tion, but this feature was not emphasised by the court. It would be difficult to draw a clear line between this type of case and one involving an appliance or standard or stock manufacture requiring perhaps only minor modifications before installation as a fixture. A contract for the purchase of a standard model radio to be built into a recess provided for that purpose in a wall may well be a contract for labour and materials where it is the vendor who undertakes the further and comparatively minor task of installation by placing the radio in position and merely affixing a dial or plate across the front of the recess.

Further extensions in the application of the doctrine may then be possible, but it must be borne in mind that, although the reasoning applied by the court in the present case is consistent with decisions prior to *Robinson v Graves*,[12] that case stands as a check on the free development of such a theory as outlined. True, the Court of Appeal was concerned in the latter case with a contract of which the end product was a portrait, and therefore a chattel. But the reasoning there applied could well have been followed by the Victorian Full Court without affecting its actual decision. Perhaps for this reason alone the test to be adopted by the courts in future decisions is to be awaited with interest.

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THE COMMON RULE IN CONCILIATION AND ARBITRATION

(R. v KELLY, EX PARTE THE STATE OF VICTORIA)

When the 1947 Conciliation and Arbitration Amendment Bill (Commonwealth) was being debated in the House of Representatives, Mr. Menzies[1] suggested that it would be useless to include the common rule[2] provisions in view of the High Court's decision in *Whybrow's Case*.[3] Dr. Evatt,[4] however, defended their inclusion on the ground that should the issue arise it might be possible to persuade the High Court to change its mind.[5] In the circumstances it is not surprising that the common rule provisions (which are in substance the same as those in the 1904-1946 Act)[6] were viewed with considerable suspicion and were challenged on almost the first occasion on which a conciliation commissioner sought to make use of them.

As early as 1949[7] the High Court had stated *obiter* that the common rule could not be upheld as a valid exercise of the Commonwealth power with respect to conciliation and arbitration. It was almost a foregone conclusion, therefore, that when the issue was expressly raised in the following year in *R. v Kelly, ex parte the State of Victoria*,[8] the High Court should adhere to its previous view in *Whybrow's Case*.[9]

The award in question concerned the meat industry and provided, in effect, that its terms should be a common rule for those engaged in that industry in the

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[1] At that time Leader of the Opposition in the Commonwealth Parliament.

[2] The common rule is a procedure whereby the terms and conditions of employment prescribed by an award or agreement in settlement of a particular dispute are made applicable to all employers and employees engaged in the trade or industry in question, irrespective of whether they were parties to the dispute. The term seems to have been coined by Sidney and Beatrice Webb. See S. & B. Webb, *Industrial Democracy* (1926 ed.) 204.

[3] *Australian Boot Trade Employees' Federation v Whybrow & Co.* (1910) 11 C.L.R. 311.

[4] Then Commonwealth Attorney-General.

[5] See Commonwealth Parliamentary Debates, 18th Parliament (1st Session), Vol. 191, 1641-2.

[6] 1904 No. 13 — 1946 No. 30.

[7] *R. v Commonwealth Court of Conciliation and Arbitration, ex parte Ozone Theatres (Aust.) Ltd.* (1948) 78 C.L.R. 389 at 401.

[8] (1950) 81 C.L.R. 64.

[9] Cited *supra* n. 3.

States of N.S.W., Victoria, South Australia and Queensland. No attempt was made to support the common rule on the basis of the National Security (Industrial Peace) Regulations,[10] and, indeed, the High Court's decision in *R. v Foster, ex parte Rural Bank of New South Wales*[11] would have made it an almost hopeless task. The only course open to the respondent union was to induce the court to overrule *Whybrow's Case*,[12] and to this end it rested its arguments on the changes which had taken place over the preceding forty-six years in the accepted view of the nature and scope of the conciliation and arbitration power.

In the first place the respondent claimed that *Whybrow's Case*[13] was no longer authoritative in view of the more recent decisions of *Clyde Engineering Co. Ltd. v Cowburn*[14] and *Waterside Workers' Federation of Australia v J. W. Alexander Ltd.*[15] But the High Court, while conceding that those decisions negatived or modified certain aspects of *Whybrow's Case*,[16] emphasised that they did not in any way detract from the authority of that case in so far as it dealt with the question of the common rule.

The second and far more important argument levelled at the authority of *Whybrow's Case*[17] concerned two interrelated principles formulated in a line of decisions which may be said to start with *Burwood Cinema Ltd. v Australian Theatrical and Amusement Employees' Association*[18] and to end with *Metal Trades Employers' Association v Amalgamated Engineering Union*.[19] This series of cases established: (1) In proceedings in the Commonwealth jurisdiction a union (organisation) acts as party principal and not as the agent of its members, and (2) In such proceedings a union may dispute with an employer or employers as to the terms and conditions of employment of future members and non-members of the union and the Arbitration Court (or since 1947 a conciliation commissioner) may make an award in respect of such future members or non-members. By this means the court and commissioners were able to achieve, in roundabout fashion, what they could not, as a result of *Whybrow's Case*,[20] do directly. The respondent claimed that since the High Court had recognised the *de facto* common rule, it should also recognise the *de jure* common rule. But the court, while conceding that in practice there might be little or no distinction between the two, insisted that the logical distinction remained (a fact emphasised by the whole series of cases establishing the *de facto* common rule) and that this must remain an insuperable barrier to its giving effect to the *de jure* common rule.

The High Court refused to overrule *Whybrow's Case*,[21] and in the circumstances it is hard to see how it could have done otherwise. The whole concept

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[10] These Regulations were made pursuant to the National Security Act 1939-1946 (Commonwealth) and were continued in force after 1946 by the Defence (Transitional Provisions) Acts 1947, 1948, 1949. Their object was to widen the industrial powers of the Commonwealth during the war.

[11] (1949) 79 C.L.R. 43. See cases cited therein.

[12] Cited *supra* n. 3.

[13] *ibid.*

[14] (1926) 37 C.L.R. 466. In this case the High Court rejected the test laid down in *Whybrow's Case* for determining whether a State Act was inconsistent with a Commonwealth award.

[15] (1918) 25 C.L.R. 434. In this case the majority of the High Court rejected the view stated by Griffith C.J. and Barton J. in *Whybrow's Case* and in earlier decisions that arbitration involved an exercise of the judicial power of the Commonwealth.

[16] Cited *supra* n. 3.

[17] *ibid.*

[18] (1925) 35 C.L.R. 528.

[19] (1935) 54 C.L.R. 387.

[20] Cited *supra* n. 3.

[21] *Ibid.*

of the *de jure* common rule was foreign to "arbitration". It transgressed the constitutional power conferred by s. 51 (xxxv) because it assumed the function of general industrial legislation. It sought to lay down terms and conditions of employment for persons who were in no way parties to an industrial dispute. Nor could the common rule be regarded as incidental to an exercise of the legislative power under s. 51 (xxxv), for "you may complement, but you may not supplement a granted power." [22]

R. v Kelly[23] has settled for the present, at least, the question of the validity of the *de jure* common rule. It emphasises, if emphasis be needed, the limitations of the Commonwealth's main industrial power. It does not, of course, impugn the desirability of the common rule as a measure of social protection; indeed that aspect has never been challenged. The validity of the *de facto* common rule was, of course, not affected by the decision, and in practice the federal tribunals may achieve common rule effect for their awards by this means. But it is a roundabout procedure which necessitates the citing of all employers and the creation of a dispute relating to non-unionists. Admittedly the problem of citation has been simplified of recent years by the increasing organisation of employers and by their registration with the Federal Arbitration Court. The *de facto* common rule remains, however, a clumsy, expensive, and, to some extent, ineffective method—a method forced upon industry by the limitations of the conciliation and arbitration power.

"Conciliation and arbitration" is, of course, not the only source of federal power with respect to labour conditions. The Commonwealth also derives power in this connection and, in particular, power to implement the common rule from s. 51 (vi) (defence), but the limitations of this source have already been adverted to. Sections 52 (i) and 122 (Seat of Government), 122 (Commonwealth Territories), and 52 (ii) and 69 (Commonwealth Public Service) also provide the Commonwealth with legislative power in relation to industrial matters, but they are by their very nature limited in scope. Potentially the most important sources are s. 51 (i) (inter-State trade and commerce) and s. 51 (xxix) (external affairs)—sources which have never been fully explored and upon which the High Court has placed no definitive boundaries.[24] The timidity of the Commonwealth in refraining from making fuller use of them can, in part, be explained by the existence in the Constitution of an express industrial power (i.e. conciliation and arbitration). But it may well be that there are contained within these two placita untapped sources of labour power which, *inter alia*, would enable the Commonwealth to provide, within certain spheres, for the *de jure* common rule.

DEREK THOMSON *

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[22] *Whybrow's Case*, cited *supra* n. 3 at 338. The incidental power [s. 51 xxxix)] has been a most important factor in the interpretation of the conciliation and arbitration power, for it has given the High Court a considerable freedom of action in determining whether a particular measure falls within the periphery of that power. In some cases the judges are able to fall back on a process of logical reasoning to justify their decision—the veto of the common rule as being foreign to the notion of arbitration is a case in point. But for the most part they must evaluate the situation and determine the boundaries of a particular power according to their own scale of values. Decisions concerning the incidental power thus tend to be essentially value judgments, as witness the various cases concerning the scope of the conciliation and arbitration power with respect to trade unions.

[23] Cited *supra* n. 8.

[24] See, e.g., *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees' Association* (1906), 4 C.L.R. 488; *Huddart Parker Ltd. v Commonwealth* (1931), 44 C.L.R.

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