THE MEANING OF INDUSTRIAL DISPUTES IN S. 51 (xxxv) OF THE CONSTITUTION

R. v. COLDHAM; EX PARTE AUSTRALIAN SOCIAL WELFARE UNION[1]

Introduction

R. v. Coldham; Ex parte Australian Social Welfare Union.[1]

The meaning and the scope of the phrase "industrial disputes" within s. 51 (xxxv) of the Constitution has been one of the most litigated areas in the legal history of Australia. At the beginning of 1983 a scholar of Australian Industrial Law could confidently state that three of the necessary requirements for an industrial dispute were: firstly, a dispute in an *industry*; secondly, the dispute was to be between parties standing in an industrial relationship; and thirdly, the dispute was to be a dispute in relation to an industrial matter. The decision of the High Court in *R. v. Coldham; Ex parte Australian Social Welfare Union*[2] has disturbed the complacency of the scholar. It has radically changed the first requirement, and has had some impact on the subsequent requirements.

The orthodox approach, which had been prominent in Australian law for over fifty years, was that "industrial dispute" was a contraction of, and in meaning identical to, "dispute in an industry". However, the High Court has now pronounced this to be a wrong interpretation and has laid down the correct approach to the question.

The decision is more easily appreciated in the light of previous judicial attempts to define the concept of industrial dispute. The High Court has been reluctant to specify definite criteria for an industrial dispute and has sympathised with the sentiments of Higgins, J. expressed in one of the landmark decisions on the subject. His Honour, when faced with the problem of defining "industrial disputes" stated that an exhaustive definition of such a phrase was so difficult it should not be attempted, and that such a need was not likely to arise any more often "than it is necessary for us to define what is a dog when we determine that a certain animal is a dog".[3]

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[1] (1983) 47 A.L.R. 225 Gibbs, C.J., Mason, Murphy, Wilson, Brennan, Deane and Dawson, JJ.

[2] *Ibid* (hereafter *Social Welfare Case*).

[3] *Federated Municipal and Shire Council Employees Union of Australia* v. *Melbourne Corporation* (1919) 26 C.L.R. 508 (hereafter *Municipalities Case*) at 574.

Historical Analysis of Judicial Interpretation of "Industrial Disputes"

The Doctrine of Implied Immunity

The first period to be examined is characterised by the dominance and subsequent demise of the doctrine of the implied immunity of instrumentalities.[4] The basis of the doctrine is to be found in the U.S. Supreme Court decision of *McCulloch v. Maryland*[5] and it can be stated as follows: that it is inherent in the nature of a federal system that the Commonwealth must not interfere with the instrumentalities of the States, nor the States with the Commonwealth's instrumentalities.

The implied immunity doctrine's successful debut in Australia occurred in the context of a decision on the validity of State tax requirements on Commonwealth public servants. In *D'Emden* v. *Pedder*[6] the High Court cited with approval the decision of *McCulloch* v. *Maryland* and stressed the similarities between the Australian and U.S. Constitutions. The Court concluded that the framers of the Australian Constitution would have intended the adoption of the implied immunity doctrine.

The doctrine was not confined to the taxation area, but became an important consideration in the High Court's initial examination of the limits of s. 51 (xxxv) of the Constitution. A very strict application of the doctrine was adopted in the decision in *Federated Amalgamated Government Railway and Tramway Service Association* v. *N.S.W. Railway Traffic Employees' Association.*[7] The High Court had to decide whether an association of employees of the State railways of New South Wales could be registered as an organisation under the Conciliation and Arbitration Act.[8] If the organisation was registered this would mean that a Commonwealth law would be binding on a State instrumentality in respect of its own employees. The High Court would not allow this interference with the control of the State Railways. This decision represented the peak of the influence of the implied immunity doctrine in relation to the arbitration power. The Court had applied a very rigid test: it rejected an argument (which later assumed some importance) that the doctrine only applied to activities or instrumentalities which were governmental in nature and not to "non-governmental" areas. The High Court held that any activity performed by a government possessed a governmental character.

Jumbunna Decision

During this era of the pre-eminence of the doctrine, the High Court initiated the judicial interpretation of "industrial disputes". The starting point was the decision in *Jumbunna Coal Mine* v. *Victorian Coal Miners' Association.*[9] The decision was not affected by the implied immunity doctrine as it did not deal with Government instrumentalities, but was concerned with the validity of the registration of the Victorian Coal Miners' Association. In the course of their judgments, Griffith, C.J. and

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[4] Hereafter referred to as the "implied immunity doctrine".
[5] (1819) 4 Wheat 316.
[6] (1904) 1 C.L.R. 91.
[7] (1906) 4 C.L.R. 488.
[8] Hereafter "the Act".
[9] (1908) 6 C.L.R. 309 (hereafter *Jumbunna*).

O'Connor, J. postulated very wide definitions of "industrial disputes".

Griffith, C.J.'s concept was unusual, as he defined an "industrial dispute" to include:

> . . . all forms of employment in which large numbers of persons are employed the sudden cessation of whose work might prejudicially affect the orderly conduct of the operations of civil life.[10]

O'Connor, J. undertook a thorough examination of the issue and espoused a more realistic view. The appellants contended that a very restrictive ambit should be given to industrial dispute, alleging that it should be confined to work connected directly or indirectly with production and manufacture. O'Connor, J. initially stated that an industrial dispute was not a technical or a legal expression but rather it "meant just what the two English words in their ordinary meaning conveyed to ordinary persons".[11] In ascertaining the meaning of "industrial dispute" his Honour referred to three sources: the dictionary; contemporary State legislation, e.g. N.S.W. Industrial Arbitration Act; and various English authorities, especially the 1874 Great Commission on Labour. He concluded that all references embraced the wide definition, namely, that industry applied to every kind of employment. Further, there was nothing in the Constitution that forced an adoption of the narrow approach; on the contrary, when the scope and purpose of the section was examined, it supported the broad definition:

> It was to remedy the evils of industrial disturbances extending beyond territorial limits of any one State that the power in question was conferred. It must have been well known to the framers of the Constitution that such disturbances are not confined to industries connected directly or indirectly with manufacture and production. The case of cooks, stewards, waiters, hairdressers are instances of trades which would not come within the narrower sense of the term "industry". Yet it is well known that unions existed in those trades long before the enactment of the Constitution. There seems to be nothing in the Constitution itself to indicate that the power conferred was intended to cover part only of the evils aimed at.[12]

The initial enunciation of the scope of "industrial dispute" was very wide, covering "every kind of dispute between workmen and employer in relation to any kind of labour".[13] The Court did not interpret the phrase as disputes in an industry, but deliberately adopted a colloquial meaning. The only limitation to the power, which reflected the influence of the implied immunity doctrine, was that the control of employment of State employees was excluded.

The Municipalities Decision

Subsequent to this decision, two strands became evident in the High Court's interpretation of "industrial disputes". The decision in the

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[10] *Id.* 332-333.
[11] *Id.* 366.
[12] *Id.* 367.
[13] *Ibid.*

Municipalities Case[14] itself exemplifies these strands, and demonstrates the interaction between the implied immunity doctrine and the interpretation of the arbitration power. The decision examined a dispute between various municipal corporations and the Union, which was representing members employed in the construction, maintenance, control and lighting of public streets. The hearing and decision is clearly divided into two parts. The first issue concerned the question whether municipalities established under State law were Government instrumentalities and thus entitled to protection under the implied immunity doctrine. The majority held that these municipal corporations were not State instrumentalities. Barton, J. and Griffith, C.J., who dissented, defined municipal corporations as State instrumentalities and thus entitled to protection. But this was to be the first occasion when the original propounders of the doctrine were outvoted. Although the *ratio* of the majority concerns the exclusion of municipal corporations from the definition of State instrumentalities, *obiter* there are indications that the implied immunity doctrine may have no further application. The second issue focussed on whether the Arbitration Court had the jurisdiction to determine this dispute. A majority of the Court found jurisdiction did exist.

The interpretation of Higgins, J. is reminiscent of O'Connor, J.'s approach in *Jumbunna*. His Honour referred to an argument proposed by counsel that the words "industrial dispute" mean a dispute in some specified industry. This interpretation was rejected; there was to be no contraction of the phrase "industrial disputes" to disputes in an industry,[15] as it was not a technical term. Higgins, J. felt that the approach should be "to give it the popular meaning to find what it would include in the mind of the man in the street".[16] As the employees concerned could be described as "manual" employees, Higgins, J. had no hesitation in allowing them to meet the definition, but he refused to commit himself to a final and exhaustive definition of the phrase.[17]

A discussion of the important concept of "industry" is to be found in the joint judgment of Isaacs and Rich, JJ. They espoused the following definition:

> Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation.[18]

This definition is very wide, but it contains the roots for the subsequent narrow interpretation. To satisfy the requirement of an "industrial dispute", their Honours require the search for a dispute in an industry. However, the criteria needed to establish an "industry" is very wide. There is no need for any reference to the character of the work done by the employees nor to the nature of the employers' undertakings. Rather, to

[14] *Supra* n. 3.
[15] *Id.* 573.
[16] *Ibid.*
[17] *Id.* 574.
[18] *Id.* 554.

constitute an industry there has to be the co-operation of capital and labour. As Sykes and Glasbeek[19] have commented, it would be difficult to exclude many employer/employee relationships from this concept of "industry".

The State School Teachers' Case

Two main characteristics may be discerned from the succeeding High Court decisions. Firstly, the trend of restricting the application of the implied immunity doctrine culminated in the doctrine's demise in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.*[20] The High Court there decided that a dispute between a State Minister and a Union representing his employees could be an "industrial dispute". The second characteristic was that the High Court adopted an expansive view of "industrial dispute". It seemed to find that most disputes satisfied the "industrial" requirement, for example, clerks employed in a gas company,[21] and journalists.[22]

In *Australian Insurance Staff's Federations* v. *Accident Underwriters Association*,[23] the Court held that a dispute between employers who carried on the business of insurance and their employees was an "industrial dispute". Isaacs and Rich, JJ. applied their co-operation test and were satisfied that as the business of insurance was incidental to industry this was sufficient to meet the capital requirement. However, this era of expansion was soon to end. The Federation of State School Teachers,[24] possibly imbued with the lenient attitude of the High Court, claimed that they were in dispute with the States of Victoria and Tasmania.

The States argued that education could not be considered an "industry" for the purposes of the constitutional power. The High Court agreed that no industrial dispute could be found. The reasoning enunciated by the Court is difficult to follow, but it is generally accepted that there are two lines of reasoning. Firstly, there is the idea that education is a peculiarly State function. This is consistent with the Isaacs/Rich test, as it could be possible that certain functions and activities of the State are incapable of providing capital for capital-labour co-operation. The second line of reasoning purports to exclude the finding of an "industrial dispute", as the occupation of teaching is not "industrial" in nature. This view is not consistent with the Isaacs/Rich test as it provides an extra limitation, one which requires the Court to focus on the activities of the employees. The Court also emphasised the word "industrial" in "industrial dispute", stating that previous views must be rejected as they did not give prominence to its requirements.

> The economic view has never been accepted by this Court: it is too wide . . . and the view that the sphere of industrialism is to be found in operations in which the relation of employer and employee subsists

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[19] E. I. Sykes and H. J. Glasbeek, *Labour Law in Australia* (1972) at 389.
[20] (1920) 28 C.L.R. 129.
[21] *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co. Ltd.* (1919) 27 C.L.R. 72.
[22] *Proprietors of the Daily News Ltd.* v. *Australian Journalists' Association* (1920) 27 C.L.R. 532.
[23] (1923) 33 C.L.R. 517.
[24] *Federated State School Teachers' Associations of Australia* v. *State of Victoria* (1929) 41 C.L.R. 569 (hereafter *State School Teachers' Case*).

> is also, in our opinion, too wide . . . It cannot, we think, be supported, for it ignores the use of the word "industrial" in the composite expression "Industrial dispute" in the Constitution.[25]

Professional Engineers' Decision

The *Professional Engineers' Case*[26] is a most important decision as the High Court attempts in it to assess prior authorities and to enunciate the principles underlying the phrase "dispute in an industry". The issue was whether professional engineers, employed by State Governments and their instrumentalities, could be covered by a Federal award.

The State Governments submitted that State agencies could never be engaged in an industrial activity, implying a dichotomy between industrial and governmental activities. The High Court refused to accept this dichotomy and their Honours were unanimous in deciding that not all State governmental activities were to be protected from Commonwealth interference. The State agencies before the Court were not to be afforded this protection. In reaching this decision the High Court employed what has been described as a "two-tier" test[27] or as the horizontal and vertical tests, in determining whether employees were engaged in an industry. That is, in determining whether a particular dispute occurred in "industry" one could examine the nature of the employees' work—the horizontal test, as well as the nature of the employer's business—the vertical test. Professor Thomson, who originally[28] described the two-tier test in this way, states that the horizontal test is the dominant factor in determining the existence of an industry. However, Sykes and Glasbeek,[29] after a close examination of the decisions, feel that it is impossible to designate either test as dominant as no consistency runs through the decisions.

The Court in *Professional Engineers* was critical of the decision in *State School Teachers*, but it was not prepared to say that it had been wrongly decided. Instead, the Court tried to rationalise it in terms of the horizontal test. In the words of Dixon, C.J., this was based on "a basal proposition . . . that the occupation which the State school teachers pursued is not by nature industrial".[30] To summarise the case law as to the type of employees that could be employed in an industry, a spectrum[31] of occupations can be established. At one end there is the manual labourer. Consistently, the High Court has stated that such a worker is employed in an industry. As Dixon, C.J. stated in the *Professional Engineers' Case*:

> If the dispute is about employment to do work of a manual character always it has been regarded as typically industrial and I doubt whether it was ever considered necessary to go further. Indeed, that would be a sufficient reason for regarding the dispute as within s. 51 (xxxv) although there was no industry or business organised for profit.[32]

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[25] *Id.* 574.
[26] (1959) 107 C.L.R. 208.
[27] D. Thomson, "Professional Engineers' Case". (1959) 34 *A.L.J.* 35.
[28] *Ibid.*
[29] *Supra* n. 19 at 397.
[30] *Supra* n. 26 at 237.
[31] P. H. Lane, *The Australian Federal System* (1979) at 306.
[32] *Supra* n. 26 at 236.

The other extreme of the spectrum would be occupations which are never industrial, which would include medical practitioners, lawyers and school teachers. Within these two poles there exist many innominate groups. Clearly, if they work for an enterprise which is "directly concerned with the production, maintenance, repair, distribution or transport of tangible things",[33] or with the services of banking and insurance, the employees will be in an industrial occupation. To determine this group the vertical and horizontal tests must be employed.

From 1975, five cases focussing on the definition of a dispute in an industry came before the High Court.[34] The Court adopted the traditional approach in determining whether an industry existed and in some circumstances used the principles in a very expansive way.[35] However, the most important aspect of these decisions is that many of their Honours expressed concern with the traditional approach and started referring with approval to the statements of O'Connor, J. and Griffith, C.J. in *Jumbunna.*[36] This trend culminated in the *Social Welfare* decision.

Background to the Social Welfare Decision

The Commonwealth Youth Support Scheme was established by the Federal Government in November 1976 as a reaction to the current high levels of youth unemployment. Although it was funded by the Commonwealth Government it was administered by State Government welfare departments. Groups of social workers, clubs and societies would apply to the Government to finance their schemes. The C.Y.S.S. groups generally operated for five or six days a week and offered their members a range of activities, from job application skills to instruction in mechanics or arts and craft.[37]

On July 10, 1979, the Arbitration Commission recorded a finding that there existed an "industrial dispute" between the Australian Social Welfare Union, a registered organisation, and the various C.Y.S.S. committees concerning the pay and conditions of project officers employed by C.Y.S.S.[38] The C.Y.S.S. Committees then made an application to Isaac, D.P. requesting that the finding be revoked. Their first ground on application invoked the traditional analysis of what constitutes an "industry", that is, that the C.Y.S.S. Committees were not employers in an industry and the project officers were not engaged in work of an "industrial" nature.[39] The second ground relied upon by the C.Y.S.S. Committees was that the eligibility rules of the union did not embrace

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[33] *Ibid.*

[34] *Re Marshall; Ex parte Federated Clerks' Union of Australia* (1975) 6 A.L.R. 707, *R.* v. *Holmes; Ex parte Public Service Association of N.S.W.* (1977) 18 A.L.R. 159, *Re Cohen; Ex parte Motor Accidents Insurance Board (Tas)* (1979) 53 A.L.J.R. 719, *Re Holmes; Ex parte Manchester Unity Independent Order of Oddfellows in Victoria* (1981) 55 A.L.J.R. 27, *R.* v. *McMahon; Ex parte Darvall* (1982) 42 A.L.R. 449.

[35] Mason, J. in *Re Marshall; Ex parte F.C.U. Id.* 716-717.

[36] Mason, Gibbs, JJ. and Stephens, J. concurring in *Re Marshall; Ex parte F.C.U. Ibid.* Gibbs, Murphy, JJ. in *R.* v. *Holmes; Ex parte P.S.A. Supra* n. 34. Gibbs, C.J. Mason, Murphy, JJ. in *R.* v. *McMahon; Ex parte Darvall. Supra* n. 34.

[37] K. Windshuttle, *Unemployment* (1st ed. 1979) at 222.

[38] Australian Social Welfare Union and Jobless Action Civic Community Youth Support Scheme and Ors. (C Nos. 2975 and 3024 of 1979) Print E 6476.

[39] *Ibid.*

the project officers. This latter argument was rejected by Isaac, D.P. and will not be examined.[40]

In determining whether the requirements of an "industrial dispute" were met, Isaac, D.P. examined the scheme and the duties of the project officers, referring in doing so to a set of guidelines entitled "Community Youth Support Scheme Policy and Guidelines for Local Committees".[41] His findings were summarised as follows:

> The participants of the scheme being generally young persons of poor motivation and low self-esteem and lacking the employment skill, the courses organised by project officers are designed to enhance the employability of participants by improving their motivation, confidence, self-esteem and sometimes their skills and in these ways assisting their entry into the workforce, occasionally by direct placement. The project officers counsel the participants, liaise with various organisations . . . and administer, organise and supervise various activities—typing, woodwork, . . .[42]

Isaac, D.P. found that the parties were involved in an "industry". To justify this conclusion he initially examined comments made by Gibbs, J. as he then was, in *Holmes Case*.[43] His Honour established that whether an activity can be considered incidental to industry is a matter of degree, and proceeded to give the examples of the magistrate in a traffic Court or clerks employed in the Department of Motor Transport as being incidental to transportation only in a remote and indirect way.[44] Isaac, D.P. seems to adopt the comments of Gibbs, J. but contrasts the role of the project officers in the scheme with the roles of Gibbs, J.'s traffic magistrate and clerks. Isaac, D.P. states that in no way could the project officers' roles be described as being remote and indirect; the C.Y.S.S. schemes operate as a man-power scheme directed to increasing the supply of productive labour.[45]

As a second justification he employs an analogy with banks and consumer credit unions. While these latter organisations assist in production by supplying capital, the C.Y.S.S. have the same role but supply labour:

> Both, therefore, do not stand outside "the whole world of productive industry and organised business" but are in a direct way ancillary to or incidental to industry itself.[46]

An appeal was made against Isaac, D.P.'s decision on the basis that there was no "industrial dispute" and a Full Bench of the Commission[47] by a majority allowed the appeal.[48]

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[40] *Id.* 7.

[41] The guidelines had no statutory force but the Commonwealth Government had the power indirectly to enforce the guidelines by withdrawal of funds.

[42] *Supra* n. 38 at 4.

[43] *Supra* n. 34 at 168.

[44] *Ibid.*

[45] *Supra* n. 38 at 8.

[46] *Ibid.*

[47] *Per* Coldham, Cohen, JJ. and Turbet Com.

[48] Australian Social Welfare Union and Jobless Action Civil Community Youth Support Scheme and Ors (C No. 3370 of 1981) Print E9317.

The majority examined in detail previous High Court authority and concluded that C.Y.S.S. Committees could not be regarded as incidental to industry. They refuted both grounds of Isaac, D.P.'s decision. They found that the work of the project officers did not have a strong connection with industry as it was directed towards helping unemployed youth who were quite outside and independent of industry. In contrast, a connection with industry could be clearly established if the scheme was directed to augmenting the employability of those already employed in industry.[49] The majority also rejected the analogy with banking and consumer credit enterprises which suggested that C.Y.S.S. and its project officers helped to increase the supply of productive labour:

> With respect we express the view that in the context of C.Y.S.S. and its project officers, the productivity of labour remains static. The objectives are not designed to achieve any improvement in the dexterity of the unskilled participant nor to sharpen or maintain the skills of the skilled participant. C.Y.S.S. confers no benefit upon employers or the community by assisting the means of production; it is designed to maintain the morale of the unemployed participant and to instruct him how the better to present himself for employment if and when that time comes.[50]

The High Court Decision

The A.S.W.U. then applied to the High Court for prohibition, certiorari and mandamus against the Commission in respect of the revocation of the finding of an "industrial dispute".[51] It presented two arguments before the Court. Firstly, it submitted that the constitutional concept of "industrial dispute" was wide enough to embrace any dispute between employers and employees as to the terms and conditions of employment. Secondly, the union argued that the decisions of Isaac, D.P. and Cohen, J. were correct, as the Committees were incidental to industry.[52] The Court unanimously upheld the first submission of the Union.

The High Court located the antecedents to the correct approach to the construction of the phrase "industrial disputes" in the judgments of Higgins, J. in the *Municipalities Case*[53] and the *Insurance Staff Case*.[54] They expressed the correct approach in the following way:

> The words are not a technical or legal expression. They have to be given their popular meaning—what they convey to the man in the street. And that is essentially a question of fact. 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" . . . It is, we think, beyond question that the popular

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[49] *Id.* 7.
[50] *Id.* 8.
[51] *Supra* n. 1.
[52] *Id.* 227.
[53] *Supra* n. 3.
[54] *Supra* n. 23.

> meaning of "industrial disputes" includes disputes between employees and employers about the terms of employment and the conditions of work.[55]

To provide a rationale for their approach the High Court undertook an historical analysis of the interpretation of "industrial disputes". An important consideration in their analysis was the sensitivity of the States to the encroachment on their powers by the Commonwealth.[56] Their Honours gave three reasons for their attraction to the *Jumbunna* approach. First, their examination of decisions since *Jumbunna* revealed "no disclosed chain of reasoning"[57] leading to a rejection of the broader view. They were particularly critical of the decision in *State School Teachers*,[58] as they could not discern any logic or reason in the rejection by the majority of the broader view,[59] except for a comment that it "ignores the use of the word 'industrial' in the composite expression 'industrial dispute' in the Constitution."[60] But such criticism was found not to be valid as the broad view does not in fact ignore the adjective "industrial", but rather

> relied upon the word to define the composite expression "industrial disputes" in the sphere of relations between employers and employees.[61]

Secondly, the Court felt that no settled interpretation of the power could be discerned from subsequent cases.[62] In particular, interpretations of the power had become confused because of the problem of disputes between a State authority and its employees, but this was no reason to reject the broad view. The third factor was the superior attraction, both in point of legal reasoning and in its practical consequences, of the broad interpretation of the provision over subsequent versions.[63]

Having established that this dispute came within the terms of s. 51 (xxxv) of the Constitution, the High Court next had to consider whether the dispute met the requirements of the Act.[64] Their Honours start with the proposition that the Act authorises the Commission to make an award in settlement of an "industrial dispute";[65] "industrial dispute" is defined in s. 4 as meaning a dispute as to "industrial matters"; "industrial matter" is defined as all matters pertaining to the relations of employers and employees. The definition of "employer" and "employee" refers to an employer in an industry and an employee in an industry; "industry" is in turn defined as including

> (a) any business, trade, manufacture, undertaking or calling of *employers*
> (b) any calling, service, employment, handicraft or industrial occupation or vocation of *employees*.

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[55] *Supra* n. 1 at 235.
[56] *Id.* 229.
[57] *Id.* 234.
[58] *Supra* n. 24.
[59] *Supra* n. 1 at 233.
[60] *Ibid.*
[61] *Ibid.*
[62] *Id.* 234.
[63] *Id.* 235.
[64] *Id.* 237.
[65] *Ibid.*

An obvious problem with this series of definitions is that of circularity, a problem which had been identified by Latham, C.J. in the *State Public Servants Case*[66] and by Dixon, C.J. in the *Professional Engineers Case.*[67] But a more significant problem is that the definition of "industrial dispute" requires a nexus with "industry".

> . . . the statutory concept of "industrial dispute" appears to contemplate disputes between parties about matters pertaining to the relation of employers in any industry and employees in any industry as defined, thereby introducing an element which in our view, is not an essential element in the constitutional concept of "industrial dispute".[68]

The High Court decided to follow Dixon, J.'s view enunciated in *Professional Engineers* and did not consider authority as to the constitutional definition of an industry but applied the definition found in s. 4. The requirement to be fulfilled was that the employee or employer in question must independently come within one of paragraphs (a), (b), or (c) of the section. The Court held that the project officers are employed in the "same calling" of employees, so no definitional problems arose.

The Consequence of the Decision

The decision in *Social Welfare Case* contains the potential to make far-reaching changes in the industrial relations system in Australia. Obviously, some of the consequences will take immediate effect while others may require the redrafting of the Conciliation and Arbitration Act or are simply speculative in nature, reflecting the expansive attitude of the High Court.

The most obvious and immediate consequence of this decision is that it broadens the categories of workers who may participate in the Federal arbitration system. Groups that have been previously held to be beyond the jurisdiction of the Commission because they were not employed in an industry, for example, State school teachers, firefighters and academics, will now have access to the Federal tribunal.

It is important to note that a specific limitation to the expanded jurisdiction was noted by the High Court. Their Honours reserved their opinion as to whether a dispute between a State or a State authority and employees engaged in the administrative services of the State is capable of falling within the Constitutional conception.[69] The decision in *R. v. Holmes*[70] demonstrates the way the High Court has been able to use the definition of dispute in an industry to stop Federal encroachment. This avenue is no longer available but their Honours suggested an alternative limitation, that is, that there is an inherent limitation to be drawn from the Federal structure of the Constitution, in particular the prefatory words of s. 51, where the power is made subject to the Constitution:

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[66] *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte State of Victoria* (1942) 66 C.L.R. 488.

[67] *Supra* n. 26.

[68] *Id.* 238.

[69] *Supra* n. 1 at 236.

[70] *Supra* n. 34.

> The nature of those limitations was discussed in *Melbourne Corporation* v. *Commonwealth* (1947) . . . If at least some of the views expressed in those cases are accepted, a Commonwealth law which permitted an instrumentality of the Commonwealth to control the pay, hours of work and conditions of employment of all State public servants could not be sustained as valid . . .[71]

With respect, it is curious that their Honours cite the *Melbourne Corporation Case*[72] as support for their proposition. A similar argument was submitted in the *Tasmanian Dams Case*,[73] and it was evident that amongst their Honours there was differing judicial perception of the relevance of the federal nature of the Constitution in the construction of Commonwealth legislative powers. The minority judges recognised the limitations of this doctrine, but the majority judges refused to be so limited. Mason, J. described such arguments based on the federal balance as "ritual invocations"[74] and Murphy, J. commented:

> It builds upon the doctrine of reserved State powers by a fallacious method of "balancing" those national State powers with some only of the undoubted federal powers. As advanced in this and recent constitutional cases the doctrine of federal balance presents only a balance between fallacies.[75]

Another problem associated with this limitation centres around what will be encompassed by the term "administrative" services of the State. Some *dicta* in older cases may prove to be useful,[76] for example, Starke, J., sitting as an Acting Deputy President of the Arbitration Court, said that officers in the administrative branches of the States, such as clerks in the Treasury or in the Lands Department, are not persons over whom the Commonwealth Arbitration Court could have any authority whatever.[77]

The registration provisions of the Act will also be affected by the *Social Welfare* decision. Presently an association must apply to be registered under s. 132. This is a complex section and reflects the judicial interpretation of the phrase "disputes in an industry", especially the two-tier approach enunciated in the *Professional Engineers' Case.*[78] Decisions like *Pitfield* v. *Franki*[79] and the *Universities Case*[80] are testimony to the restrictive nature of the provision. Since the *Social Welfare* decision, even without any amendment to s. 132, a wider range of associations will be able to come within s. 132 (b) and be able to be registered. But for the future the decision opens up the possibility of simplifying s. 132.

The most speculation as to the consequences of the *Social Welfare Case* focusses on the observation by the Court that the expression

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[71] *Ibid.*

[72] *Melbourne Corporation* v. *Commonwealth* (1947) 74 C.L.R. 31.

[73] *Commonwealth of Australia* v. *State of Tasmania* (1983) 57 A.L.J.R. 440.

[74] *Id.* 488.

[75] *Id.* 505.

[76] *Health Inspectors' Association of Australia* v. *City of Melbourne* (1922) 16 C.A.R. 978; *Federated Carters and Drivers' Industrial Unions of Australia* v. *Bailey* (1922) 16 C.A.R. 530.

[77] *Commonwealth Public Service Commissioner* v. *Government Service Women's Federation* (1920) 14 C.A.R. 794.

[78] *Supra* n. 26.

[79] (1970) 44 A.L.J.R. 391.

[80] *R.* v. *McMahon; Ex parte Darvall, supra* n. 34.

"industrial disputes" is to be understood in its popular sense. In a previous section of this paper it was stated that the orthodox approach required at least three elements for an industrial dispute: firstly, the existence of a dispute in an industry; secondly, the parties must be standing in an industrial relationship; and thirdly, the subject matter of the dispute must be an industrial matter. It is submitted that to define "industrial disputes" according to its popular meaning would signal a move away from a strict demarcation between these three elements to a merged idea of the "industrial dispute".

The possibility of this approach was mooted by Murphy, J. in *R.* v. *Holmes*[81] where his Honour described the phrase "industrial disputes" as referring

> . . . to work disputes and covers disputes concerning the entry into and termination of the work relationship as well as those concerning remuneration and other conditions of work. Disputes about recognition of unions, preference to unionists in entering, during, or on termination of the work relationship, exclusion of non-unionists from work, retirement benefits, establishment of machinery for review of dismissals or for re-instatement are examples of industrial disputes.[82]

The High Court in the *Social Welfare Case* was not so radical, but it is submitted that the Court did contemplate a merging of the first two requirements. It stated that "industrial disputes"

> . . . no doubt extends more widely to embrace disputes between parties other than employer and employee such as demarcation disputes, but just how widely it may extend is not a matter of present concern.[83]

Previously there existed some constitutional limitations to the Commission's jurisdiction in hearing demarcation disputes. In *R.* v. *Commonwealth Conciliation and Arbitration Commission; Ex parte Transport Workers' Union*,[84] Barwick, C.J. stated that a dispute between two employee organisations over the question of coverage of particular work would not give rise to an "industrial dispute". In contrast, a dispute concerning the assignment by an employer to an employee of specific work would attract the Commission's jurisdiction. Since the *Social Welfare Case*, it is submitted that the necessity of requiring an employer to initiate proceedings in the Commission to settle an inter-union dispute has disappeared. Yerbury[85] contends that by not limiting the Commission's jurisdiction to employer and employee relationships, it may now have the power to arbitrate upon more substantial redundancy payments. As some of these entitlements are not received until the employment relationship has ended, the traditional analysis as espoused by McTiernan and Williams,

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[81] *Supra* n. 34.
[82] *Id.* 178.
[83] *Supra* n. 1 at 236.
[84] (1969) 119 C.L.R. 529.
[85] D. Yerbury, "The Commonwealth's Industrial Power. The High Court's recent expansionist approach." *Current Affairs Bulletin*, March, 1984.

JJ. in the decision of *R.* v. *Hamilton Knight*[86] would deny the Commission jurisdiction.

Although at the moment such an ambitious scope of s. 51 (xxxv) is purely speculative, any attempt by the Commission to take advantage of the potential of the *Social Welfare* decision is marred by the present definitions in the Act. Parliament would need to change the definition of "industrial matters" in s. 4 so that it no longer referred restrictively and exclusively to "matters pertaining to the relations of employers and employees".

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[86] *R.* v. *Hamilton Knight, Ex parte Commonwealth Steamship Owners' Assoc.* (1952) 86 C.L.R. 283.