4, 1957

No. 27 of 1956.

In the Privy Council.

AN APPEAL FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA (Intervener)

Appellant

AND

HER MAJESTY THE QUEEN

AND

THE BOILERMAKERS' SOCIETY OF AUSTRALIA (Prosecutor)

AND

THE HONOURABLE RICHARD CLARENCE KIRBY, THE HONOURABLE EDWARD ARTHUR DUNPHY and THE HONOURABLE RICHARD ASHBURNER, JUDGES OF THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION (*Respondents*)

AND

THE METAL TRADES EMPLOYERS' ASSOCIATION (*Respondent*)

Respondents

AND BETWEEN:

THE HONOURABLE RICHARD CLARENCE KIRBY, THE HONOURABLE EDWARD ARTHUR DUNPHY and THE HONOURABLE RICHARD ASHBURNER, JUDGES OF THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION (Respondents)

Appellants

AND

HER MAJESTY THE QUEEN

AND

THE BOILERMAKERS' SOCIETY OF AUSTRALIA (Prosecutor)

AND

THE METAL TRADES EMPLOYERS' ASSOCIATION (*Respondent*)

AND

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA (Intervener)

Respondents

(CONSOLIDATED APPEALS)

Case

for THE HONOURABLE THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA and THE HONOURABLE RICHARD CLARENCE KIRBY, THE HONOURABLE EDWARD ARTHUR DUNPHY and THE HONOURABLE RICHARD ASHBURNER, JUDGES OF THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION.

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THE ISSUE IN THE APPEAL.

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1. These are consolidated appeals by special leave of Her Majesty in Council granted by Order in Council dated the 1st day of June 1956 p. 121.
from the judgment and order dated the 2nd day of March 1956 of the p. 120.
High Court of Australia which by a majority of four Judges to three made absolute an order *nisi* for a writ of prohibition directed against the abovenamed Judges of the Commonwealth Court of Conciliation and Arbitration (Appellants) and the abovenamed The Metal Trades Employers' Association (Respondent) all of whom were Respondents to the said writ of prohibition.

10 2. The questions for decision are Australian constitutional questions of great and general importance. They are whether it is constitutional for the Parliament of the Commonwealth of Australia to grant both judicial and non-judicial powers to Judges appointed for life and, if not, whether in the particular case of such a grant to Judges of the Commonwealth Court of Conciliation and Arbitration it is the grant of judicial or of non-judicial powers which fails. The High Court decided that it is unconstitutional to combine judicial and non-judicial power and that in the particular case it is the grant of judicial power that is invalid.

20 3. The question whether this decision is right is of great importance not only in the particular case but generally. There is no express constitutional limitation of the nature applied by the High Court upon the powers of the Parliament. It is an expression of the United States constitutional doctrine of the implied legal separation of constitutional powers which had never been applied in Australia before the decision in the present case. The implication of such a limitation would not only deny to Parliament power which it has exercised on many occasions since 1904 and result in the invalidity of a number of Commonwealth statutes but, in addition, it would import into Australian
30 constitutional law, at a time when governmental experience, judicial decisions and analyses by legal authorities have alike demonstrated the impossibility of tracing precise boundaries between the legislative, executive and judicial functions respectively, a new and serious element of rigidity. The contrary principle, moreover, namely that the extent to which judicial and non-judicial powers may be properly combined is a matter for the plenary discretion of the legislature, is a familiar part of the constitutional law of the United Kingdom and of all the

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Australian States. Nor, as the example of Canada shows, is this United States doctrine of the legal separation of powers a necessary concomitant of a federal legislature under a written constitution. The Canadian Constitution, coming as it did between that of the United States and that of the Commonwealth of Australia, had an important influence on the latter. Both the Canadian and Australian Constitutions were based on the British principle of responsible government which is the antithesis of this United States doctrine of legal separation of powers.

p. 120. 4. The order for a writ of prohibition made in this case by the High Court prohibited further proceedings under two orders made by the Commonwealth Court of Conciliation and Arbitration (hereinafter referred to as " the Arbitration Court ") composed of the Judges who were Respondents to the said writ of prohibition. The said two orders
p. 24. of the Arbitration Court were made on the 31st day of May 1955 and
p. 54. the 28th day of June 1955. The first of such orders required obedience on the part of the abovenamed Respondent The Boilermakers' Society of Australia (a registered organization of employees) to a provision contained in an industrial award termed The Metal Trades Award. The said award prescribes terms and conditions of employment for specified types of work performed by members of various registered organizations of employees (including the abovenamed The Boilermakers' Society of Australia) for various employers including members of the abovenamed The Metal Trades Employers' Association (a registered organization of employers). The said award was made under the provisions of the Conciliation and Arbitration Act 1904-1952, enacted by the Parliament of the Commonwealth of Australia (which Act is hereinafter referred to as " the Arbitration Act "). The particular provision of the said award of which the said order made by the Arbitration Court on the 31st day of May 1955 required obedience was a clause 19 (*ba*) (*i*) which prohibited any organization a party to the award (including the abovenamed Respondent The Boilermakers' Society of Australia) from in any way, whether directly or indirectly, being a party to or concerned in any ban, limitation or restriction upon the performance of work in accordance with the award. The Arbitration Court found that The Boilermakers' Society of Australia had been a party to or concerned in three bans, limitations or restrictions upon the performance of work in accordance with the award and ordered it to cease to be a party to or concerned in the said bans, limitations or restrictions and enjoined it from continuing
p. 54. the breaches of the award or permitting further breaches. The second

of the said orders of the Arbitration Court, made on the 28th day of June 1955, comprised a finding by the Arbitration Court that the above-named Respondent The Boilermakers' Society of Australia had been guilty of contempt of the Arbitration Court by wilfully disobeying the aforesaid order of the 31st day of May 1955 and imposed a fine of £500 upon The Boilermakers' Society of Australia and ordered it to pay the costs of the proceedings. The aforesaid orders of the Arbitration Court were made pursuant to the powers conferred upon it by sections 29(1) (*b*) and (*c*) and 29A of the Arbitration Act.

5. Sections 29(1) (*a*), (*b*) and (*c*) and 29A of the Arbitration Act and the preceding sections 17, 18 and 19 were in the following terms :—

"17. (1.) There shall be a Commonwealth Court of Conciliation and Arbitration.

(2.) The Court shall consist of a Chief Judge and such other Judges as are appointed in pursuance of this Act.

(3.) The Court shall be a Superior Court of Record.

18. (1.) The Chief Judge and each other Judge—

(*a*) shall be appointed by the Governor-General; and

(*b*) shall not be removed except by the Governor-General, on an address from both Houses of the Parliament in the same session, praying for his removal on the ground of proved misbehaviour or incapacity.

(2.) For the purposes of this Act, the Judges shall have seniority according to the dates of their commissions.

19. The qualifications of the Chief Judge and of each other Judge shall be as follows :—

He must be a barrister or solicitor of the High Court or of the Supreme Court of a State of not less than five years' standing.

29. (1.) The Court shall have power—

(*a*) to impose penalties, not exceeding the maximum penalties fixed (or, if maximum penalties have not been fixed, not exceeding the maximum penalties which could have been fixed) under paragraph (*c*) of section forty of this Act, for a breach or non-observance of an order or award proved to the satisfaction of the Court to have been committed;

(*b*) to order compliance with an order or award proved to the satisfaction of the Court to have been broken or not observed;

(*c*) by order, to enjoin an organization or person from committing or continuing a contravention of this Act or a breach or non-observance of an order or award;

29A. (1.) The Court has the same power to punish contempts of its power and authority, whether in relation to its judicial powers and functions or otherwise, as is possessed by the High Court in respect of contempts of the High Court.

(2.) The jurisdiction of the Court to punish a contempt of the Court committed in the face or hearing of the Court, when constituted by a single Judge, may be exercised by that Judge; in any other case, the jurisdiction of the Court to punish a contempt of the Court shall (without prejudice to the operation of sub-section (7.) of section twenty-four of this Act) be exercised by not less than three Judges.

(3.) The Court has power to punish, as a contempt of the Court, an act or omission although a penalty is provided in respect of that act or omission under some other provision of this Act.

(4.) The maximum penalty which the Court is empowered to impose in respect of a contempt of the Court consisting of a failure to comply with an order of the Court made under paragraph (*b*) or (*c*) of the last preceding section is—

(*a*) where the contempt was committed by—

(*i*) an organization (not consisting of a single employer)—£500; or

(*ii*) an employer, or the holder of an office in an organization, being an office specified in paragraph (*a*), (*aa*), or (*b*) of the definition of " office " in section four of this Act—£200 or imprisonment for 12 months;

or

(*b*) in any other case—£50."

6. The majority Judges of the High Court held that under the Constitution of the Commonwealth of Australia (hereinafter referred to as " the Australian Constitution ") it is not permissible for the Parliament to enact that there shall be conferred on the one tribunal both judicial and arbitral powers and functions. The majority Judges held that the consequence was that the Arbitration Court was validly

exercising arbitral functions conferred on it but that, although the Parliament had declared it to be a superior court of record, the conferring of judicial powers on it was contrary to the Australian Constitution and invalid. Accordingly, they held that sections 29 (1) (*b*) and (*c*) and 29A of the Arbitration Act were invalid.

7. By section 51 (xxxv) of the Australian Constitution the Parliament has power to make laws for the peace order and good government of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. By Chapter III of the Australian Constitution, the Parliament has power to create federal courts other than the High Court (section 71) and to include in the jurisdiction of such federal courts, *inter alia,* jurisdiction in any matter arising under any law made by the Parliament (sections 76 (*ii*) and 77). The only contention before the High Court, and the only ground upon which the High Court held that the provisions of sections 29 (1) (*b*) and (*c*) and 29A of the Arbitration Act were invalid, was that it was not permissible to combine in one tribunal the function of arbitration and the function of enforcing awards, the power of Parliament to establish separate tribunals for these purposes being conceded. It follows that there is in this case no question of any conflict between the powers of the Commonwealth and the powers of a State. The only issue is as to the manner in which the undoubted powers of the Commonwealth can be exercised by it.

THE HISTORY OF THE LEGISLATION IN ISSUE.

8. The first Act of the Parliament of the Commonwealth which combined both judicial and non-judicial powers in the Arbitration Court was the Commonwealth Conciliation and Arbitration Act enacted in 1904. The Court was to be constituted by a President, who was to be appointed by the Governor-General from among the Judges of the High Court, and the Court was given power not only to make arbitral awards but to enforce them by the imposition of penalties and the making of injunctions. The Arbitration Court was established in 1905 under the Commonwealth Conciliation and Arbitration Act 1904. From the outset it was declared by Parliament to be a court of record and had conferred on it both judicial and arbitral functions. In consequence of the leading case of *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* 6 C.L.R. 309, decided by the High Court in 1908, a dispute extending beyond the limits of any one

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State exists whenever an organization of employees or of employers with members in more than one State makes an industrial demand which is not granted. Thereupon under the Arbitration Act the Arbitration Court (and, subsequently, Conciliation Commissioners) had power to settle a dispute by making an award. By reason of the decision in the *Jumbunna* case and the rapid growth throughout Australia of nation-wide trade unions and employers' organizations, there was a wide extension of the jurisdiction to make awards under the Arbitration Act. In consequence, at the present time wages and industrial conditions of about forty per cent. of the employees in Australia are determined by awards made under federal statutes.

9. Under the original Arbitration Act, the tenure of the President of the Arbitration Court was limited to seven years. In 1918, in *Waterside Workers' Federation* v. *J. W. Alexander Limited* 25 C.L.R. 434, the High Court decided that section 72 of the Australian Constitution requires that Judges of federal courts created by Parliament be given life tenure and that as the Judges of the Arbitration Court had not been given life tenure they could not exercise any part of the judicial power of the Commonwealth. It was held at the same time that the arbitral functions did not involve the exercise of judicial power. There was no suggestion by the High Court in *Alexander's* case that, if the Judges of the Court had life tenure, judicial and arbitral functions still could not be combined in the one Court. On the contrary, it is the submission of the Appellants that the whole judgment proceeded on the basis that there could be such a combination of powers and functions provided the Judges were given life tenure. In the light of this decision, the Arbitration Act was amended by Parliament in 1926 to give the Judges of the Arbitration Court life tenure. It was not until 1952 that the constitutional validity of the combination in one tribunal, constituted by Judges having life tenure of both judicial and non-judicial (i.e. arbitral) powers was questioned. The amending Act of 1926 also contained provisions making it clear that powers and functions which Parliament had previously attempted to confer on the Arbitration Court, both judicial and arbitral, were to be exercised by it, and its judicial functions were extended. The Arbitration Act was amended from time to time after 1926 and the power to make awards was subsequently conferred primarily upon Conciliation Commissioners and the arbitral functions of the Arbitration Court were confined to certain limited matters such as standard hours, basic wage, annual leave and the like, with a limited right of

appeal from Conciliation Commissioners. On the other hand, subsequent to 1926 the judicial functions of the Arbitration Court were added to from time to time and in 1947 the Arbitration Court was changed from a court of record to a superior court of record.

10. When in 1900 by section 51 (xxxv) of the Australian Constitution Parliament was given power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State", the clothing of an Arbitration Court with both the arbitral power to make an award and the judicial power to enforce it was already a familiar idea in Australia. As Taylor J. points out in his judgment in the present case, the Industrial Conciliation and Arbitration Amendment Act 1898 of New Zealand had adopted this principle and served as the model for a Western Australian Act in 1900. New South Wales followed suit in 1901. The enforcement provisions of the Commonwealth Conciliation and Arbitration Act of 1904 (some of which in essentials were the same as some of the provisions held invalid in the present case) should accordingly, it is submitted, be regarded as a *contemporanea expositio* of the constitutional powers, in this regard, of the Australian Parliament.

p. 117, l. 45.

11. Since the granting of special leave to appeal by Her Majesty in Council in the present case, the Arbitration Act has been amended in the manner referred to in the Petition for special leave to appeal herein but, as indicated in the Petition, such amendments do not affect in any way the general issues involved in the present case or diminish the great importance thereof. Nor is the actual decision in the present case, namely the validity of the orders made and the fine imposed upon the abovenamed Respondent The Boilermakers' Society of Australia, affected in any way by the amendments.

12. Before 1952, numerous cases were decided in the High Court on the footing that the combination of judicial and arbitral powers was constitutional. In 1952, however, certain members of the High Court, without submission or argument from the parties to the litigation, raised the question of the constitutional validity of the combination of judicial and non-judicial power: *R.* v. *Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd.* (1952) 85 C.L.R. 138 at p. 155. After that case the High Court continued to decide cases on the footing that such a combination was constitutional. In 1955 the High Court conjectured that, in the event of the combination

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being unconstitutional, it was not to be assumed in the case of the Arbitration Court that it would be the non-judicial powers that would fail : *R.* v. *Wright; Ex parte Waterside Workers' Federation* (1955) 93 C.L.R. 528 at p. 542. This present case, in which the grant of judicial power to the Arbitration Court was successfully challenged, followed that conjecture.

RELEVANT HIGH COURT DECISIONS.

13. The Arbitration Court, established as it was with both judicial and arbitral functions, exercised its judicial functions constantly after 1926. On numerous occasions it imposed penalties in the form of imprisonment or fines for breaches of the provisions of the Arbitration Act and awards made thereunder. The Arbitration Court also imposed imprisonment for contempt of itself as a superior court of record and the High Court expressly upheld an order so made when challenged in the High Court (*R.* v. *Taylor; Ex parte Roach* (1951) 82 C.L.R. 587) on the ground that the Arbitration Court was a superior court of record, and had, therefore, at common law, power to punish summarily contempts of its judicial authority. In so deciding, four of the five members of the unanimous Court said at p. 599—

> " The legislation establishes a Court to which jurisdiction is given forming part of the judicial power of the Commonwealth and to which an authority of an entirely different character is given falling outside the judicial power of the Commonwealth and derived under an exercise of the legislative power conferred by section 51 (xxxv) of the Constitution. There is thus combined a double power in one office."

14. In numerous other cases before 1956, the High Court upheld the exercise of judicial powers by the Arbitration Court or recognised the exercise by it of judicial powers. The following are such decisions of the High Court :—

Jacka v. *Lewis* (1944) 68 C.L.R. 455.

Barrett v. *Opitz* (1945) 70 C.L.R. 141.

Harrison v. *Goodland* (1944) 69 C.L.R. 509 esp. at pp. 515 and 521.

Australian Workers' Union v. *Bowen* (1948) 77 C.L.R. 601.

R. v. *Taylor; Ex parte Federated Ironworkers' Association* (1949) 79 C.L.R. 333.

R. v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Federated Gas Employees' Industrial Union* (1951) 82 C.L.R. 267.

R. v. *Kelly; Ex parte Waterside Workers' Federation of Australia* (1952) 85 C.L.R. 601 at p. 609.

R. v. Kelly; Ex parte Berman (1953) 89 C.L.R. 608.

R. v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Amalgamated Engineers' Union* (1953) 89 C.L.R. 636.

15. In the submission of the Appellants, the High Court in 1938 in *R.* v. *Federal Court of Bankruptcy; Ex parte Lowenstein* 59 C.L.R. 556 expressly decided that there is no doctrine of legal separation of powers which prevents a Court created under Chapter III of the Australian Constitution from having conferred on it and exercising both judicial and non-judicial functions provided the non-judicial functions are not inconsistent with the exercise of the judicial functions.

16. Further in *Victorian Stevedoring Co. Pty. Ltd. and Meakes* v. *Dignan* (1931) 46 C.L.R. 73, the High Court decided that the Australian Parliament could validly make a law which did no more than hand over to the Executive in its entirety the power to make laws on a matter within the competence of the legislature. This decision which has been constantly followed both in peace and war is quite inconsistent with the acceptance of the United States doctrine of legal separation of powers. It has permitted in Australia the most far-reaching delegations of legislative power not only to the Executive but to other persons and bodies. In contrast, in the United States of America the doctrine of the legal separation of powers has been applied to prevent Congress from authorizing the Executive to make laws generally on a subject matter. Congress can merely authorize the Executive to make ancillary regulations for carrying out the legislative will as declared by the statute.

THE APPELLANTS' GENERAL CONTENTIONS.

17. There is no express provision in the Australian Constitution prohibiting Parliament from exercising its powers so as to confer on one tribunal a combination of judicial and arbitral functions. The majority of the High Court decided, however, that such a combination of functions was not permissible by reason of an inference which in

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their opinion is to be drawn from the Australian Constitution. In the respectful submission of the Appellants, this inference involves importing into the interpretation of the Australian Constitution, for the first time after more than fifty years of federation and notwithstanding its repeated rejection by the High Court, the doctrine of the legal separation of powers which has been applied by the Supreme Court of the United States in the interpretation of the United States Constitution. This doctrine of the legal separation of powers was in the United States to a substantial extent the product of contemporary political doctrine at the time the United States Constitution was adopted and interpreted. No such contemporary political doctrine existed in Great Britain or Australia at the time the Australian Constitution was enacted. Even if such a political doctrine had existed, it would, it is submitted, have been irrelevant in the interpretation of the Australian Constitution.

18. In submitting that there is no express constitutional limitation upon the powers of the Parliament to combine judicial and non-judicial powers in the one institution, the Appellants are prepared to concede that an implication to be drawn from the provision in section 71 of the Constitution that the judicial power of the Commonwealth shall be vested in certain courts, constituted as provided in section 72, is that the judicial power of the Commonwealth cannot be vested in any body other than a court so constituted save and except to the extent to which provision to the contrary is made, for example by sections 74 and 101. Similarly, the executive power of the Commonwealth is reserved by section 61 of the Constitution to the Queen, and is exercisable by the Governor-General as Her Majesty's representative. The Appellants accordingly do not contend, as the majority Judges seem to imply, that the presence of Chapters I, II and III of the Constitution and the form and contents of sections 1, 61 and 71 are of no legal consequence and a mere draftsman's arrangement. But whilst these consequences which the Appellants concede flow from the form of the Constitution, it is submitted that there is no warrant for implying an entirely different limitation, namely that an organ which is empowered to exercise one of the functions so specified in sections 1, 61 and 71 of the Constitution cannot also exercise some other function which is outside the categories therein specified. In Australia, as in other British countries, the ordinary processes of government involve a mass of administrative and quasi-judicial functions which do not intrinsically fall under the heading of the " legislative " or of the " executive " or of the " judicial " power of the Commonwealth. It is the Appellants'

submission that the Constitution on its true construction leaves to the discretion of Parliament the selection of the most appropriate repository for functions of this character, and that the majority judgment of the High Court in the present case seriously diminishes this sphere of Parliament's discretion. Again, as the High Court of Australia has repeatedly recognised, the form of the Constitution does not in any way limit the power of Parliament to delegate subordinate legislative authority.

19. In Great Britain, any separation of powers is no more than a factual one and is not a product of any legal doctrine or limitation. Governmental functions are, in fact, allocated to various organs of government, but such allocation produces no legal consequences and in no way limits the power of the Imperial Parliament. There is nothing to prevent the Parliament from combining, in the one tribunal, powers in relation to any number of functions of any kind. In Great Britain there have been over the centuries many combinations in one person or organ of the various governmental functions. Her Majesty is the head of all three organs of government, the Parliament, the Executive and the Judiciary. The Privy Council performs both judicial and executive functions. The House of Lords is both the upper house of the legislature and the supreme appellate court. The Lord Chancellor is not only the head of the Judiciary, but also a member of the Executive and head of the upper legislative chamber. Cabinet Ministers perform both legislative and executive functions. The Court of Chancery has always exercised numerous functions which are administrative in character. Justices of the Peace have, over the centuries, been entrusted with a wide variety of judicial and administrative functions. Courts of Quarter Sessions still exercise the power of stopping up or diverting highways. Magistrates' Courts have licensing and other like functions. More recently, when the Railway and Canal Commission, which was a court of record, was abolished in 1949, those of its functions which had not been transferred to the Transport Tribunal were given to the High Court including the power to determine applications for rights to work, or restrictions on, mineral workings and applications for rights to search or bore for coal or petroleum.

20. Further, in the United Kingdom there has never been any clear-cut distinction between the nature of governmental functions.

In the Report of the Committee on Ministers' Powers 1932 it was said, at p. 9—

> "The Courts, by means of the prerogative writs, exercised and still exercise an administrative control, under judicial forms, over all subordinate jurisdictions, amongst which was included in the eighteenth century the whole machinery of local government. In the sphere of local government, the lines between the different functions of government were not merely blurred but disappeared. Quarter and Petty Sessions in town and country alike exercised legislative, executive and judicial functions."

21. In the Appellants' respectful submission, the proper approach to the powers of the Parliament under the Australian Constitution is to apply the principles which exist in relation to the powers of the Parliament of the United Kingdom and not those which have been applied to the Constitution of the United States. In Australia, as in the United Kingdom, the Queen is part of the legislature, executive power is reserved to the Queen, and the courts are the Queen's courts. It is significant that the Australian Constitution recognizes the Queen in Council as the final court of appeal. It is also significant that both the Senate and the House of Representatives have, *inter alia,* the powers of the House of Commons of the United Kingdom to commit for contempt. In the Australian Constitution, as in any written constitution, it is inevitable that, as a matter of description, various organs of government are referred to and their prime functions specified, but it is submitted that this was not intended to and does not, in fact, limit in any way the power of the Australian Parliament to confer on such organs of government such additional appropriate functions as the Parliament thinks fit. In this regard the powers of the Australian Parliament are, it is submitted, as plenary as those of the Imperial Parliament.

22. The importation into the interpretation of the Australian Constitution of the United States doctrine of the legal separation of powers would also give insufficient significance to one of the most fundamental distinctions between the Australian Constitution and the United States Constitution. Whereas under the United States Constitution there is a complete separation between the legislature and the executive, the Australian Constitution by contrast follows the British model. A basic feature of the Australian Constitution is the presence of the principle of responsible government. There is, under

Chapters I and II of the Australian Constitution, a close and constant inter-relationship and indeed combination in the same persons of executive and legislative powers and functions. In so far as there is at any point of time any separation of the functions of government in the British and Australian Constitutions, it is merely factual without legal consequences, in contrast with the legal separation under the United States Constitution. The basic differences between the Australian and the United States Constitutions were recognized in the leading case decided by the High Court of Australia in 1920 of *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.*, 28 C.L.R. 128 (the *Engineers'* case) where four of the five Judges who constituted the majority of the Court (Knox C.J. and Isaacs, Rich and Starke JJ.) in a joint judgment at p. 147 said—

> "In the words of a distinguished lawyer and statesman, *Lord Haldane,* when a member of the House of Commons, delivered on the motion for leave to introduce the Bill for the Act which we are considering :—
>
> 'The difference between the Constitution which this Bill proposes to set up and the Constitution of the United States is enormous and fundamental. This Bill is permeated through and through with the spirit of the greatest institution which exists in the Empire, and which pertains to every Constitution established within the Empire—I mean the institution of responsible government, a government under which the Executive is directly responsible to—nay, is almost the creature of—the Legislature. This is not so in America, but it is so with all the Constitutions we have granted to our self-governing colonies. On this occasion we establish a Constitution modelled on our own model, pregnant with the same spirit, and permeated with the principle of responsible government. Therefore, what you have here is nothing akin to the Constitution of the United States except in its most superficial features.'
>
> With these expressions we entirely agree."

23. As a matter of legal principle, there is nothing inconsistent in the one body making and enforcing industrial awards and, as mentioned earlier, legislative practice in Australia and New Zealand in 1900 demonstrates this. On the contrary, the enforcement of industrial awards is a vital element in the prevention and settlement of industrial disputes and, it is submitted, the prevention and settlement

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of industrial disputes is ineffective and incomplete in the absence of proper provisions for the enforcement of awards. The Appellants contend that it is a matter for Parliament's discretion whether enforcement powers should be vested in a separate tribunal or in the same tribunal as makes the awards.

24. In any event, various of the powers of the Australian Parliament, including that in section 51 (xxxv), are so framed as to authorize the Parliament pursuant thereto to create bodies to exercise a variety of functions some of which might be described as judicial, others as non-judicial, and others as falling within either description.

25. It is further submitted that the present case is one in which the doctrine of *stare decisis* should have been applied to uphold the validity of the legislation in issue. Not merely had the Arbitration Court exercised its powers of enforcement for approximately thirty years but the High Court had, over the years, decided a large number of cases on the basis that the Arbitration Court was a court of record and could exercise judicial powers. Further, in the 1930's the High Court had, in the Appellants' submission, expressly decided that judicial and non-judicial functions could be vested in the same federal court and that the United States doctrine of the legal separation of powers did not apply to the Australian Constitution.

THE EFFECT OF THE DECISION ON COMMONWEALTH LEGISLATION GENERALLY.

26. Until the decision of the High Court in the present case was given the Parliament and Government of the Commonwealth of Australia were able to frame legislation in the knowledge that if a question arose as to whether or not a function involved the exercise of judicial power any doubts could be removed by vesting the function in a court constituted with life tenure. The decision of the High Court in the present case destroys this clear and certain method of proceeding. Under the judgment of the High Court a decision will have to be reached in every case as to whether or not a function involves the exercise of judicial power. This is often a question of great complexity as to which no sure answer can be given in advance of judicial decision. If the wrong conclusion is reached the result will be invalidity of the legislation. It will no longer be safe to give a function to a court with life tenure to cover the possibility that the function may be held to be judicial because should it be held to be

non-judicial the vesting will be invalid. Hence, no sure rule will exist and great uncertainty as to the validity of important legislation will be an ever-present characteristic of much Commonwealth legislation.

27. There are at the present time under laws made by the Australian Parliament numerous and important combinations of judicial and non-judicial functions in federal courts including the High Court. Some examples are as follows :—

Judiciary Act 1903-1955.

Section 86	Power in the High Court to make rules of Court.

Commonwealth Electoral Act 1902-1953.

Section 184	The High Court is constituted a Court of Disputed Returns.
Section 202	Power in High Court to make rules.

Patents Act 1952-1955.

Section 66 (1) ...	Power of High Court to grant extension of time for sealing Letters Patent.
Sections 90-95 ...	Power of High Court to extend term of Letters Patent.

Life Insurance Act 1945-1953.

Section 39 (2) ...	Assets of statutory fund shall not be invested in insurance business without sanction of High Court.
Section 40 (3) (4) & (5)	Appeal to High Court against directions of Commissioner as to allocation of statutory fund.
Section 47	Appeal to High Court or Supreme Court against refusal of Commissioner to approve of any person as auditor of life insurance company.
Section 52	Appeal to High Court against decision of Commissioner rejecting account or balance sheet of company.
Section 58	Appeal to High Court from directions by Commissioner following investigation into affairs of Company.

Section 75	Life insurance business not to be transferred or amalgamated without approval of High Court.
Section 119	High Court may order company to issue special policy to replace policy lost or destroyed.

Bankruptcy Act 1924-1955.

Section 149	Power of Bankruptcy Court to inquire into misconduct or complaints of misconduct by trustees.
Section 213 (2)	Prosecution not to be instituted except
Section 214 (2)	by order of the Bankruptcy Court.
Section 216 (1)	
Section 217 (1) (*b*)...	Power of Bankruptcy Court to commit bankrupt for trial before any Court of competent jurisdiction.

Navigation Act 1912-1956.

Sections 356-8 ...	Establishes Courts of Marine Enquiry.
Section 377	Empowers Courts of Marine Enquiry to hear appeals or references in respect of the detention of a ship alleged to be unseaworthy and gives the Courts all the powers of the Minister.
Section 385	Empowers the High Court to remove the Master of any ship within its jurisdiction if the Court thinks it necessary to do so.

28. Having regard to the existence of provisions such as those above referred to, this matter is one of very great and general importance. The decision of the majority of the High Court imposes on Parliament for the first time in more than fifty years a far-reaching and widespread limitation which seriously impedes it in the exercise of its sovereign powers. In the respectful submission of the Appellants, there is no warrant for importing by implication into the Australian Constitution any such limitation on the power of Parliament.

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CRITICISM OF THE MAJORITY JUDGMENT.

29. The Judges of the High Court who constituted the majority were Dixon C.J. and McTiernan, Fullagar and Kitto JJ., who delivered a joint judgment. pp. 58 to 81.

(*a*) In the course of their reasons for judgment they say that the basal reason why a combination of arbitral functions with the exercise of any part of the strictly judicial power of the Commonwealth is constitutionally inadmissible is that Chapter III does not allow powers which are foreign to the judicial power to be attached to the Courts created by or under that Chapter for the exercise of the judicial power of the Commonwealth. They decide that this conclusion flows not from any express prohibition but from the language of Chapter III of the Constitution and the implications involved in that language and from the language of the opening sections of the first three Chapters of the Constitution and the implications involved in such language. It is respectfully submitted that no such implication is involved in the language. Further, even if there were such an implied doctrine it would not produce the results which their Honours decided. The principle they enunciate would have resulted in the Arbitration Court, which is constituted by Parliament as a superior court of record, being deprived of its arbitral powers. It would not result in the Court being deprived of its judicial powers. The only basis upon which the latter result could be reached would be if it were decided that the Arbitration Court was not a court at all. In so far as the majority Judges do decide that the Arbitration Court is not a court it is submitted that they have disregarded the clear will of Parliament in creating it a court of record in 1904, in giving its members life tenure with extended judicial functions in 1926 and in making it a superior court of record in 1947. p. 75, l. 3.

(*b*) The majority Judges were strongly influenced by the legal doctrine of the separation of powers applied by the Supreme Court and other courts of the United States. It is submitted that for the reasons stated above this doctrine should not be applied to the Australian Constitution.

(*c*) The majority Judges also consider that the presence of responsible government in the Australian Constitution does not affect legal powers and that the separation of judicial from other powers is affected by different considerations. It is submitted that this overlooks the basic consideration that the doctrine of p. 65, l. 9. p. 65, l. 21.

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responsible government and the power to delegate legislative power (recognized in *Victorian Stevedoring Co.* v. *Dignan* above referred to) lead to the conclusion that in the matter of the distribution of powers the Australian Constitution was following the British model in marked contrast with that of the United States.

p. 61, l. 45. (*d*) The majority Judges refer to the provisions of the Constitution providing for the establishment of the Interstate Commission. They decide that the doctrine of the legal separation of powers would prevent the conferring on the Interstate Commission of judicial powers, even if its members could have been given life tenure. It is submitted that on the contrary sections 101, 103 and 73 (*iii*) clearly contemplate the exercise of judicial and other powers by the Commission. By virtue of these sections, the Commission was to exercise powers of " adjudication " for the maintenance of " the provisions of the Constitution relating to trade and commerce and of all laws made thereunder " (section 101) and where, in the exercise of these powers, any judgment, decree, order or sentence is made by it, an appeal therefrom is given to the High Court " but on questions of law only " (section 73 (*iii*)). These provisions are inconsistent with any doctrine of a legal separation of powers. The only ground upon which the High Court decided in *New South Wales* v. *The Commonwealth* (1915) 20 C.L.R. 54 that the Interstate Commission could not exercise judicial powers was that its members did not have life tenure.

p. 75, l. 5. (*e*) The majority Judges advert to the fact that the High Court has held that an appeal can be granted to it from courts of federal territories whose members are not appointed for life and which are not therefore federal courts within the meaning of Chapter III of the Constitution. The majority treat this as an exception based on the sovereign power of the Australian Parliament to legislate for the territories and as not going to any question relating to a federal system consisting of States and Commonwealth. However, if the true view were that Chapter III of the Constitution contains an exclusive statement of all powers which can be conferred on federal courts, no exception would be possible on any basis. Further, the doctrine of the legal separation of powers in no way touches upon the relationships between the Commonwealth and the States. Again, the exception relating to the territories points to the likelihood that if the doctrine of the legal separation of powers is applied to the Australian Constitution refinements and inconsistencies of the kind which have developed

in the United States to produce what has been described as a judicial paradox will inevitably develop in Australia.

(*f*) The majority Judges decide that it is not possible under section 51 of the Constitution to confer any power upon a court. As Taylor J. points out, in so far as section 51 (xxxix) permits Parliament to confer legislative power upon Courts, this is a departure from any such suggested limitation on the powers in section 51.

p. 60, l. 39 to p. 61, l. 1f.

p. 112, l. 42 to p. 113, l. 23.

(*g*) The majority Judges refer to earlier decisions of the High Court inconsistent with their present decision but say that those decisions cannot stand in the way of the decision they reach to the contrary. They say that it is understandable that no attack was made on the judicial powers of the Arbitration Court until recently because it was not until *R.* v. *Metal Trades Employers' Association; Ex parte Australian Amalgamated Engineering Union, Australian Section* (1951) 82 C.L.R. 208 that provisions such as Clause 19 (*ba*) of the Metal Trades Award were sustained in the High Court. The learned majority Judges appear to have overlooked the fact that a bans clause in a federal award was upheld by the High Court as early as 1936 in *Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association* 54 C.L.R. 626.

p. 77, l. 29.

THE MINORITY JUDGMENTS.

30. It is submitted that the conclusion of the dissenting Judges of the High Court is correct and the Appellants respectfully adopt principles enunciated and applied in their reasons for judgment. It is respectfully submitted that Williams J. sets out the true principles for application to the Australian Constitution and correctly decides that the Arbitration Court is a true federal court and gives to the previous decisions of the High Court their appropriate meaning and significance. It is also respectfully submitted that Webb J. correctly applied to the powers of the Australian Parliament with respect to the distribution of government functions the principles repeatedly laid down by the Privy Council in relation to other Dominion and Colonial Legislatures and also properly refused to apply to the Australian Constitution the United States doctrine of the strict separation of powers. It is also submitted with respect that Taylor J. rightly points out that there are many functions properly capable of being assigned by Parliament to more than one branch of government and that there is nothing in the Australian Constitution which prevents the Arbitration Court from being invested with both judicial and arbitral functions.

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His Honour also, it is submitted, points to the true significance of contemporary legislative practice at the time when the Australian Constitution was enacted.

pp. 82 to 95. 31. Williams J. dissented.

p. 83, l. 19. (*a*) His Honour pointed out that the doctrine of the separation of powers has led to great difficulties in the United States and that the High Court should apply it with great circumspection to the Australian Constitution.

p. 83, l. 21. (*b*) His Honour said that the Australian Constitution is an Act of the Imperial Parliament and should be interpreted as such and that in English constitutional history the doctrine of the separation of powers means little more than that effective government requires that there should be a Parliament elected by the people to make the laws, an executive responsible to Parliament to execute them and an independent judiciary to interpret and enforce them.

p. 83, l. 33. (*c*) His Honour agreed with the statement of Kitto J. in *R.* v. *Davison* (1954) 90 C.L.R. 353 at p. 381 that at the time the Australian Constitution was being formed, neither in England nor elsewhere had any precise tests by which the respective functions of the three organs of government might be distinguished ever come to be generally accepted.

p. 84, l. 4. (*d*) Under the Australian Constitution, Williams J. pointed out, the persons elected or appointed to exercise the legislative and executive powers are not kept separate and distinct but the position is exactly to the contrary.

p. 87, l. 4. (*e*) His Honour said that the intention of Parliament in 1926 to create the Arbitration Court a federal court is clear and that in

p. 87, l. 22. his opinion it had been validly created as a federal court.

p. 87, l. 35. (*f*) His Honour considered that if the combination of powers in the Arbitration Court was not permissible it would be the arbitral functions that would be invalid.

p. 87, l. 25. (*g*) His Honour decided that there is no express provision in the Australian Constitution to prevent courts exercising other than judicial powers, that the prohibition could only arise from

p. 87, l. 44. some implication and that, far from there being any such implication, the implication in the case of some of the powers conferred on Parliament by section 51, if implication is needed, is to the contrary. His Honour said that section 51 (xvii) bankruptcy and

insolvency, (xviii) copyrights, patents and trade marks, (xxii) divorce and matrimonial causes and, in relation thereto, parental rights and the custody and guardianship of infants, and (xxxv), the one in issue in the present case, appeared to require a mixture of administrative and judicial functions for their effective exercise, that such functions would be complementary of one another and unless there is something tacit in the Constitution which prevents the whole of the functions being performed by the one tribunal, it would appear to be convenient for one tribunal to perform them. That tribunal would have to be created a court before it could be made the receptacle of judicial functions.

(*h*) His Honour pointed out that many functions of a quasi judicial administrative character have been recognized as functions suitable for courts to undertake and he gave various examples thereof. p. 88, l. 18.

(*i*) Dealing with section 51 (xxxv), His Honour pointed out that an award can only be made effective and the dispute settled if there is some sanction to compel the parties to obey the award and that it is within the content of the power to provide not only for the making but also for the enforcement of awards, the whole process being a continuous process. His Honour decided that there is no incompatibility in the one tribunal making the award and afterwards seeing that it is obeyed and that if Parliament thinks fit to combine the functions in one tribunal and to create it a federal court in order that it should have complete capacity to perform them all, he could find nothing expressed or unexpressed in the Australian Constitution to prevent Parliament resorting at the same time to its powers under section 51 and Chapter III of the Constitution for that purpose. p. 88, l. 52. p. 89, l. 12.

(*j*) Williams J. could not find any decision of the High Court which militated against this conclusion and said that, on the contrary, there were decisions which supported it. He referred to *Roche* v. *Kronheimer* (1921) 29 C.L.R. 329 and *Victorian Stevedoring Co.* v. *Dignan* (1931) 46 C.L.R. 73. He held that *R.* v. *Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 C.L.R. 556 is an express decision that non-judicial functions can be conferred on a federal court. He also decided that *Dignan's* case and *Lowenstein's* case are quite antipathic to the idea that the doctrine of the separation of powers, so far as it is implicit in the Australian Constitution, means that there is a rigid demarca- p. 89, l. 6. p. 89, l. 34. p. 90, l. 6. p. 93, l. 6. p. 93, l. 7.

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tion of powers between the legislative, executive and judicial organs of government.

p. 93, l. 37. (*k*) His Honour found support for his conclusion in the High Court decisions under section 122 of the Constitution relating to federal territories.

p. 94, l. 4. (*l*) His Honour said that the non-judicial functions which can be conferred on federal courts must not be functions which courts are not capable of performing consistently with the judicial process.

p. 94, l. 36. (*m*) His Honour referred to the numerous earlier decisions of the High Court accepting the Arbitration Court as a body properly constituted to undertake its dual functions and as a federal court created under Chapter III of the Constitution.

p. 95, l. 17. (*n*) His Honour concluded that there is no constitutional impediment to the Arbitration Court exercising both sets of functions and that there is nothing at variance between the p. 95, l. 39. arbitral duty to make the award and the curial duty to enforce it.

pp. 96 to 107. 32. Webb J. also dissented.

p. 98, l. 17. (*a*) His Honour said that the arbitral powers and the judicial powers in the Arbitration Act are complementary to each other.

p. 99, l. 9. (*b*) Referring to *Waterside Workers' Federation* v. *J. W. Alexander Ltd.* (1918) 25 C.L.R. 434 His Honour said that in none of the reasons for judgment was it suggested that arbitral functions could not be validly mixed with judicial functions; it was p. 99, l. 10. simply on the ground that the President was not appointed for life that the enforcement provisions were held invalid by the majority and no member of the Court suggested that Chapter III of the Australian Constitution prevented the High Court or any federal court from doing anything more than exercise the judicial power of the Commonwealth.

p. 101, l. 21. (*c*) His Honour said that to say the least it had been assumed in many cases that the mere combination of arbitral and judicial powers did not give rise to any question of validity or jurisdiction p. 101, l. 29. and that every member of the High Court as at present constituted was a party to one or more of these decisions.

p. 102, l. 15. (*d*) Webb J. said that in his opinion the solution of the problem lay in the well-known passages in decisions of the Privy

Council in *R.* v. *Burah* (1878) 3 A.C. 899 at pp. 904-905, *Hodge* v. *The Queen* (1883) 9 A.C. 117 at p. 132, *Powell* v. *Apollo Candle Co. Ltd.* (1885) 10 A.C. 282 at p. 289 and *Attorney-General for Ontario* v. *Attorney-General for Canada* (1912) A.C. 571 at p. 583, that the powers of the Parliaments of the Dominions are as plenary and ample as those of the Imperial Parliament and that if the text of the Constitution says nothing expressly then it is to be taken for granted that the power is bestowed unless it is clearly repugnant to the sense of the text. p. 102, l. 15 to p. 105, l. 4.

(*e*) His Honour held that the members of the High Court who took the broad view of section 122 of the Constitution in *R.* v. *Bernasconi* (1915) 19 C.L.R. 629 and *Porter* v. *The King* (1926) 37 C.L.R. 432 were really giving effect to what the Privy Council said in the passages he cited from the abovementioned cases. p. 104, l. 43.

(*f*) His Honour went on to decide that it would be necessary to fall back on the strict doctrine of the separation of powers to hold that powers other than the judicial power of the Commonwealth cannot be conferred on the High Court or other federal courts. He decided that the theory of the strict separation of powers as applied in the United States of America plays no part in the Australian Constitution. p. 105, l. 10. p. 105, l. 17.

(*g*) His Honour accordingly concluded that Chapter III of the Australian Constitution permits of the combination of arbitral and judicial powers as in the Arbitration Act. p. 105, l. 35.

33. Taylor J. also dissented. pp. 108 to 119.

(*a*) His Honour pointed out that there are many functions which are capable of being assigned by Parliament in its discretion to more than one branch of Government. He referred to functions under the Patents Act, the Trade Marks Act, the Bankruptcy Act, the Navigation Act, the Life Insurance Act, the Trading with the Enemy Act, the National Security (Contracts Adjustment) Regulations and the Women's Employment Regulations. He said that these illustrations lead inevitably to the conclusion that, though the Australian Constitution effects a broad and fundamental distribution of powers among the organs of government, it is not such a distribution as precludes overlapping in the case of powers or functions the inherent features of which are not such as to enable them to be assigned, *a priori*, to one organ rather than to another. p. 110, l. 6. p. 110, l. 15 to p. 112, l. 17. p. 112, l. 7.

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p. 112, l. 48. (*b*) His Honour said that the suggestion that it was permissible to invest federal courts with limited legislative powers reasonably incidental to the performance of their judicial functions and that this may be justified under section 51 (xxxix) of the Australian Constitution is to depart in a real, and not merely an apparent, manner from the notion that the legislative power to confer authority upon courts is to be sought exclusively in Chapter III.

p. 114, l. 44. (*c*) In discussing *Waterside Workers' Federation* v. *J. W. Alexander Ltd.* (1918) 25 C.L.R. 434, His Honour said that the only vice which a number of members of the Court saw in the legislation was the absence of life tenure for the President and that this view of *Alexander's* case was acted upon when the Court was reconstituted in 1926 and had remained unchallenged until the present case.

p. 115, l. 2. (*d*) Taylor J. said that whilst Chapter III contained an exhaustive declaration of the judicial power with which federal courts may be invested, he saw nothing to prohibit Parliament from conferring other powers or imposing other duties upon them under section 51. He said that this would not extend to conferring powers and functions which are essentially legislative or executive in character except in so far as they were strictly incidental to their judicial functions. His Honour's view was
p. 115, l. 29. that arbitral functions are not essentially legislative or executive in character.

p. 116, l. 16. (*e*) His Honour said that arbitration presents some features which are characteristic of the exercise of judicial power and that
p. 116, l. 26. the Constitution authorizes Parliament to establish tribunals for compulsory arbitration in accordance with ordinary principles
p. 117, l. 15. of justice, and that the legislative power in the Constitution was intended to authorize Parliament at least to employ instruments of the same character as those recognized at the time of the enacting of the Constitution as a usual or commonly accepted instrument of compulsory arbitration in such matters. Otherwise the power would have been deprived of a great deal of its significance.

p. 117, l. 21. (*f*) His Honour then referred to the form of legislation in certain Australian States and New Zealand dealing with conciliation and arbitration contemporary with or prior to the enactment
p. 118, l. 31. of the Australian Constitution and agreed with the view of

Isaacs J. in an early High Court decision that it was an irresistible inference that the grant with respect to industrial disputes extending beyond the limits of any one State was as full and unrestricted as a State already possessed over disputes confined to its own borders. Taylor J. also referred to the special character of the arbitral functions of the Arbitration Court, presenting in their nature and exercise a number of features which are characteristic of judicial functions. p. 118, l. 42.

(*g*) These considerations, coupled with the fact that the combination in one tribunal of both arbitral and limited judicial authority is and has been for over half a century a well-recognised concept, induced His Honour to think that in the absence of a clear provision or implication in the Constitution which denies to the legislature the right to combine these two functions in a court constituted under sections 71 and 77 (*i*) of the Australian Constitution the attack on the validity of the legislation must fail. His Honour said that the arguments had failed to convince him that there is to be found in the Constitution any implication which, in the face of the special character of the power conferred by section 51 (xxxv) could so operate. p. 118, l. 47. p. 119, l. 2.

CONCLUSION.

34. The Appellants respectfully submit that the decision of the majority of the High Court is erroneous and ought to be reversed, that this appeal should be allowed and the order of the High Court set aside, and that the abovementioned order *nisi* for a writ of prohibition should be discharged for the following, amongst other

REASONS.

1. Because Parliament created the Arbitration Court as a superior court of record to exercise part of the judicial power of the Commonwealth.

2. Because there is nothing in the Australian Constitution which expressly or impliedly prevents Parliament from conferring arbitral functions upon a court which it creates.

3. Because the Australian Constitution in section 101 provides for a combination of judicial and non-judicial functions in

the Interstate Commission which is the very thing that the High Court has decided that the Constitution necessarily forbids.

4. Because the United States doctrine of the legal separation of powers, by which the majority of the High Court was so strongly influenced, is one which is inconsistent not only with the framework of the Australian Constitution but with its express provisions.

5. Because, although the Australian Constitution does give legislative power to Parliament, executive power to the Queen and judicial power to the Courts, that division does not require the inference that Parliament cannot confer subordinate legislative authority where it chooses or that it cannot confer powers which are not strictly legislative, executive or judicial, but for example can be described as administrative, upon organs of its own choice.

6. Because the majority of the High Court was wrong in—

   (*a*) disregarding Parliament's creation of the Arbitration Court as a federal court;

   (*b*) finding an implication in the Australian Constitution that a combination of judicial and non-judicial functions is forbidden;

   (*c*) importing into the Australian Constitution the United States doctrine of the strict legal separation of powers;

   (*d*) departing from earlier decisions which recognize the validity of such a combination.

7. Because the conclusion of the minority of the High Court was correct.

K. H. BAILEY.
DOUGLAS I. MENZIES.
C. I. MENHENNITT.

No. 27 of 1956

In the Privy Council.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

THE ATTORNEY-GENERAL
OF THE COMMONWEALTH OF AUSTRALIA

AND

THE QUEEN

AND

THE BOILERMAKERS' SOCIETY OF AUSTRALIA

AND

THE HONOURABLE RICHARD CLARENCE KIRBY
AND OTHERS JUDGES OF THE COMMONWEALTH
COURT OF CONCILIATION AND ARBITRATION

AND

THE METAL TRADES EMPLOYERS' ASSOCIATION

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AND

THE ATTORNEY-GENERAL OF THE
COMMONWEALTH OF AUSTRALIA

Case

FOR THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA AND THE HONOURABLE RICHARD CLARENCE KIRBY, THE HONOURABLE EDWARD ARTHUR DUNPHY AND THE HONOURABLE RICHARD ASHBURNER, JUDGES OF THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION.

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