such employment, and in exercising such rights of dismissal as were conferred on it by the Agreement. Argument before the High Court, and the judgments, concentrated on the question of dismissal, because Ansett by then had agreed

1. (1930) 43 C.L.R. 472.
2. *Id.*, 485-486. See *infra,* text to n.69.
3. Arguments in at least two later cases were clearly based upon this suggestion, but sought to extend it beyond the context of Commonwealth awards: see *Colvin* v. *Bradley Bros. Pty. Ltd.* (1943) 68 C.L.R. 151, 157, 161; *O'Sullivan* v. *Noarlunga Meat Ltd.* (1955) 92 C.L.R. 565, 593.
4. *E.g., Colvin* v. *Bradley Bros. Pty. Ltd.* (1943) 68 C.L.R. 151, 158-159 *per* Latham C.J.; *Airlines of N.S.W.* v. *N.S.W. (No.2)* (1965) 113 C.L.R. 54, 79-80 *per* Barwick C.J.
5. (1980) 28 A.L.R. 449.
6. Barwick C.J., Stephen and Aickin JJ.
7. The relevance of subject matter to inconsistency is discussed in a recent article by Rumble, "The Nature of Inconsistency Under Section 109 of the Constitution", (1980) 11 *F.L.Rev.* 40, esp. 45-52.

to employ the defendant pursuant to orders of the Victorian Equal Opportunity Board.[8]

Part III of the Victorian Act includes s.18 which makes it unlawful, *inter alia,* for an employer to discriminate on the ground of sex or marital status either in offering employment or terms of employment, or by dismissing an employee. Part IV includes s.40(2), which confers on the Equal Opportunity Board power to order that a person the subject of a complaint refrain from committing any further act of discrimination against the complainant, pay damages to the complainant, or perform specified acts redressing the loss caused to the complainant by the act of discrimination. Section 40(4) prescribes a penalty of up to $1,000 for the offence of contravening or failing to comply with an order made under the section. Section 54 provides that a contravention of the Act does not as such incur a sanction (criminal or civil) except to the extent expressedly provided, "sanction" including the granting of an injunction or declaration.

The relevant provisions of the Agreement were contained in cl.6, entitled "Contract of Employment", and cl.50, entitled "Grievance Procedures". Clause 6 provided, *inter alia,* as follows:

> "B. The services of a pilot shall be terminable by either the employer or a pilot –
>
> 1. During the first six months of service, by seven days' notice in writing;
>
> 2. After the completion of six months of service, by one month's notice in writing;
>
> 3. By the payment of the pilot of seven days' or one month's salary in lieu of notice as aforesaid
>
> or
>
> 4. By the forfeiture by the pilot of the last seven days' or one month's salary paid to him, in lieu of notice as aforesaid.
>
> Provided that the period of notice as set out herein may be reduced or waived by mutual agreement. A pilot whose services are terminated whether by summary dismissal or notice shall be given the reasons for this dismissal in writing, in the notice of dismissal, and shall have recourse to the Grievance Procedures except as provided in s.6H...
>
> H. During the period of Initial Service which shall be 12 months in respect of all matters associated with his employment, a pilot's service may be terminated in accordance with this agreement without recourse to the Grievance Procedures."

The Grievance Procedures, set out in cl.50, provided in a very detailed procedure for the determination of disputes as to matters which included a pilot's dismissal. The Procedures involved a three-tiered system for reviewing such disputes, with a final determination to be made if necessary by the Grievance Board, a determination made binding on the Federation, Ansett, and the pilots.

Ansett argued that certain provisions of the Act were inconsistent with the Agreement in two ways. First, it was argued that the Act was "directly"

8. The Victorian Supreme Court refused Ansett's application that these orders be stayed pending the outcome of the originating summons.

inconsistent in that it purported to limit or deny a right, conferred upon Ansett by cl.6B, to dismiss its pilots upon any ground whatsoever, subject only to the provisions as to notice and the Grievance Procedures.[9] Secondly, the Act was said to be "indirectly" inconsistent in seeking to regulate the matter of dismissal of pilots, a matter (or "covered field") dealt with completely and exhaustively by the Agreement.[10] Some confusion seems to have arisen as to what sort of inconsistency was really at issue. Aickin J.,[11] and perhaps Wilson J. also, [12] thought that argument in the case had been "primarily directed" to the application of the "covering the field" test, whereas both Stephen and Mason JJ.[13] thought the main thrust of Ansett's case to have been the existence of so-called "direct", "conferred right" inconsistency. Mason J. concluded that the case was really one in which one and the same alleged inconsistency could be formulated by either or both of these two different "senses" of the notion: where the foundation of the claim of inconsistency is "the giving of permission or the grant of a right by Commonwealth law", and the right is intended to be absolute, "State law which takes away the right is inconsistent because it is in conflict with the absolute right and because the Commonwealth law relevantly occupies the field."[14] Aickin J. stated in his concluding remarks that:

> "The two different aspects of inconsistency are no more than a reflection of different ways in which the Parliament may manifest its intention that the federal law, whether wide or narrow in its operation, should be the exclusive regulation of the relevant conduct."[15]

Granted that the two "aspects" of inconsistency are (and were in this case) theoretically closely related,[16] this reflection is apposite. Here, the "conferred right" argument rested upon a construction of cl.6B as explicitly granting Ansett a right to dismiss, and cl.50 was only indirectly relevant in (arguably) providing evidence supporting this construction. The "covering the field" argument was much weaker, and therefore subordinate: should the suggested construction of cl.6B be rejected, it might still be maintained that the two clauses together were intended to constitute an exhaustive treatment of the

9. This argument, and the model of inconsistency it represents, will be referred to hereafter as the "conferred right" argument and "conferred right" inconsistency respectively.
10. This argument, and the model of inconsistency it represents, will be referred to hereafter as the "covering the field" argument and "covering the field" inconsistency respectively.
11. *Ansett* v. *Wardley* (1980) 28 A.L.R. 449, 475.
12. *Id.*, 483 where Wilson J. described Ansett's argument. The only mention of "direct" inconsistency is in connection with determinations of the Grievances Procedures. See also *infra,* text to n.18.
13. *Id.*, 453, 463 respectively.
14. *Id.*, 464.
15. *Id.*, 479.
16. It has been argued that "conferred right" inconsistency can always be subsumed as a species of "covering the field" inconsistency, and therefore does not warrant treatment as a separate test: see Murray-Jones, "The Tests for Inconsistency Under Section 109 of the Constitution", (1979) 10 *F.L.Rev.*25, 34-37. It may be that a right and a "covered field" both involve a freedom from further regulation, and that the conduct or matter the subject of the right could be described as a (very narrow) "field". But the "covering the field" notion is a metaphor best used where there is no more concise or less abstract concept at hand. It is, furthermore, imprecise and often elusive when applied to concrete cases (as Evatt J. has pointed out — see *infra,* nn. 82-83). Where rights are concerned, surely utility as well as elegance favours analysis in terms of rights rather than metaphors for rights. Rumble also argues that so-called "direct" inconsistency is analytically identical to covering the field inconsistency: Rumble, *loc. cit.* (*supra*, n.7), 72, 77, 79. This argument is discussed *infra*, n.48. Rumble acknowledges that the various "categories" of inconsistency "may have a function to perform in illustrating the variety of ways in which inconsistency can arise" (72) but beyond this illustrative function he apparently regards all formulations of inconsistency in other than covering the field terms as otiose.

subject matter of termination of employment (so as, in effect, to confer the same right in the form of freedom from further regulation). The second argument alleged an intention expressed implicitly rather than explicitly, to be found not by direct construction of the provisions but by examination of the nature of the regulation effected by them, in the light of their purpose and so on. (Of course, the latter procedure can also be used to assist the former: here it has a more direct role).

The upshot was that all the justices except Wilson J. grappled mainly with the "conferred right" argument, and then deemed its resolution dispositive of the "covering the field" issue.[17] The discussion of these problems by Wilson J. was, as will be seen, rather unclear[18] but he seems to have been oddly out of step in addressing himself more to the "covering the field" question.[19] The crux of the case, in any event, lay in construing the clauses in issue, particularly cl.6B, in order to ascertain what was provided explicitly or otherwise in relation to Ansett's rights to dismiss its pilots. The crucial question, according to Stephen and Mason JJ.,[20] was whether the Agreement intended any such rights to be unqualified or subject to such other restrictions as the "general law", including State law, might impose.

The relief sought by Ansett was refused by the High Court, which on the substantial question of inconsistency split 4 to 2. Barwick C.J. and Aickin J. formed the minority in finding that there was inconsistency between the provisions of the State Act and the Agreement. In lieu of the relief sought they were prepared to declare that Part III of the Act would not apply to the dismissal by Ansett of Mrs. Wardley if such dismissal should accord with the provisions of the Agreement.[21] The majority, Stephen, Mason, Murphy and Wilson JJ., declined to grant any relief and did not find any inconsistency so far as the parties and the particular orders made by the State Board were concerned.[22] Significant for present purposes was a further split, within the majority itself, as to the proper construction of the Agreement. Mason, Murphy and Wilson JJ. adopted identical constructions of cl.6B,[23] but Stephen J. strongly disagreed and concurred in the result only through a quite different approach.[24]

Aickin J., with whom Barwick C.J. concurred, held that cl.6B authorized the dismissal without review of a pilot during his first six months of service on either seven days' notice, or payment of seven days' salary, upon any ground

17. Aickin J. upheld Ansett's case on this basis, although he described the argument in terms of both types of inconsistency: *Ansett* v. *Wardley* (1980) 28 A.L.R. 449, 475-476, 478-479, (Barwick C.J. concurred, 451-452). Stephen and Mason JJ. disposed of the "conferred right" argument and added that their reasoning also negated that of "covering the field": 459, 467 respectively. Murphy J. did not mention "covering the field" at all: 469.
18. See *infra,* text to n.38ff.
19. *Ansett* v. *Wardley* (1980) 28 A.L.R. 449, 483 (outline of Ansett's argument), 485-486 (discussion).
20. *Id.,* 453, 464 respectively.
21. *Id.,* 479 *per* Aickin J., 452 *per* Barwick C.J. (concurring).
22. *Id.,* 461, 469, 469, 489 respectively. It should be noted that both Mason and Wilson JJ. thought that in other circumstances actual inconsistency might arise. Mason J. (*id.,* 467-468) discussed conflict between determinations of the State Board and the Grievance Board (invoked under the Agreement). Wilson J. (*id.,* 487-488) thought that the State Board's power of reinstatement upon dismissal, as opposed to its other powers, might be inconsistent. Stephen J. referred to the situation discussed by Mason J. but did not express any opinion: *id.,* 461. These matters will not be discussed in this comment.
23. See *infra,* text to n.26.
24. See *infra,* text to n.54ff.

whatsoever: insofar as it purported to limit this power, the State Act was inconsistent and invalid.[25]

The ordinary meaning of the words used in cl.6B seems to support this view. The sentence beginning "The services of a pilot shall be terminable by either an employer or a pilot ..." appears to authorize termination of employment in accordance with the specified procedures (as to notice and so on). The suffix "-able" in the word "terminable" is generally used to form an adjective with the sense "that can, may, must be -ed", and "terminable" in this context clearly seems to mean "that may be terminated".[26] It need hardly be added that "may" is a permissive or enabling expression generally taken to confer a faculty or power.

Neither Mason, nor Murphy or Wilson JJ. satisfactorily rebutted the apparent ordinary meaning of cl.6B (which, moreover, none acknowledged). All three construed the clause as prescribing certain procedures for dismissal, but as leaving the question of the "substantive right to dismiss" to the "general law".[27] It is somewhat difficult to come to grips with this conclusion since the reasoning behind it is either almost non-existent (Mason and Murphy JJ.), or unclear (Wilson J.). Murphy J. did not support his interpretation of the clause with any reasons at all,[28] apparently regarding the matter as obvious. Mason J. adduced nothing to justify the conclusion other than a rather forced "comparison" between cl.6B and a statutory provision.[29] Wilson J., as has been remarked, seems to have addressed himself primarily to the "covering the field" argument[30] although some of his observations, to which attention will be directed shortly, provide the only positive clues as to the thinking underlying the construction in question.[31]

Let us turn first to Mason J., who asserted baldly that "Clause 6B does not deal with the substantive right of dismissal. Instead, its opening words assume the right of the employer under the general law to terminate the employment of a pilot."[32] The clause, he stated later, "is only concerned with the question of notice."[33] In support, his Honour invited a comparison with s.43(6) of the Broadcasting and Television Act, 1942 (as amended) (Cth.). "The contrast", he asserted, "shows that cl.6B does not in itself expressedly or impliedly seek to vest in the employer an unfettered right of dismissal on any grounds."[34] Section 43(6) makes the "terms and conditions of employment of officers and temporary employees ... such as are determined by the Commonwealth with the approval of the Public Service Board." With respect, it is difficult, if not impossible, to make any meaningful contrast between cl.6B and the totally dissimilar statutory provision. Section 43(6) is a statutory provision conferring power to determine contractual terms; cl.6B is a particular contractual term unrelated to it. How the former illuminates the interpretation of the latter would seem to be a mystery.

This comparison appears even more startling in view of his Honour's rejection of an argument that another contrast, this time between cl.6B and an

25. *Ansett* v. *Wardley* (1980) 28 A.L.R. 449, 476 (*per* Aickin J.).
26. *Concise Oxford Dictionary of Current English* (6th ed., 1976), 1194.
27. *Ansett* v. *Wardley* (1980) 28 A.L.R. 449, 465-467, 469, 485-486, respectively.
28. *Id.*, 469.
29. See *infra,* text to n.33.
30. See *supra,* n.19.
31. See *infra,* text to n.38ff.
32. *Ansett* v. *Wardley* (1980) 28 A.L.R. 449, 465. The latter comment was repeated twice: 466, 467.
33. *Id.*, 466.
34. *Ibid.*

apparently quite similar clause considered in a decision of the South Australian Full Court, supported the view that cl.6B did confer a right to dismiss. In *R.* v. *Industrial Court of South Australia; Ex parte General Motors-Holden's Pty. Ltd.*,[35] the South Australian Full Court had construed a clause (cl.6(c)(i)) which read in part:

> "Employment shall be terminated by a week's notice on either side given at any time during the week or by the payment or forfeiture of a week's wages as the case may be. Such notice may be given at any time ... This shall not affect the right of the Company to dismiss an employee without notice for malingering, inefficiency [etc.] ..."

Mason J. distinguished this clause from cl.6B on the basis that the last sentence of the former conferred a "right" of a sort not similarly given by the latter.[36] The distinction involved ignoring the opinion of the South Australian Full Court (including Bray C.J.), which clearly regarded the clause before it as conferring a right to dismiss quite independent of the right of summary dismissal with which the last sentence of the clause dealt: nothing in the judgments indicates that the former was somehow coloured or governed by the latter.[37] It is true that the case involved a workman who had been dismissed summarily, and that strictly speaking only the last sentence in the clause required interpretation. Even so, a contrast of the two clauses would seem to strengthen Ansett's case rather than the reverse: cl.6(c)(i) did not use the phrase "shall be terminable", but the weaker expression "shall be terminated" which is much less suggestive of a power or right.

Wilson J.'s treatment of these issues is not entirely clear. Within 18 lines of opening his discussion of the substantial question of inconsistency, his Honour appears to have disposed of both the "conferred right" and the "covering the field" arguments.[38] As to the former he noted, cl.6 "does no more than declare that the engagement may be terminated by either the employer or the pilot on certain prescribed notice": (despite the "may") if that were all nothing would suggest the exclusion of State law.[39] As to the latter, although the parties carefully attended to the resolution of disputes about dismissals, his Honour found "[no] intention to deal exclusively with all the consequences of a termination of employment."[40] But having rejected both of Ansett's arguments, Wilson J. then went on again to examine both cl.6 and cl.50 "mindful to secure to the paramount law that full and free operation which its proper construction requires. "[41] In what follows, it is unclear if his Honour was referring to the "conferred right" argument, that of "covering the field", or both. Nevertheless, these passages contain the crucial reasons, applicable to either argument, which apparently swayed Wilson J. and, one suspects, Mason and Murphy JJ. as well.

Wilson J. concluded that nowhere in the Agreement did the parties intend to deal with the general question of the employer's grounds for dismissal or, in

35. (1975) 10 S.A.S.R. 582.
36. *Ansett* v. *Wardley* (1980) 28 A.L.R. 449, 466. In fact, this sentence would appear *not* to confer any right but rather to simply recognize a pre-existing right at common law to dismiss summarily: see *Printing Industry Employees Union of Australia* v. *Jackson & O'Sullivan Pty. Ltd.* (1957) 1 F.L.R. 175, 180 *per* Dunphy J.
37. (1975) 10 S.A.S.R. 582, 590 *per* Bray C.J., 599-600 *per* Walters and Wells JJ.
38. *Ansett* v. *Wardley* (1980) 28 A.L.R. 449, 484 ("Leaving aside the Grievance Procedures ..."), 485.
39. *Ibid.*
40. *Id.*, 485.
41. *Ibid.*

his words, "with a definition of the employer's grounds for dismissal."[42] He appears to offer three reasons to support this.[43] First, there was no explicit reference in the Agreement to the question, whereas "one would have expected to see explicit reference to it" had the parties intended to deal with it. Secondly, the parties certainly did not intend to deal with sex discrimination in relation to dismissal: again, one would have expected this to be specifically raised, particularly given the legal background (which included the Victorian Act) against which the Agreement was concluded. Thirdly, the Agreement was obviously not inconsistent with s.5 of the Conciliation and Arbitration Act, 1904 (Cth.), forbidding dismissal because of union activity, which demonstrates that the Agreement could not have been intended to authorize dismissals regardless of the employer's grounds. It is submitted that none of these reasons effectively answers the minority position.

The first proposition ignores rather than rebuts the apparent natural meaning of the words "shall be terminable". Those words might be regarded as either the explicit reference to the question of the employer's grounds for dismissal which Wilson J. found to be lacking, or at least as effectively reversing the "presumption" of "what one would have expected to see": that is, given the apparent meaning of the words used, one would expect explicit reference to grounds for dismissal if the clause were *not* intended to confer the right claimed by Ansett, rather than the opposite.

As to the second proposition, that the Agreement was clearly not intended to deal with sex discrimination as a reason for dismissal, it is not entirely clear whether this was advanced as in itself supporting the conclusion that the parties were bound by the Victorian Act, or as a fact supporting the wider proposition that the Agreement did not purport to deal with the general topic of (all) grounds for dismissal. But even if both were intended, Wilson J. seems to have shot wide of the mark.

His Honour reasoned that given the existence of the Victorian Act when the Agreement was drawn up, the parties would have explicitly adverted to it in their negotiations and the resulting Agreement had they (or, rather, Ansett) intended to exclude its application to them. That is an unexceptionable observation. But it does not follow that without explicit provision to the contrary the Agreement is subject to the Act, because the Act might well be excluded without that result ever having been consciously intended. This would in fact follow if the Agreement were drawn up upon assumptions and in terms inconsistent with the application of the Act, a consequence perhaps not even considered by either party, let alone adverted to. There is a crucial difference between not intending to do X, and intending not to do X: the former usually does not preclude X in fact being done, but the latter does.

While Wilson J. raised the question of the parties' assumptions, a more rigorous enquiry into the matter suggests that it offers him little assistance. There is no indication of what evidence as to the parties' negotiations (which he adverted to) was before Wilson J. Mason J. mentioned that the log of claims initially served on Ansett was not in evidence,[44] and it seems likely that Wilson J. simply inferred from the fact that the Agreement did not allude to the Victorian Act that it was never discussed. This was probably the case. Stephen J. stated that the "whole question" of sex discrimination "is simply one which is not adverted to, and this because a reading of the Agreement

42. *Id.*, 486.
43. *Id.*, 485-486.
44. *Id.*, 462.

makes it tolerably clear that it was drawn up upon the unstated assumption that the situation for which it was legislating was one in which no pilots were women."[45]

If Stephen J. were correct, as seems likely, then it does not follow from the failure of the parties to advert to the matter that it was assumed that they would be bound by the Victorian Act. The parties apparently framed their terms of settlement as if the Act did not exist. Bearing that in mind, when looking to the "legal background" against which the agreement as to termination of employment was reached (in order to ascertain the assumptions embodied in the terms of settlement), it is the law of dismissal as it stood before or apart from the Victorian Act which is relevant. Examined from this point of view, again it seems clear that cl.6B *was* intended to authorize dismissal without restriction as to grounds, contrary to Wilson J.'s conclusion.

Clause 6B in fact reflected the common law position, which entitles a master to dismiss his servant by giving reasonable notice (provided that the contract is neither for a specific term, nor implied to be a yearly hiring). At common law there are no restrictions as to the grounds upon which such dismissal might be made. As Lord Reid said in *Ridge* v. *Baldwin*:[46]

> "The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none."[47]

If the agreement were intended to confer a right to dismiss upon notice without restriction as to grounds, it is not to the point that the parties inadvertently ignored a consideration of policy (the question of sex discrimination) in arriving at that intention. Nor can such inadvertence be remedied by the Court "adjusting" the provisions of the Agreement to accord with the Court's conjecture as to what the parties' intentions would have been had that consideration of policy been adverted to, at least in a case such as this where no manifest contradiction or absurdity has been created.[48] To return, then, to the two possible interpretations of this second of Wilson J.'s propositions, the fact that the parties did not intend to deal with sex discrimination as a reason for dismissal does not support the conclusion that the parties must be bound by the Victorian Act, and does not support the proposition that the Agreement did not purport to deal with the general topic of (all) grounds for dismissal.

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45. *Id.*, 456.
46. [1964] A.C. 40.
47. *Id.*, 65.
48. In arguing that so-called "direct" inconsistency is analytically identical to covering the field inconsistency, Rumble maintains that the former could involve an apparently absolute Commonwealth provision which might have to be appropriately "qualified" in the face of circumstances which make the provision operate in a fashion clearly not anticipated or intended by the Commonwealth (Rumble, *loc.cit.* (*supra,* n.7), 75). But the examples given by Rumble probably fall within the contradiction or absurdity exception, where the Commonwealth's "true" intention is clear. Beyond this exception, it is doubtful that the Court should adjust provisions to accord with what it thinks the legislature would have wanted had it foreseen the circumstances in question. Here, there may well be an important distinction between "direct" (including conferred right) inconsistency and covering the field inconsistency. In relation to the latter, there *is* no express intention and the Court must engage in what Rumble calls the "fiction (some might say deceit)" of ascertaining the legislature's "true" intention (77). But where the legislature has spoken, the law is what is enacted, not what should (or even would) have been provided had other factors been considered (with the exception previously noted).

The third reason advanced by Wilson J., also adverted to by Murphy J. (but not as a reason),[49] involved a comparison of the relationship of the Agreement and s.5 of the Commonwealth Conciliation and Arbitration Act, to the relationship between the Agreement and the Victorian Act. Since s.5, forbidding dismissal of an employee because of union activity, qualified Ansett's power to dismiss its pilots, Wilson J. concluded that "the Agreement does not confer on Ansett the authority, subject only to other provisions of the Agreement, to terminate Mrs. Wardley's employment ..."[50] This argument, taken only that far, is undeniable. Unfortunately, his Honour implied that it could be taken further, and that by analogy since the Agreement was subject to, and qualified by, a Commonwealth law it therefore had to be construed so as to be subject to any other laws purporting to restrict the power to dismiss. The fallacy is, with respect, self-evident.

A powerful objection to the approach taken by Mason, Murphy and Wilson JJ., and not answered by them, was put by Stephen J. His Honour noted that their approach entailed splitting the concept of termination into distinct elements, the "bare right of termination", and procedural matters such as the period of notice, the two elements being regarded as somehow having "different origins" and as coming together "only when united in the contract itself".[51] Stephen J. doubted, however, that a bare right of termination "devoid of all provision as to its exercise" could exist, since it cannot be a right exercisable at will without notice (this, when introduced into the contract of employment would be irreconcilable with the notice provisions of cl.6B). His Honour also pointed out that the concept of a bare right "incapable of exercise until provisions as to its exercise are supplied from another source", is not to be found in the general law of contract which, on the contrary, recognizes a right of termination upon reasonable notice (in the absence of specific agreement). Because this right would conflict with the terms of cl.6B as to notice, as would a right to terminate without any notice at all, his Honour concluded that it could not be the case that cl.6B concerned itself only with questions of procedure.

Stephen J. concluded this discussion by asserting that cl.6B provided the parties "with their respective powers of termination as well as prescribing the procedure for termination": it imported into the contract of employment "a right of termination on notice, complete in itself."[52] Nevertheless, his Honour denied the existence of inconsistency.

Wilson J.'s judgment suggests that of the three propositions he advanced, the second was the critical one. In two paragraphs,[53] the chain of reasoning seems to be as follows:

1. Defendant argued that sex was not within the purview of the Agreement, but was a distinct and separate item.
2. This may be to put too much emphasis on sex, rather than dismissal.

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49. *Id.*, 469. Stephen J. at one point compared s.18(2)(b) of the Victorian Act to s.15(1)(c) of the Racial Discrimination Act, 1975 (Cth.), stating that both the provisions were "remote from the industrial subject matter with which s. 6B deals. . .": 458. His honour does not seem to have been attempting to make the same argument as that of Wilson J. discussed here.
50. *Id.*, 486.
51. *Id.*, 459. The citations following are all at 459-460.
52. *Id.*, 460.
53. *Id.*, 486 — the first two complete paragraphs.

3. "On the other hand", Ansett should have explicitly adverted to the Victorian Act (*i.e.,* to the question of sex discrimination in, *inter alia,* dismissals), given its existence at the time of negotiations.

4. There is nothing to suggest that the parties were at all concerned with a definition of the employer's grounds for dismissal.

The argument did not proceed in quite this step-by-step fashion, of course. One sentence, concerning the object of cl.50, appears between what have been nominated as steps 3 and 4. Nevertheless, it seems clear that whatever other factors also led his Honour to step 4, step 3 was a crucial, perhaps the crucial, consideration.[54] In fact, it may be that what lay at the heart of the approach of not only Wilson J., but also Mason and Murphy JJ., was this one undeniable fact: that the Agreement was never intended to deal in any way with questions such as that of sex discrimination, that such questions had nothing to do with the parties' purposes in framing the terms of their Agreement. If so, in construing the Agreement so as to give effect to that fact, their Honours were led into asserting not only that sex discrimination was not dealt with by the Agreement, but that the whole question of grounds for dismissal was untouched as well. Here, steps 1 and 2 above are relevant. It would appear that their Honours were unable to separate or distinguish the question of sex discrimination in the form of dismissal from the more general question of dismissal. Wilson J. noted the argument that the latter was dealt with, but not the former (step 1), but found that this put too much emphasis on sex, rather than dismissal.

If this is so then in a sense the approach of Mason, Murphy and Wilson JJ. was predicated upon the same unstated (because assumed) premiss as that of Barwick C.J. and Aickin J. This "major premiss" was, in effect, that dismissal on the ground of sex falls within, or forms part of, the legal category, or subject matter, of "grounds for dismissal" (or, perhaps, "the right to dismiss"), and that there is no relevant conceptual distinction between sex as a reason for dismissal and other reasons.[55] It was in the adoption of different minor premisses that the two approaches diverged to reach opposite conclusions. In the case of Barwick C.J. and Aickin J., the minor premiss was that the Agreement clearly *did* deal with the right to dismiss: it therefore followed that it also dealt with dismissal on the ground of sex, at least insofar as by omission it excluded it as a limitation on the right granted. Mason, Murphy and Wilson JJ. reasoned (it has been suggested) from the minor premiss that the Agreement did not deal with sex, generally or as a ground for dismissal, and so it followed that the Agreement did not deal with the matter of grounds for dismissal generally (and cl.6B was construed accordingly).

Both of the "minor premisses" seem to have merit: cl.6B did seem to deal with the right of Ansett to dismiss, but it and the Agreement as a whole also seemed to have nothing at all to do with the question of sex discrimination in the form of dismissal. In the judgment of Stephen J. these two considerations

54. Also, as has been pointed out previously, it may be that "step 3" was offered as itself supporting directly the conclusion that the parties were bound by the Victorian Act.

55. Another clue perhaps supporting this inference lies in the treatment by Mason J. of what he called the defendant's "second point", which appears much like the argument Wilson J. referred to ("step 1" in the text above) except that the argument is transformed: it is not just that the Agreement could not deal with sex discrimination but that it could not confer an absolute right to dismiss (because it is not an industrial matter). The discrepancy may be due to Mason J. being unable to distinguish in a relevant manner dismissal because of sex from other grounds of dismissal. See Mason J., 462-463. Of course, it may be that both arguments were put in a confused fashion: there was certainly confusion as to argument in the case (see *supra,* text to nn.10-12).

were reconciled, by the rejection of what has been called the "major premiss" of his brethren.

Stephen J. drew a distinction between sex as a ground of dismissal (and perhaps others as well), and such other grounds as relate to what his Honour called "industrial considerations".[56] The distinction enabled the conclusion that while the Agreement dealt with the latter, conferring upon Ansett a right to dismiss without restriction as to such grounds, it did not concern itself with or affect in any way the former. In dealing with the "right to dismiss", the Agreement was confined to considerations relating to the employment relationship between the parties and was intended to regulate the rights of termination only insofar as "industrial considerations" were involved. Its regulations were therefore intended to operate alongside general laws of the land dealing with other aspects of the termination of employment: aspects, unrelated to industrial matters, such as discrimination on the ground of sex, race or religion. These, being social evils which as a concern of broad social policy are manifested in widespread areas of human activity, are appropriately dealt with by general laws applying throughout the community. Sex discrimination, even when manifested in dismissal from employment, is not part of the "area of industrial relations", and the Agreement did not purport to deal with it as this would constitute "trespassing upon alien areas remote from its purpose and subject matter."

There is some ambiguity in the judgment as to whether the absence of inconsistency was due to an intention implicit in the Agreement not to deal with sex discrimination as an aspect of dismissal, or to a lack of competence in the Agreement regardless of its intentions because the matter fell beyond the scope of industrial relations.[57] On the one hand, his Honour stated that the question "resolves itself, in the end, into a search for legislative intent"[58] and found in the Agreement "no hint of concern with any such general social questions as equality of opportunity between men and women ..."[59] This was partly because "the whole question is simply one which is not adverted to", because the parties acted on the "unstated assumption that the situation for which it [the Agreement] was legislating was one in which no pilots are women."[60] However, it was also because sex discrimination is an "alien area ... remote from [the Agreement's] purpose and subject matter."[61] But while the Agreement did not concern itself with sex discrimination for these reasons, Stephen J. seems to have gone further and held that it could not properly have done so anyway. It was not simply that sex discrimination was "an item separate from other subject matters within the area of industrial relations", like the question of long service leave held in *Collins* v. *Charles Marshall Pty. Ltd.*[62] not to have been dealt with by the award in question in that case. Rather, sex discrimination "forms no part of that area" of industrial relations because it is "unrelated to industrial considerations".[63] The Commonwealth

56. This and the following references in this paragraph are to be found generally at (1980) 28 A.L.R. 449, 454-459.
57. See the separate discussions of Commonwealth power, on the one hand, and intention, on the other, in relation to covering the field in Rumble, *loc.cit.* (*supra,* n.7), 46 and 51 respectively.
58. *Ansett* v. *Wardley* (1980) 28 A.L.R. 449, 455.
59. *Id.,* 456.
60. *Ibid.*
61. *Id.,* 454.
62. (1955) 92 C.L.R. 529.
63. *Ansett* v. *Wardley* (1980) 28 A.L.R. 449, 458. His Honour also characterized "discrimination against women" as a "distinct subject matter of regulation" which, like the matters considered in *Clarke* v. *Kerr* (1955) 94 C.L.R. 489, was "outside the province of federal industrial awards": 457.

Conciliation and Arbitration Act is silent as to sex discrimination for this reason, and that silence extended to the Agreement. Most industrial disputes pertain to the relationship of employer and employee and "have nothing inherently to do with questions of discrimination on the grounds of sex," and this Agreement in his Honour's view arose out of just such an "orthodox" industrial dispute.[64] But Stephen J. stopped short of asserting that no award could ever deal with sex discrimination. He suggested that a particular dispute might involve some such question, adding that in such a case "the precise nature of its involvement may then determine whether or not the dispute is indeed an industrial dispute."[65]

The point at which Stephen J. departed from Barwick C.J. and Aickin J. is indicated in the objection made by the latter that:

> "It is no doubt true, as was argued, that discrimination on grounds of race or sex was not dealt with in the Agreement, nor was it as such a matter in dispute, but that is not sufficient to deny the possibility of inconsistency ... The critical matter is the field of the federal law."[66]

While aimed at the position taken by Stephen J., the objection really answers what has been suggested was the major consideration which influenced Mason, Murphy and Wilson JJ.: if sex discrimination in the form of dismissal lies within the subject matter of grounds of dismissal (or the right to dismiss) because it *is* a ground of dismissal (the "major premiss"), and that subject-matter is the "field" of the Agreement, then the field having been conclusively dealt with it is irrelevant that in doing so the Agreement did not advert to that particular aspect or portion of the field.[67] For Stephen J. it was also true that "the critical matter is the field of the federal law": Aickin J.'s objection misses its intended target because it was on this "critical issue" that Stephen J. challenged the assumption made by his brethren. Stephen J. defined the "field" of the Agreement more narrowly, to restrict it, insofar as it concerned grounds for dismissal, to those grounds relating to industrial considerations. Hence, dismissal on the ground of sex did not lie within the subject matter of the Agreement.

Stephen J. was able to avoid a holding of inconsistency without resorting to the conceptually crude distinction drawn by the other members of the majority between the "substantive right to dismiss", and the procedure for dismissal. That distinction, apart from its deficiencies in the theoretical realm, involves practical implications which, it is submitted, are unacceptable. It would allow the Agreement's provisions to be qualified not only by State laws such as the Victorian Act, regulating matters far removed from the industrial "arena" within which the parties negotiated, but also by State laws purporting to control directly the industrial relationship itself. For example, a law forbidding the dismissal of employees on harsh, unreasonable or unconscionable grounds would seem clearly to trespass upon matters which the parties to the Agreement had themselves intended to dispose of (in cl.50). The approach of Stephen J. would indicate inconsistency in such a case, while leaving the operation of laws such as the Victorian Equal Opportunity Act untouched.

The importance of *Ansett* v. *Wardley* for constitutional theory lies, as was suggested at the outset, in the judgment of Stephen J. In particular, the debate

64. *Id.*, 457.
65. *Ibid.*
66. *Id.*, 478-479.
67. See the discussion *supra,* text to n.46ff.

entered into between his Honour and the minority, Barwick C.J. and Aickin J., must be pursued. This debate concerned the concept of subject matter, and its role in the determination of questions of inconsistency.

Both Barwick C.J. and Aickin J. attacked the position adopted by Stephen J., both on the basis that the subject matter of the State law is not relevant to the existence of inconsistency.[68] Paramountcy of federal laws, Barwick C.J. maintained, is universal and without exception and "no matter what the subject matter of the State law" it must give way if inconsistent.[69] Similar opinions have been expressed in a few scattered judgments of the High Court,[70] but not until the judgment of Stephen J. in the present case had the opposite view been articulated with any real force.

In fact, the only precursor in any real sense was the now familiar passage in *Ex parte McLean*[71] where Dixon J. discussed a hypothetical Commonwealth award expressedly forbidding shearers to injure sheep. Dixon J. stated that such an award should probably be construed as intending to regulate that conduct only in its "industrial aspect": insofar, that is, as it related to the industrial rights and duties of employers and employees.[72] Therefore, a shearer who wounded a sheep intentionally might be prosecuted under State criminal law for unlawfully and maliciously wounding an animal even though the specific conduct was dealt with by the award. Such a State law would not be regulating the conduct from the same point of view as the award: both would be dealing with different "aspects" of the conduct and no inconsistency would arise out of their simultaneous application to it.

In *Colvin* v. *Bradley Bros. Pty. Ltd.*[73] Latham C.J. stated that the "classification of statutes according to their true nature" is irrelevant to "any application of s.109".[74] However, Fullagar J. impliedly questioned this *dictum* in *O'Sullivan* v. *Noarlunga Meat Ltd.*[75] when he hinted that it might have been expressed "somewhat too widely".[76]

In the case of "covered field" inconsistency some analysis of the subject matters dealt with by the State law would seem unavoidable. A "field" in this context has been variously described, but it clearly seems that in all instances what is meant could be described less metaphorically as a subject-matter.[77] To "invade a field" is to deal with a subject matter, or a part thereof: while it does not entail that the trespassing law be a law "upon" or "with respect to" that subject matter, the notion does require that the law deal to some extent with a "subject matter". The *dictum* of Latham C.J. in *Colvin* v. *Bradley*[78] does seem to be aimed at the former, and in this sense perhaps it was not expressed too widely. Nevertheless, the opponents of "subject matter analysis" in the context of inconsistency have generally gone further than that. At the heart of their objection is the misconceived notion that the subject matters dealt with by a State law are simply those physical persons, things, activities, or transactions which the law regulates. Barwick C.J. stated in *Ansett* v. *Wardley* [79] that once

68. *Ansett* v. *Wardley* (1980) 28 A.L.R. 449, 451, 479 respectively.
69. *Id.*, 451.
70. See *supra*, n.4.
71. (1930) 43 C.L.R. 472.
72. *Id.*, 486.
73. (1943) 68 C.L.R. 151.
74. *Id.*, 159.
75. (1954) 92 C.L.R. 565.
76. *Id.*, 593.
77. See Rumble, *loc.cit.* (*supra*, n.7), 42, 46, 52.
78. (1943) 68 C.L.R. 151, 159.
79. (1980) 28 A.L.R. 449.

the scope of the federal law is determined "the inconsistency, if any, of the State laws ought readily to emerge."[80] All that is required, according to this view, is an examination of the application of the State law to objective things.

But subject matters are not quite so simple: generally speaking, subject matters are not simply generic expressions which function solely to denote sets of physical things (including activities and transactions), so that a law dealing with any member of such a set necessarily touches or deals with the subject matter. Subject matters describe groups of things according to certain defining characteristics: the things which possess the relevant characteristic(s) belong to the subject matter. But all things belong to many different subject matters by possessing a vast multitude of different characteristics: a man may be a husband, father, doctor, alien, justice of the peace, Victorian and so on, and a particular act may be one of payment, fraud, conversion, and interstate commerce at the same time. Laws also deal with physical things by virtue of relevant characteristics possessed by those things. Now, almost certainly, when a State law deals with a thing which falls within a "covered field", but by virtue of a characteristic of no relevance to that field, it cannot be said that the State law "enters the field". This was the point made by Dixon J. in *Ex parte McLean.*[81] The subject matters dealt with or even touched by a law cannot be identified through a straightforward examination of the physical operation of that law and the identification of the things in the real world that it regulates. Hence, the protests of Evatt J. that "subject matters of legislation bear little resemblance to geographical areas",[82] and that an "analogy between legislation with its infinite complexities and varieties and the picture of a two dimensional field ... [is] of little assistance."[83]

Wynes affirmed the following three propositions in relation to the "covering the field" test.[84] First, a covered subject matter is not free from "any or all State legislation which may affect or have some connection with it."[85] Secondly, it is not essential that the State act "considered as a whole should be upon or 'with respect to' the same subject matter."[86] Thirdly, what is required is that when a State law deals with conduct "which may conceivably form a portion of that subject ['covered'], the question is whether the State Act deals with such conduct as forming an element in the subject ..."[87] Repeating the first and third propositions, he stated that "covered fields" are "withdrawn, not from any or all State legislation ... but only from State legislation which attempts to govern it in the character in virtue of which it is regulated by Commonwealth law."[88] In other words, what is required is an enquiry into the *way* in which the State law regulates a thing, or the point of view which the law adopts toward it. This is a question of the character of the law: it is subjective of the law, not objective of the thing regulated.

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80. *Id.*, 451.
81. (1930) 43 C.L.R. 472, 486.
82. *Stock Motor Ploughs Ltd.* v. *Forsyth* (1932) 48 C.L.R. 128, 147.
83. *Victoria* v. *Commonwealth* (1937) 58 C.L.R. 618, 634. An interesting exception is the subject matter of exclusive Commonwealth domain conferred in s.52(i) of the Constitution: as interpreted in *Worthing* v. *Rowell and Muston Pty. Ltd.* (1970) 44 A.L.J.R. 230, the subject matter *is* a "geographical area" such that any law entering the boundary of that area touches the subject matter.
84. *Legislative, Executive and Judicial Powers in Australia* (5th ed., 1976), 105-106.
85. *Id.*, 105.
86. *Id.*, 106.
87. *Ibid.*
88. *Id.*, 105-106.

Dixon C.J. developed his own approach to this sort of problem, particularly in the context of s.92 (although this is not now regarded as raising any issue as to the subject matter of the law).[89] That approach was based upon the recognition that each act or thing belonging to a subject matter does so by virtue of its possessing some aspect or quality (characteristic) which defines the subject matter. For a law to touch the subject matter, it must not only regulate an act or thing but deal with it "in consequence of" or "by reference to" that characteristic or aspect which the subject matter connotes. Thus, Dixon J.'s hypothetical State law in *Ex parte McLean* [90] deals with the same act as a Commonwealth award, but not in its "industrial aspect".[91] In the words of Wynes, it does not "govern it in the character in virtue of which it is regulated by Commonwealth law."[92]

How does this relate to the role of subject matters more generally in the federal distribution of legislative powers? Subject matters are used in defining a grant of power over certain things to a particular legislature because those things possess characteristics which are deemed to be of concern to that legislature, or can be appropriately dealt with by it. The Commonwealth was granted power over "aliens" because the characteristic possessed by aliens (and identifying them as "aliens") of being alien was thought likely to raise matters of concern which might be better dealt with by the federal legislature: thus the purpose of the grant of power was to enable that legislature to enact laws concerned with matters arising out of the characteristic of an identifiable group within the community of being alien. Similarly, when a subject matter is "covered", the competence of the States to pass laws concerned with matters arising from the relevant characteristics of the subject matter is removed. But a State law interested in quite unrelated characteristics of a thing which happens to fall within that "covered field" does not intrude into the field. In the words of Stephen J. in *Ansett* v. *Wardley*:[93]

> "Their interaction will then involve no more than an intermeshing of laws, each legislature having confined itself to those aspects of a particular situation appropriate to its own particular role in the federal compact."[94]

What, then, of "conferred right" inconsistency? In *Ansett* v. *Wardley,* after all, Stephen J. was dealing with a right rather than a field: one might think that while subject matter is of the essence of "covered fields", the same cannot be said of legal rights or privileges. Interestingly, Aickin J. mentioned that in *Ex*

89. See *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1935) 52 C.L.R. 189, 204-206. The ideas expressed therein were anticipated by Rich J. in *Willard* v. *Rawson* (1933) 48 C.L.R. 316, 324, but have their roots in earlier cases such as *Duncan* v. *Qld.* (1916) 22 C.L.R. 556, 640 *per* Gavan Duffy and Rich JJ., and *W. & A. McArthur Ltd.* v. *Qld.* (1920) 28 C.L.R. 530, 550, 552. The Dixon approach won majority approval in *Hughes & Vale Pty. Ltd.* v. *N.S.W. (No.1)* (1953) 87 C.L.R. 49, but came to be expressed in a somewhat different formula in cases such as *Hospital Provident Fund Pty. Ltd.* v. *Victoria* (1953) 87 C.L.R. 1, 17; *Wragg* v. *N.S.W.* (1953) 88 C.L.R. 353, 387; and *Grannall* v. *Marrickville Margarine Pty. Ltd.* [1955] A.L.R. 331, 338-339, where "characteristics" and "qualities" became "facts", "events" or "things". But language reminiscent of *Gilpin's* case still recurred: see *Hughes and Vale Pty. Ltd.* v. *N.S.W. (No.2)* (1955) 93 C.L.R. 127, 162 and also *Mansell* v. *Beck* (1956) 95 C.L.R. 550. Rumble has also suggested that this part of Dixon C.J.'s s.92 approach can be used in analysing State intrusion into covered fields: *loc.cit.* (*supra,* n.7), 47-48.
90. (1930) 43 C.L.R. 472.
91. *Ibid.*
92. *Op.cit.* (*supra,* n.84), 105-106.
93. (1980) 28 A.L.R. 449.
94. *Id.,* 457.

parte McLean Dixon J. "suggested that it might be possible that State laws not dealing with industry at all would not necessarily be inconsistent even though ... [it] dealt with the same conduct" as a Commonwealth award.[95] But Aickin J. added "Whatever its significance, there is no suggestion that it could save State legislation which altered, impaired or detracted from the operation of an award or agreement in its application to industrial matters ..."[96]

While Stephen J. held that cl.6B conferred "a right of termination on notice, complete in itself"[97] this was not, in his view, an "absolute right".[98] In essence, it amounted to a right circumscribed by subject matter, a right effective only within the particular field of industrial relations with no authority to withstand State laws affecting the same conduct but from outside that field.

Colvin v. *Bradley Bros. Pty. Ltd.*[99] provides an interesting contrast to the *Ansett* case. It concerned an executive order made under a New South Wales statute, and a Commonwealth industrial award which clashed directly over whether a particular woman could or could not work. The plaintiff argued that there was no inconsistency because the State law was directed at a subject matter totally unrelated to that of the award: the former, it was alleged, related to general social conditions and community welfare, while the latter was directed only to the relations between employers and employees in certain industries and callings.[100] The argument was rejected because of the existence of direct inconsistency (as opposed to "covering the field" inconsistency) in the form of the denial by the State of a Commonwealth "conferred right". The remarks of Latham C.J. refuting the relevance of characterization in s.109 cases immediately followed his mention of the argument, and were prefaced by the words, "But, in my opinion, it cannot be said that where there is actual inconsistency ... [characterization is relevant],"[101] as if to contrast "actual" inconsistency with, say, inconsistency under "covering the field". Starke J. made a very similar comment.[102]

One difference between the two cases lies in the use by Stephen J. of the notion of a limited right. The limitation was inherent in the limited jurisdiction of the award-making bodies established under the Conciliation and Arbitration Act (Cth.). There is at least one case where a very similar situation, this time in the context of limited Commonwealth legislative power, arose.

Airlines of N.S.W. Pty. Ltd. v. *N.S.W. (No.2)*[103] concerned the validity of certain regulations made pursuant to the Air Navigation Act, 1920 (Cth.), including, *inter alia,* regs. 198, 199 and 200B, and the consistency with those regulations of the Air Transport Act, 1964 (N.S.W.). Regulation 198 prohibited the use of aircraft in regular public transport operations except in accordance with a licence issued by the Director-General of Civil Aviation.

Regulation 199 provided for the issuing of such licences, in the case of intra-State air services, having regard to "safety, regularity and efficiency of air navigation and to no other matters." Regulation 200B provided that such a licence authorized the conduct of operations in accordance with its provisions, subject to the Act, the regulations and other Commonwealth laws. The State

95. *Id.*, 479.
96. *Ibid.*
97. *Id.*, 460.
98. *Id.*, 454.
99. (1943) 68 C.L.R. 151.
100. The arguments are described *id.*, 157, 161 *per* Latham C.J. and Starke J. respectively.
101. *Id.*, 157-158.
102. *Id.*, 161 ("But there is a direct collision ... in the present case.").
103. (1965) 113 C.L.R. 54.

Act *inter alia* prohibited the carrying for reward of passengers or goods intra-State without a State licence, to be issued only after consideration of public need, the fostering of competition and suitability of the applicant.

The regulations were supportable only by the trade and commerce or the external affairs power (in each case perhaps with the incidental power), and in relation to each the Commonwealth's legislative authority over intra-State air navigation was inherently limited. As to trade and commerce, the limitation (in a nutshell) lay in the extent to which such navigation directly and physically affected interstate or overseas air navigation; as to external affairs, it was the extent to which Commonwealth regulation could be said to be the performance of international obligations entered into by ratification of the Covenant on International Civil Aviation, or incidental to such performance. The justices differed as to whether either or both powers supported regs. 198 and 199,[104] but all except one held them to be valid.[105] Regulation 200B was unanimously declared invalid: the granting of paramount authority to licensees to carry on intra-State operations regardless of State laws was deemed to go beyond the limitations upon Commonwealth power, such authority having no reasonable connection with the protection and orderly regulation of inter-State or overseas trade, or with fulfilling international obligations.

Regulation 200B pushed aside, the question of inconsistency focused upon the impact if any of the State Act on regs. 198 and 199. Hence, close attention was paid to the exact nature of the faculty conferred by the licence. The general view was that, while reg. 200B had purported to confer "positive authority", reg. 199 was in the nature of a relaxation of or exemption from a prohibition (imposed in reg.198) rather than an "enabling" provision.[106] But Barwick C.J. disagreed, contending that

> "... to say that the licence is but the relaxation of the prohibition ... is in my opinion an inadequate analysis. When an authority having power to prohibit an act licenses the doing of that act, the licence may properly be regarded as no more than permission to do that so far as the grantor's control of the matter extends."[107]

Analysis supports the view of Barwick C.J. on this point. The contending view is that the licence simply "cancels a negative" in the form of the prohibition, while conferring no positive faculty at all. But insofar as the granting of a licence indicated the fulfilment of the Commonwealth's requirements as to "safety, regularity and efficiency", it is submitted that the licence did constitute a "permission": had the State purported to add requirements of its own as to those matters, it would surely have constituted such an interference as to be inconsistent – it would have entered the area of power controlled by the Commonwealth and denied a permission granted within that area. Another way of illustrating the same point is to suppose that Commonwealth power over intra-State air navigation was not limited: in that situation the same regulations (again, without reg. 200B) would surely amount to a paramount permission beyond the ability of the State to modify or deny. Again, in Barwick C.J.'s words,

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104. Barwick C.J., Menzies and Owen JJ. thought both; Kitto and Windeyer JJ. trade and commerce only; McTiernan J. external affairs.
105. Taylor J. dissented.
106. *Airlines of N.S.W.* v. *N.S.W. (No.2)* (1965) 113 C.L.R. 54, 119 *per* Kitto J.; 135 and 143 *per* Menzies J.; 154-155 *per* Windeyer J.; 167 *per* Owen J.
107. *Id.*, 95.

> " ... where the licence is granted under the paramount law of a legislature which has full control of the particular activity, the licence assumes the aspect of an authority to do the act in question."[108]

When viewed from this perspective, the case concerned a "limited right", the limitation stemming from and inherent in the limited subject matter dealt with. The limitation, moreover, did not take the form of a mere physical boundary dividing off certain acts and things in the real world. Rather, it separated different "aspects" of one and the same set of acts and things, some of which fell within Commonwealth power and others without. Hence, both the Commonwealth and the State were empowered to regulate the same set of acts and things pertaining to "intra-State air navigation". In the case of the Commonwealth, legislative capacity extended to the aspects of "safety, regularity and efficiency"; in the case of the State, other aspects of the same set of acts and things could be dealt with. As Kitto J. concluded:

> "any ground for suggesting inconsistency disappears if the situation is more fully described, as by saying that consideration of matters concerning the safety, regularity and efficiency of air navigation has led the federal Director-General of Civil Aviation to conclude that A, though not B, should be debarred from conducting the service, while consideration of matters concerning public needs in relation to air transport services or concerning other topics ... has led the State Commissioner for Motor Transport to conclude that B, though not A, should be debarred from conducting the service. The federal Regulations and the State Act each employ a licensing system to serve a particular end; but the ends are different, and that means that the two sets of provisions are directed to different subjects of legislative attention."[109]

Once again, in the context of "conferred right" and not "covering the field" inconsistency, we see the question of subject matter peeping through.

It may be that in the case of "conferred right" inconsistency, subject matter will not often be a crucial consideration. Although all Commonwealth power is limited to particular subject matters, a Commonwealth law validly made with respect to one of them can quite properly affect other subject matters not otherwise within Commonwealth reach. As long as the subject matter being dealt with warrants the conferring of an absolute right, it will therefore not be relevant that the right affects or intrudes into other subject matters. What distinguishes *Ansett* v. *Wardley* and *Airlines of N.S.W.* v. *N.S.W. (No. 2)*[110] is that in those cases the subject matters being dealt with simply would not support such an unlimited right.

If the Commonwealth legislature or award making body adverts to the propriety of limiting a conferred right so as to operate only within a particular subject matter, the limitation would almost certainly be made explicit and of course then no question of inconsistency would be suggested.[111] Where no such limitation is expressed it is therefore highly likely that at most the Commonwealth has not adverted to the conferred right having some

108. *Ibid.*
109. *Id.*, 121-122. The judgment of McTiernan J. (*id.*, 108-109) also rests explicitly upon a subject matter distinction in denying the existence of inconsistency.
110. (1965) 113 C.L.R. 54.
111. The Commonwealth legislation considered in *Palmdale-A.G.C.I. Ltd.* v. *Workers' Compensation Commission of N.S.W.* (1977) 140 C.L.R. 236 would seem to be an instance of this.

undesirable consequence in subject matter areas not considered. As in *Ansett* v. *Wardley* itself, this would be a case of the Commonwealth not intending to do X, rather than intending not to do X: the inadvertence would be irrelevant and would not justify the right being limited, because the law is what is enacted, not what should have been enacted. This is precisely the objection to Wilson J., in construing cl.6B as he did, relying on the fact that the parties did not intend to deal with sex discrimination. Hence, Stephen J.'s judgment must be based upon the limited nature of the subject matter jurisdiction of Commonwealth award making bodies, rather than on the parties who made the particular Agreement in issue not having intended to deal with the subject matter of sex discrimination.

In conclusion, subject matter will be significant in the context of "conferred right" inconsistency only in cases like *Ansett* v. *Wardley* and *Airlines of N.S.W.* v. *N.S.W. (No.2)*[112], where Commonwealth power is limited in some particularly stringent way. However, in cases of "covering the field" inconsistency subject matter is crucial: the concept, after all, might be rephrased "covering the subject matter". Thus, the judgment of Stephen J. is perhaps more pertinent when examined with a view to its implications. The following thoughts are apposite in relation to the concepts of both "covering the field" and, on a deeper level, subject matter:

> "Legal speculation endeavours to depict in language the structure and occurrences of the external world as they are related to the phenomena of the law. That enterprise is surrounded by numerous dangers. 'Symbolism is very fallible', Whitehead has observed, 'in the sense that it may induce actions, feelings, emotions, and beliefs about things which are mere notions without that exemplification in the world which the symbolism leads us to suppose.' At the least, language is the medium through which legal thinkers communicate with one another and record the knowledge they discover. There is the related circumstance that language has a connection with legal reality. Thus the relations between words and meaning, and between words and things, are matters that legal speculation must face in its effort to reach a valid understanding of the nature and role of law."[113]

*J. D. Goldsworthy**

112. (1965) 113 C.L.R. 54.
113. Cairns, "Language of Jurisprudence" in R.N. Anshen (ed.), *Language: An Enquiry into its Meaning and Function* (1957), 232.

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