CASE NOTES

THE SCHOOL TEACHERS' CASE AND THE SUPERANNUATION CASE

RE: Patrick John Lee and Anor., Officers of the Independent Teachers' Federation.
Ex Parte Neville John Harper, Minister for Justice and Attorney-General for the State of Queensland (B21 of 1985);

RE: Van Davey and Anor., Officers of the Australian Teachers' Union.
Ex Parte Neville John Harper, Minister for Justice and Attorney-General for the State of Queensland (B22 of 1985);

RE: Derek Ian Robson and Anor., Officers of the Teachers' Association of Australia.
Ex Parte Neville John Harper, Minister for Justice and Attorney-General for the State of Queensland (B23 of 1985). ('the School Teachers' case')*

RE: The Manufacturing Grocers' Employees Federation of Australia and the Association of Professional Engineers Australia.
Ex Parte, The Australian Chamber of Manufacturers and The Victorian Employers Federation. ('the Superannuation case')**

There is now possibly no more politically or economically sensitive subject than industrial relations! Section 51 (xxxv) of the Constitution provides the framework for national industrial relations practice in Australia. The federal industrial relations power contained in s.51 (xxxv) is the most litigated provision in the Constitution and its interpretation has been surrounded by uncertainty and ambiguity. However, in two recent decisions the High Court demonstrated a new willingness to construe the provision according to its plain words and in so doing cleared the way for a more expansive interpretation of the Commonwealth industrial relations power.

In a long spanning line of authorities, the High Court had established several limitations on the exercise of the conciliation and arbitration power by the Commonwealth under s. 51 (xxxv). It has been held that a valid exercise of the power requires that:—

(i) there is a dispute;[2]
(ii) the dispute is interstate in character;[3]
(iii) the dispute is in an industry;[4]

* (1986) 65 A.L.R. 577, High Court of Australia: Gibbs C.J., Mason, Wilson, Brennan, Deane and Dawson JJ.
** (1986) 65 A.L.R. 461, High Court of Australia: Gibbs C.J., Mason, Wilson, Brennan, Deane and Dawson JJ.
[1] Ford, H.A.J., 'The Federal Industrial Dispute Power: Comments on some Constititutional Considerations' in Rawson (ed.), *Changing Industrial Law* (1985) 46.
[2] *R v. Commonwealth Court of Conciliation and Arbitration and the Australian Builders' Labourers' Federation; Ex parte G.P. Jones and W. Cooper & Sons* (1914) 18 C.L.R. 224.
[3] *Jumbunna Coalmine (NL) v. The Victorian Coalminer's Association* (1908) 6 C.L.R. 309.
[4] *The Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation* (1919) 26 C.L.R. 508.

(iv) the subject matter of the dispute is industrial;[5]
(v) the dispute is to be prevented or settled by the means of conciliation and arbitration.[6]

In addition, the scope and application of the Commonwealth industrial relations power has been further complicated by the definitions of 'industry'[7], 'industrial dispute'[8] and 'industrial matters'[9] in the Conciliation and Arbitration Act 1904 ('the Act') and the relationship of these definitions to the words used in s. 51 (xxxv) of the Constitution.

The Requirement of a Dispute in an Industry.

Over the years one of the most limited features of the High Court's treatment of s. 51 (xxxv) has been its interpretation of the qualifying adjective 'industrial' as it appears in both the Constitution and in s. 18 of the Act.[10] According to the view which prevailed for more than half a century, the presence of the word 'industrial' in the constitutional grant imported crucial limitations into federal legislative power. One of these limitations concerned the arena in which any dispute had to arise if it was to be within the scope of s. 51 (xxxv).

In the earliest case in which this issue was raised and discussed, *Jumbunna Coalmine (NL) v. The Victorian Coalminers' Association*,[11] the view favoured by the majority of the Judges was, in substance, that the industrial character of a dispute derived primarily from the condition that the relevant employment involve a considerable number of persons the sudden withdrawal or cessation of whose labour might prejudicially affect the orderly conduct of the operations of civil life.[12]

However, subsequent to the *Engineers'* case[13], there emerged from a series of cases stretching over a period of several decades, a considerably more restrictive view of the scope of s. 51 (xxxv). As a consequence of this line of authorities significant groups of workers — including State school teachers,[14] the academic staff of tertiary educational institutions[15], firemen[16] and a substantial number of persons employed in State and Federal Government departments in various statutory authorities[17] — have been held to be beyond the jurisdiction of the Conciliation and Arbitration Commission. In these cases the High Court had effectively translated the term 'industrial disputes' to 'disputes in an industry'.[18]

[5] *Metal Trades Employers' Association v. Amalgamated Engineering Union* (1935) 54 C.L.R. 387 and for an application of the limitation see *R v. Kelly; Ex parte Victoria* (1950) 81 C.L.R. 64.
[6] *Australian Boot Trade Employees' Federation v. Whybrow & Co.* (1910) 11 C.L.R. 311.
[7] Section 4 of the Act provides that 'industry' includes any business, trade, manufactured undertaking or calling of employers or any calling, semi-employment, handcraft or industrial occupation or vocation of employees.
[8] Section 4(1) of the Act provides that an 'industrial dispute' is a dispute as to an industrial matter which extends beyond the limits of any one State.
[9] Section 4(1) of the Act provides that 'industrial matters' are all matters pertaining to the relations of employers and employees, and include all questions of what is right and fair in relation to an industrial matter having regard to the interests of the persons immediately concerned and of society as a whole.
[10] Section 18 of the Act provides that the Commission is empowered to prevent or settle industrial disputes by conciliation and arbitration.
[11] (1908) 6 C.L.R. 309.
[12] See more particularly the judgment of Griffths C.J., 332-3, O'Connor J., 366-7 and Issacs J., 370.
[13] *Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.
[14] *The Federated State School Teachers' Association of Australia v. State of Victoria* (1929) 41 C.L.R. 569.
[15] *R v. McMahon; Ex parte Darvall* (1982) 42 A.L.R. 449.
[16] *Pitfield v. Franki* (1970) 123 C.L.R. 448.
[17] *R v. The President etc. of the Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers Australia* (1959) 107 C.L.R. 208; and *R v. Holmes; Ex parte Public Service Association (N.S.W.)* (1977) 140 C.L.R. 63.
[18] Ford, *op. cit.* 48-9.

Various explanations have been offered for the development of this line of authority and it is probably best explained by reference to the High Court's concern to enable the States to regulate their own industrial relations and to a lesser extent to protect the rights and prerogatives of management. The situation has also been compounded by the fact that s. 132 of the Act restricts registration to any association of employers engaged in or in connection with any industry and to associations of employees engaged in or in connection with any industry or industrial pursuit.

The reversal in the High Court's attitude to this requirement occurred in *R.* v. *Coldham; ex parte Australian Social Welfare Union* ('the *CYSS* case')[19]. In that decision, the High Court unanimously held at page 235:

> The correct approach to the construction of the expression 'industrial disputes' in s. 51 (xxxv) was, we think, expressed by Higgins J. in the *Municipalities'* case (at 572-5) and the *Insurance Staffs'* case (at 528-30) reflecting the view earlier expressed by O'Connor J. in *Jumbunna* shorn of its association with the doctrine of inter-governmental immunities. The words are not a technical or legal expression. They have to be given their popular meaning — what they convey to the man on the street. And that is essentially a question of fact. That the expression is 'industrial disputes', not 'disputes in an industry', as Higgins J. noted, makes quite inexplicable the emphasis given in the later cases to limitations on the power derived from the meaning of the word 'industry'.

The School Teachers' case

The *School Teachers'* case further clarifies the position established in the *CYSS* case and deals with one of the unresolved aspects of the latter decision. It is also to be noted that, while the *CYSS* case dealt squarely with s. 51 (xxxv) of the Constitution, the *School Teachers'* case relates specifically to the interpretation of the provisions of the Act.

The first question for decision in each of the three matters constituting the *School Teachers'* case was whether all or any of the three associations of teachers involved were eligible to be registered as an organization of employees pursuant to s. 132 of the Act. The associations were the Independent Teachers' Federation ('the ITF'), the Australian Teachers' Union ('the ATU') and the Teachers' Association of Australia ('the TAA'). The membership of the TAA under its constitution consists of persons employed in or in connection with school teaching, whether employed in government or non-government schools, and includes school teachers in administrative, inspectorial, advisory and research positions. The membership of the ATU under its constitution is similar to that of the TAA excepted that the ATU is largely confined to those employed in government educational institutions. The membership of the ITF is also similar, except that it is confined to employees of non-government and independent schools including grammar schools.

The Industrial Registrar held that the TAA was eligible for registration as an association under s. 132 of the Act. The Minister for Justice and Attorney-General for the State of Queensland and other persons appealed against that decision to a Full Bench of the Conciliation and Arbitration Commission ('the Commission') under s. 88F of the Act.[20] The Industrial Registrar had already referred the applications of the ITF and the ATU to the Full Bench of the Commission under s. 88E of the Act.[21]

The Full Bench of the Commission held in favour of the registration of all three teacher associations.[22] The Minister for Justice and Attorney-General for the State of Queensland then

[19] (1983) 47 A.L.R. 225.
[20] Section 88 F(1) of the Act provides that the Commission may grant leave to appeal from an act or decision of the Registrar and may itself hear and determine the appeal in respect of which leave is granted.
[21] Section 88 E(1) of the Act provides that the Registrar may refer a matter or a question (other than a question of law) arising in connection with a matter before him to the Commission for decision.
[22] Coldham and Marks, JJ. and Commissioner Turbet.

sought a writ of prohibition or a writ of certiorari to prohibit further proceedings on the applications to the Industrial Registrar and to quash the decision of the Full Bench.

The High Court unanimously upheld the decision of the Full Bench.

As previously mentioned, the first question for decision was whether an association of employees, whose membership largely comprised school teachers, was entitled to be registered as an organization pursuant to s. 132 of the Act. This in turn required the Court to answer the question — Is a person employed as a school teacher engaged in or in connection with an industry or in or in connection with an industrial pursuit? The Chief Justice dealt with the issue swiftly when he held at page 584:

> In my opinion, upon the proper construction of s. 132(1)(b) and para. (b) of the definition of 'industry' in s. 4(1) of the Act, any association whose members include not less than one hundred employees in or in connection with any calling, service, employment, handicraft or industrial occupation or vocation of employees, is eligible for registration under s. 132. Clearly enough, an association whose members include not less than one hundred persons employed as school teachers answers that description, for teaching by persons employed to teach is a calling of the employees in the ordinary understanding of that expression.

In a joint judgment, Mason, Brennan and Deane JJ. reviewed the history of the decisions of the High Court as to the meanings of the words 'industry' and 'industrial' up to 1970 when *Pitfield v. Franki*[23] was decided. They noted that line of reasoning had been abandoned in the *CYSS* case and held that there was no reason why the High Court should not interpret s. 132(1) of the Act in the wide sense and within the scope of the constitutional power established in that case.

Wilson J. held that the allocation of resources, whether by government or by private bodies, in order to provide land, buildings, facilities and teachers for an education service otherwise than for profit to the undertakers, resulted in the establishment of an industry, so as to attract to the persons so employed the eligibility referred to in s. 132(1).

Dawson J., examining the relevant provisions of s. 132(1) and s. 4(1) of the Act, decided that there could be no doubt that school teaching may consititute an undertaking in the employers and a calling or vocation of employees within the definition of 'industry'.

His Honour concluded by holding at p. 606:

> An industry which may form the basis of an 'industrial dispute' must now be identified by reference to the relationship of employer and employee rather than by reference to the nature of the work performed or its product.

The genesis of the second issue to be dealt with in the *School Teachers'* case can be found in the following quotation from the judgment in the *CYSS* case at p.236:

> It is also unnecessary to consider whether or not disputes between a State or a State authority and employees engaged in administrative services of the State are capable of falling within the constitutional conception. It has been generally accepted, notwithstanding the *Engineers' case*, that the power conferred by s. 51 (xxxv) is inapplicable to the administrative services of the States . . . If the reasons hitherto given for reaching that conclusion are no longer fully acceptable, it may be that the conclusion itself finds support in the prefatory words of s. 51, where the power is made 'subject to this Constitution' . . .

The Attorney-General and Minister for Justice in the State of Queensland argued that the members of the three teachers' associations were engaged in 'the administrative services of the State'. It therefore followed that the Queensland teacher associations would be ineligible for registration under the Commonwealth Act.

The High Court unanimously rejected this argument and, in so doing, indicated a narrow protection for the administrative services of the States. It is clear the expression cannot be intended

[23] (1970) 123 C.L.R. 448.

to include all employees of the State who happen to do some adminstrative work.
Gibbs C.J. held at page 585:

> A more appropriate approach is to consider whether the law, whose validity is in question would impair the ability of the State to continue to exist and function as such, but clearly provisions fixing the wages and conditions of employment of school teachers would not have that effect. Moreover, there is no suggestion here of a law which is aimed at, or discriminates against, a State or States.

Wilson J. and Dawson J., in separate judgments, formed the same view.

In their joint judgment, Mason, Brennan and Deane JJ. went on to express a preliminary view on the wider question as to the exercise by the Commission of its authority over employees of a State engaged in the administrative services of the State or of its agencies.

While acknowledging that the exercise by the Commission of its authority to settle the terms and conditions of employment of State employees effects a significant subtraction fron the autonomy of the State, the learned judges held at page 592:

> There is, accordingly, much to be said for the proposition that, assuming that there is no discrimination against a State or singling out, such as occurred in *The Queensland Electricity Commission v. The Commonwealth,* the exercise of the arbitration power in the ordinary course of events will not transgress the implied limitations on Commonwealth legislative power.

The learned judges went on to consider, in more general terms, the relevance of implied limitations on the exercise of Commonwealth legislative power in the interest of preserving the existence of the States as constituent elements in the Federation.

Mason, Brennan and Deane JJ. made it clear that in their present view implied limitations were to be read subject to the express provisions of the Constitution.

In a forthright statement, the judges said at page 593:

> Where a head of Commonwealth power, on its true construction, authorises legislation the effect of which is to interfere with the exercise by the States of their powers to regulate a particular subject matter, there can be no room for the application of the implied limitations.

Futhermore -

> Nor do they protect the States from an erosion in their status occasioned by the increasing regulation of community affairs by the Commonwealth in accordance with its power.

The Requirement of an 'Industrial Matter'

The industrial character of the dispute has long been held to depend not only on the nature of the employment, but also on the subject matter of the dispute.[24] Section 4 of the Act in defining an industrial dispute 'to be a dispute as to an industrial matter' both reflects and contributes to this view. Section 51 (xxxv) of the Constitution is silent as to the subjects of disagreement which fall within its scope. However the High Court has consistently held that a dispute was not within federal powers unless it was a dispute between employer and employee as to one or more of a limited class or category of subjects set out the definition of 'industrial matters' in s. 4 of the Act. More importantly, the High Court has excluded matters considered to be the sole concern of management from the jurisdiction of the Commission. This is the doctrine of managerial prerogatives.[25]

[24] Ford, *op. cit.* 57.
[25] For a fuller exposition of this doctrine see the judgment of Barton J. in *The Australian Tramway Employees Association v. Prahran and Malvern Tramways Trust* (1913) 17 C.L.R. 680, 688.

The *Superannuation* case is the culmination of a series of decisions of the High Court in the last few years which have significantly reduced the scope of this doctrine.[26]

The Superannuation case

In the *Superannuation* case the High Court dealt with the return of an order nisi for a writ of prohibition directed to members of the Commission prohibiting them from further hearing certain proceedings to the extent that they involved any claim for superannuation benefits for employees.

The Manufacturing Grocers' Employees Federation of Australia (MGEFA) and the Association of Professional Engineers (APE) had served a log of claims for the variation of their respective awards which, inter alia, provided for payments by employers into an approved superannuation fund in respect of employees, in lieu of an increase in wages.[27]

In a single joint judgment, the High Court discharged the order nisi and held the Commission had jurisdiction to deal with the applications and to arbitrate for the inclusion of employee superannuation in the respective awards.

The respondent employers had challenged the Commission's jurisdiction to deal with the application on several grounds.

It was argued that a claim for superannuation benefits was beyond the jurisdiction of the Commission as it was not an 'industrial matter' within s. 4 of the Act and because it was not an 'industrial dispute' within s. 51(xxxv) of the Constitution. The High Court specifically interpreting s. 4 of the Act held at page 467:

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

The High Court expressed the view that as a matter of common understanding superannuation benefits could be regarded as an aspect of the terms and conditions of employment being in many circumstances in the interests of both employers and employees. Superannuation payments were an integral part of the employer-employee relationship even though the benefit is deferred until after the employment relationship has ended. It is immaterial that the actual payments are made by employers to third parties i.e. the trustees of approved superannuation funds. The payments are clearly an incident of employment because they constitute money earned in an industrial relationship and are a contribution by the employer for the benefit of the employee. They are not social welfare benefits divorced from the industrial relationship.[28]

The employers also mounted a more technical objection to the jurisdiction of the Commission on the basis of s. 58 of the Act. Section 58(1)(a) provides that an award continues in force for a period specified in the award not exceeding five years from the date on which the award comes into force. The employers' submission extended the reasoning of the High Court in *R. v. Hamilton Knight; Ex parte the Commonwealth Steamship Owners Association*[29] where it was held that the Commission did not have jurisdiction to deal with a demand for pensions for employees

[26] *Federated Clerks' Union of Australia and Anor. v. Victorian Employers' Federation and Others* (1984) 54 A.L.R. 489; *Slonim v. Fellows* (1984) 54 A.L.R. 673; *CYSS* case (1983) 47 A.L.R. 225.

[27] The form of the APE claim was actually confined to a demand for wages increases, but at the proceedings before the Commission it expressed its recognition of the fact that benefits may be passed on in alternate ways such as the payment of amounts by employers to approved superannuation funds.

[28] Compare the judgment of McTiernan J. in *R v. Hamilton Knight; Ex parte the Commonwealth Steamship Owners Association* (1952) 86 C.L.R. 283, 298.

[29] (1952) 86 C.L.R. 283.

who had served for a certain time and had then retired at 65 years of age.[30] The High Court had little difficulty in distinguishing the present superannuation claims from a demand for employee pensions and in so doing held that the superannuation claim was consistent with s. 58(1). The Court reasoned that the payments were to be made by the employers by way of contribution to approved superannuation funds in the currency of the award and through the duration of the mutual relations of employer and employee. This was separate and distinct to the trust deed which constitutes the particular superannuation fund for the continuance of which there is no dependence upon any award. Put more simply, the employer under the claim was required to make contributions to the fund only for the period specified in the award, whilst the superannuation benefits were payable under the trust deed at any time. The High Court also rejected the *Hamilton Knight* decision as any authority for the proposition that pensions, superannuation benefits or like benefits could not arise out of the employment relationship and so be regarded as an 'industrial matter'.

It is to be noted that the limited form of the claim in the present matter was crucial to the High Court's decision. The present demands did not involve the Commission having any direct function in the supervision or control of the superannuation scheme to which contributions were to be made. The High Court foreshadowed that claims in another form may well extend the role of the Commission beyond its jurisdiction over 'industrial matters' and the decision is clearly a guide to the appropriate drafting to be adopted by the parties to a superannuation agreement.

Conclusion

In common with all federal constitutional powers, the meaning and extent of the industrial relations power contained in s. 51(xxxv) is very much a function of the decisions and attitudes of the Justices of the High Court of Australia.[31] The *School Teachers'* case and the *Superannuation* case reflect important changes in both approach and direction on the part of the Court. In both decisions, the Court overruled earlier authority to give effect to the ordinary and popular meaning of the words used in s. 51(xxxv). In view of various comments made in and the general thrust of the *School Teachers'* case and the *Superannuation* case, it is unlikely that the previously established limitations on the exercise of the Commonwealth industrial relations power under s. 51(xxxv) will continue to be applied to the same extent or in the same form. That is not to say that the present interpretation of s. 51(xxxv) will mean that the concept of an 'industrial dispute' is unlimited. The constitutional restrictions on the exercise of the power will, however, be defined on a clearer and more rational basis.

TIM GREENALL*

[30] In particular, Dixon C.J. and Fullagar J. held that because of s. 48(1)(as it then was) the Commission could not make an award in terms operating beyond a period to be specified therein, not exceeding five years. Therefore, a claim for pensions to be paid years in advance of the expiration of the award was beyond the power of the Commission.

[31] Ford, *op. cit.* 46.

* L.L.B. (Hons.)B.A. The writer wishes to gratefully acknowledge the assistance of The Honourable Mr. Keith D. Marks Q.C. in the preparation of this case note.