4,1957

No. 27 of 1956.

In the Privy Council

ON 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 Respondent

THE BOILERMAKERS' SOCIETY OF AUSTRALIA.

RECORD.

p. 120. 1. This is an appeal from a Judgment and order dated the 2nd day of March 1956 of the High Court of Australia which made absolute an order *nisi* for a Writ of Prohibition directed against the above-named Judges of the Commonwealth Court of Conciliation and Arbitration and the above-named Metal Trades Employers' Association. The appeal is brought pursuant to special leave granted on the 1st day of June 1956.

pp. 56–57.

pp. 121–123.

2. The Boilermakers' Society of Australia is a party to an award known as the Metal Trades Award which was made pursuant to the provisions of the Conciliation and Arbitration Act 1904–1952. The Metal Trades Employers' Association is also a party to the said Award. Clause 19 (*ba*) (i) of the said award is in the following terms :—

> " No organization party to this award shall in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation or restriction upon the performance of work in accordance with this award."

pp. 24–26. 3. On the 31st day of May 1955 the Commonwealth Court of Conciliation and Arbitration made orders against the Respondent The Boilermakers' Society of Australia which in substance ordered the said Society to comply with the said clause 19 (*ba*) (i) of the said award.

4. The Commonwealth Court of Conciliation and Arbitration made the orders pursuant to the provisions of paragraphs (*b*) and (*c*) of sub-section (1) of Section 29 of the Conciliation and Arbitration Act 1904–1952, which is in the following terms, so far as material :—

> " 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."

5. On the 28th day of June 1955 the Commonwealth Court of Conciliation and Arbitration made a further order adjudging the Respondent The Boilermakers' Society of Australia guilty of contempt of the said Court and imposing a fine of £500 and ordering the said Respondent to pay the taxed costs of the Claimant, the Metal Trades Employers' Association. pp. 54–56.

6. The Commonwealth Court of Conciliation and Arbitration made this order pursuant to the provisions of Section 29A of the Conciliation and Arbitration Act 1904-1952. Section 29A is in the following terms :—

" 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 of 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) —Five hundred pounds ; 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—Two hundred pounds or imprisonment for twelve months ; or

(*b*) in any other case—Fifty pounds."

The said order was made, as appears from the judgment delivered on 28th June 1955, on the ground that the said Boilermakers' Society had p. 54. pp. 53–54.

been a party to and concerned in a ban limitation or restriction of work imposed by the members of another organization, " by permitting its
p. 53, ll. 28 to 31. members," that is to say, the members of the Respondent Boilermakers' Society " to subsidize the strike by contributing periodically what is known as ' strike pay ' to the striking members of the Federated Ironworkers Association."

p. 56. 7. On the 30th day of July 1955 the said Respondent Boilermakers' Society obtained from the High Court of Australia an order *nisi* for a Writ of Prohibition directed to the aforesaid Judges of the Commonwealth Court of Conciliation and Arbitration and the Metal Trades Employers' Association to show cause why a Writ of Prohibition should not issue directed to the Respondents prohibiting them from proceeding further on the orders referred to above on the ground that the provisions of Sections 29 (1) (*b*) and (*c*) and 29A of the Conciliation and Arbitration Act 1904–1952 were *ultra vires* and invalid in that—

(A) the Commonwealth Court of Conciliation and Arbitration is invested by statute with numerous powers, functions and authorities of an administrative, arbitral, executive and legislative character, and

(B) the powers which Sections 29 (1) (*b*), 29 (1) (*c*) and 29A respectively of the Conciliation and Arbitration Act 1904–1952 purport to vest in the said Court and exercised by it in making the said orders are judicial, and

(C) the said Sections 29 (1) (*b*), 29 (1) (*c*) and 29A are accordingly contrary and repugnant to the provisions of the Constitution of the Commonwealth and, in particular, Chapter III thereof.

p. 120. This order *nisi* was made absolute as set out in paragraph 1 above.

pp. 58 to 81. 8. The decision of the High Court, as appears from the joint opinion of the majority of the Justices, was in substance that it is not within the powers of the Commonwealth Parliament to confer on a body established primarily for the performance of non-judicial functions jurisdiction which of its very nature forms part of the judicial power of the Commonwealth, notwithstanding that such body is organised as a Court and that its members have the tenure prescribed for judges of a Federal Court by Section 72 of the Constitution ; and that it is beyond the powers of the Commonwealth Parliament to provide for a combination with judicial power of functions which are not ancillary or incidental to the exercise of judicial power but are foreign to it.

9. The legislative power of the Commonwealth Parliament to provide for conciliation and arbitration is contained in Section 51 (xxxv) of the Constitution, whereby the Parliament is given power, subject to the Constitution, 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."

10. The judicial power of the Commonwealth is dealt with in Chapter III of the Constitution. Section 71 provides that the judicial

power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other Federal Courts as the Parliament creates and in such other Courts as it invests with federal jurisdiction. Section 72 provides for the appointment tenure and remuneration of Justices of the High Court and of the other Courts created by the Parliament. Section 73 provides for the appellate jurisdiction of the High Court. Section 74 deals with appeals to Her Majesty in Council and is more fully referred to hereunder. Section 75 provides for matters in respect of which the High Court shall have original jurisdiction and Section 76 enumerates the matters in respect of which original jurisdiction may be conferred on the High Court, including, *inter alia*, matters " arising under this Constitution or involving its interpretation " and matters " arising under any laws made by the Parliament." Section 77 provides that with respect to any of the matters mentioned in Sections 75 and 76 the Parliament may make laws defining the jurisdiction of any federal court other than the High Court; defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the Courts of the States; and investing any court of a State with federal jurisdiction.

11. The Respondent Boilermakers' Society submits that the subject matter of the present appeal raises a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States and that, accordingly, the appeal is one which cannot be dealt with by Her Majesty in Council unless a certificate is first obtained from the High Court under Section 74 of the Constitution of the Commonwealth of Australia.

12. Section 74, so far as material, provides as follows :—

> " No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council."

13. The meaning and effect of this provision has been considered by the Judicial Committee on a number of occasions. The principal cases in which the provision has been considered are :—

Jones v. *Commonwealth Court of Conciliation and Arbitration* [1917] A.C. 528; 24 C.L.R. 396.

The Minister for Trading Concerns of Western Australia v. *Amalgamated Society of Engineers* [1923] A.C. 170.

The Commonwealth v. *Bank of New South Wales* [1950] A.C. 235; 79 C.L.R. 497.

Nelungaloo Pty. Ltd. v. *The Commonwealth of Australia* [1951] A.C. 34.

14. The decision in *Jones* v. *The Commonwealth Court of Conciliation and Arbitration* was to the effect that a question as to the validity of an

award made under the Commonwealth Conciliation and Arbitration Act raised a question of limits *inter se* because the award, if valid, would limit the operation of State power within the field covered by the award. The judgment of their Lordships ([1917] A.C. at p. 532) contains the following passage :—

> " Whatever may be the power of the Commonwealth in regard to industrial disputes, whether or not that power must be exerted in harmony with State laws or State awards, it is at all events clear that the field of legislation and of consequent determination in obedience to laws so made is divided between State and Commonwealth, and these are constitutional powers because they spring from constitutional sources.
>
> " The able but necessarily difficult arguments of Mr. Lawrence and Mr. Romer were directed to show that the decision of the High Court in the present case was not upon a question as to the limits *inter se* of Commonwealth and State powers. They said that it did not decide any conflict of powers and could not impair the power of the State and, therefore, was not concerned with limits *inter se*, laying emphasis upon the two Latin words. Let it be supposed that no conflict has arisen and that the powers of the State could not be so impaired. These considerations do not, in their Lordships' opinion furnish the test.
>
> " Their Lordships consider that the High Court decided, first, that the dispute before them was one extending beyond the limits of one State ; and secondly, that the President had jurisdiction to make his award under the legislation of the Commonwealth passed pursuant to their constitutional powers. The High Court decided that the frontier of the Commonwealth power reaches in this case into the State, and it therefore followed that the State has not exclusive, if any power in this case. This appears to their Lordships to be a question as to the limits *inter se* of the several powers, however much or little the Commonwealth may be required to conform to State laws or State awards, and however much or little the State may impose laws upon its own subjects."

15. In *Minister for Trading Concerns of Western Australia* v. *The Amalgamated Society of Engineers* [1923] A.C. 170, a number of questions was raised by the petition, including the question whether the Commonwealth Conciliation and Arbitration Act was invalid on the ground that it set up a Court which was not constituted in the manner required by the Commonwealth Constitution. It was argued that this was an *inter se* question and also that several other questions raised were also *inter se* questions. Their Lordships refused to permit an appeal on the ground that Section 74 of the Constitution precluded such an appeal without a certificate of the High Court but did not in pronouncing their decision indicate which of the questions raised by the appeals were regarded as *inter se* questions.

16. In *Commonwealth of Australia* v. *Bank of New South Wales* [1950] A.C. 235, their Lordships were concerned primarily with the question how far an appeal could be permitted on questions other than *inter se*

questions in a case in which *inter se* questions were also involved. But at page 292 of the report their Lordships stated that the argument that the Act there in question was invalid on the ground that its provisions " were inconsistent with the maintenance of the constitutional integrity of the States " admittedly raised an *inter se* question. The following passage from the decision in that case at page 293 is relevant to the construction of Section 74 :—

> " It is in the first place clear that in the establishment of the Federal Constitution of the Commonwealth of Australia it was a matter of high policy to reserve for the jurisdiction of her own High Court the solution of those *inter se* questions which were of such vital importance to Commonwealth and States alike. Reference may be made on this aspect of the matter to the judgment of Griffith, C.J., and Barton and O'Connor, JJ., in *Baxter* v. *The Commissioners of Taxation, New South Wales*, 4 C.L.R. 1087. In its broad outline Section 74 speaks for itself in this respect and the policy which it embodied is emphasised in later Judiciary Acts ; see Section 38A of the Judiciary Act 1903–1934 which reproduces Section 2 of Act No. 8 of 1907. It would be a paradoxical result if in the face of Section 74 the determination of *inter se* questions which might be of transcendent importance was left to this Board by the accident that the Respondent having won before the High Court on some other point yet wished to rely also on a contention which raised an *inter se* point."

17. In *Nelungaloo Pty. Ltd.* v. *The Commonwealth of Australia* [1951] A.C. 34, at p. 52, their Lordships after quoting portion of the above passage observed :—

> " Section 74 in fact was part of that bargain to which the members of the federation gave their consent when they entered the federation, and it ought to be construed as it was construed in the *Banks*' case, broadly and so as to give effect to the purpose for which it was enacted. Their Lordships are not disposed to allow exceptions to the broad construction which they have already adopted, that an appeal involving the determination of any *inter se* question is excluded from the jurisdiction of His Majesty in Council unless the appellant has obtained a certificate from the High Court."

Nelungaloo Pty. Ltd. v. *The Commonwealth of Australia* was a case in which a question arose whether a particular regulation made in purported exercise of statutory power provided " just terms " within the meaning of Section 51 (xxxi) of the Constitution. It was contended that as the regulation did not provide just terms it was invalid. The Respondent before your Lordships' Board contended that this was an *inter se* question. The Appellant claimed that this was not an *inter se* question, since the right of the Commonwealth to acquire property was not in dispute and the only question was whether just terms had been provided. The decision of their Lordships, however, was that the question was an *inter se* question for the reasons stated at page 50 of the report. After quoting the words of Dixon, J., in *Australian National Airways Pty. Ltd.* v. *The Commonwealth*, 71 C.L.R.

115 at 122–3, " The settled interpretation of the crucial words of Section 74 is that they cover any decision upon the extent of a paramount power of the Commonwealth," their Lordships said :—

> " the Appellant, while not admitting the broad principle thus stated, submitted that in any event placitum (xxxi) should, on account of its special subject matter, be treated as exceptional. It is therefore necessary now to consider the meaning and effect of the placitum. On this their Lordships find no substantial doubt or difficulty. The placitum creates a power to acquire property for Commonwealth purposes ; but it is a power *sub modo*, for it is a power to acquire on just terms and not otherwise. In this sense it is, as Dixon, J., said in the present case, a power to make laws with respect to a compound conception, namely ' acquisition-on-just terms.' So far as the Commonwealth is authorized, beyond that it has no authority to acquire property in any State. The exercise of the power is conditional upon the observance of the constitutional limitation, just as under placitum (xxxv) the exercise of the power is conditional on the existence of the constitutional limitation that there should be a dispute extending beyond the bounds of any one State. Under either placitum the question whether the constitutional limitation of the Commonwealth power has been exceeded raises the question how far the constitutional power of the Commonwealth reaches into the State, and how far, if at all, the States' power has been affected by the Commonwealth power. Each of these questions requires the Court to determine, on a construction of the Constitution, the limitations of the powers of the Commonwealth and of the States *inter se*."

18. The scope of Section 74 has also been considered in the High Court of Australia. Questions as to the meaning of Section 74 have sometimes arisen directly on an application for a certificate. At other times they have arisen indirectly by reason of the provisions of Section 38A and Section 40A of the Judiciary Act 1903–1950. Section 38A provides that in matters involving any *inter se* questions the jurisdiction of the High Court shall be exclusive of the jurisdiction of the Supreme Courts of the States ; and Section 40A provides that when an *inter se* question arises in any cause pending in a Supreme Court of a State, it shall be the duty of the Court to proceed no further in the cause, and the cause shall be " by virtue of this Act, and without any order of the High Court, removed to the High Court."

19. In *Pirrie* v. *McFarlane*, 36 C.L.R. 170, the High Court had to consider whether a cause in the Supreme Court of Victoria, which raised a question as to whether a member of the Defence Forces was obliged to comply with the State Motor Car Act, was properly removed to the High Court under Section 40A. All members of the Court were of opinion that Section 40A was valid and that the question above stated was an *inter se* question, so that the cause was properly removed to the High Court. Isaacs, J., however, added an additional reason for saying that an *inter se* question was involved, namely that the validity of Section 40A itself was in issue, and this he held to be an *inter se* question. He said at page 195, " The limits are plainly in dispute when a Commonwealth law assumes the

power and that power is denied to divest a State Court of its pre-existing jurisdiction in a matter within the Commonwealth judicial power and to invest it with Federal jurisdiction at the discretion of the Parliament, in relation to that matter, or to make the jurisdiction of the High Court exclusive."

20. In *The Commonwealth* v. *Kreglinger & Fernau Ltd. & Bardsley*, 37 C.L.R. 393, the Court upheld the validity of Section 39 (2) (*a*) of the Judiciary Act (which provides, in effect, that in a matter falling within Sections 75 or 76 of the Constitution there shall be no appeal, except to the High Court, from a single judge of the Supreme Court).

The majority of the Court also held that the question of its validity was an *inter se* question. This matter is dealt with at pp. 401, 418–420, 424–428 and 430. This Respondent relies in particular on the following passage in the judgment of Isaacs, J., at p. 419 :—

> " There was a distinct question *inter se*. The objection taken in December was that the Supreme Court, that is the *judicial organ* of the State, has no power in face of the Commonwealth *legislation* to make such an order. There was a question of conflict whether one power of the State, namely, its *judicial* power, or one power of the Commonwealth, namely its legislative power, should prevail."

21. In *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (No. 2) 71 C.L.R. 115 application was made for a certificate under Section 74 to enable the Plaintiff to appeal to Her Majesty in Council in respect of the decision of the High Court that the Commonwealth had power, under Section 51 (i) of the Constitution, to create a corporation and to empower it to conduct the business of establishing and managing air services. At p. 123 Dixon, J. (with whom Williams, J., agreed) said :—

> " It is not easy to see why this does not mean a decision concerning the delimitation of Commonwealth power, which necessarily implies a decision as to the extent of State power which is subordinate, that is which is subject to the paramountcy of the legislative power of the Commonwealth. The only answer suggested on the part of the Plaintiff is that the provisions of the National Airlines Act are but facultative, that our decision means no more than that the Commonwealth Parliament may create a corporate agent and arm it with a capacity to carry on air services, and that this involves no impairment of State power ; for the States may do the same. But even if this were all the Act did, and all our decision justified, still it would mean that the State legislatures could pass no laws conflicting with the possession or exertion of the capacity thus bestowed "

22. In *O'Sullivan* v. *Noarlunga Meat Ltd.* (1956), The Argus L.R. 223, the question was discussed whether a question as to the true test of inconsistency under Section 109 of the Constitution was an *inter se* question. Kitto, J., held that it was, but the other members of the Court did not

find it necessary to decide the point. In the joint judgment of Dixon, C.J., Williams, Webb and Fullagar, JJ., however, the following statement as to the policy of Section 74 appears at p. 227 :—

> " At bottom, the policy of Section 74 is to confine the decision of essentially Federal questions to this Court, but at the same time to confide to the Court a discretion which will make it possible to obtain the decision of the Privy Council in a case the features of which make it desirable to do so for some special reason."

23. It is submitted that the following propositions are warranted by the foregoing citations :— 10

(A) That Section 74 ought to be given a broad interpretation, in accordance with the policy of confining the decision of essentially Federal questions to the High Court of Australia, unless a certificate is granted by the High Court ;

(B) That an *inter se* question arises when a question arises as to the validity of Commonwealth legislation which, if valid, would narrow the field in which State legislation or other constitutional power could operate.

(C) That such a question arises whether or not the State has actually exercised the legislative or other power over which the 20 Commonwealth power would be paramount.

(D) That where the question is whether the exercise of Commonwealth power is invalidated by the failure to observe a condition or restriction to which the exercise of Commonwealth power is subject, an *inter se* question arises.

(E) That an *inter se* question arises when the question is whether the Commonwealth has power to set up an agency or authority (e.g. an airline corporation) since the State could not pass any legislation conflicting with the possession or exertion of the capacity bestowed on such agency or authority. 30

(F) That the constitutional powers referred to in Section 74 are not limited to legislative powers but extend to judicial powers.

(G) That an *inter se* question arises where it is contended that the provisions of the Commonwealth Statute, if valid, would be inconsistent with the maintenance of the constitutional integrity of the States.

24. It is submitted by this Respondent that the decision by the High Court of Australia that the Court of Conciliation and Arbitration could not validly exercise judicial power was a decision upon an *inter se* question because :— 40

(i) Had the judicial power of the Court been upheld, the States would not have been able to exercise their powers in such a way as to impair the performance by the Court of the judicial functions so conferred.

(ii) The judicial powers of the Court, if valid, would have been exerciseable in such a way as to affect the States in the exercise of their constitutional powers.

(iii) Had the Court been held to be a " Federal Court " within the meaning of Chapter III of the Constitution, the Commonwealth Parliament would have had power to make its jurisdiction exclusive of that which belongs to the Courts of the States (Constitution Sec. 77 (ii)).

(iv) The principles adopted by the majority of the High Court impose a limitation or restriction on the exercise by the Commonwealth Parliament of its power to establish a system of conciliation and arbitration and also of its power to establish federal courts.

(v) The constitutional requirement that the federal courts established by or under Chapter III of the Constitution shall be independent of the Legislature and Executive is an important and essential safeguard of the States, since to those courts is, or can be, committed the determination of matters arising under the Constitution or involving its interpretation, or arising under any laws made by the Parliament; and accordingly a contrary decision would impair the constitutional integrity of the States by subjecting such questions to the judicial determination of tribunals whose functions were not exclusively judicial but included also executive or administrative or legislative functions.

25. As to the first of the five reasons stated in paragraph 24 above, it is submitted that, had the judicial powers of the Court of Conciliation and Arbitration been upheld, any law of the State which conflicted with the exercise of such powers would have become inoperative under Section 109 of the Constitution. For example, a law forbidding a State civil servant to absent himself from his employment without leave would afford no answer to a summons to attend and give evidence before the Court in its judicial capacity, and the necessity of obedience to the summons of the Court would be a defence to a charge under the State law. In habeas corpus proceedings taken in the Supreme Court of a State under the constitutional powers of the State, the warrant of the Court of Conciliation and Arbitration for the imprisonment of an employer or official under Section 29A of the Act would be a good return to the writ.

26. Apart from such direct conflicts, the effect of a decision in favour of the validity of the legislation conferring judicial power on the Court would be to extend Commonwealth legislative power in other directions. Thus an acquisition of property for the purpose of establishing a place of incarceration for persons sentenced by the Court to imprisonment under Section 29A would be valid, as would also a law passed under Section 120 of the Constitution requiring the States to make provision for the detention in their prisons of persons so sentenced.

27. As to the second of the five reasons stated in paragraph 24, Section 4 of the Conciliation and Arbitration Act defines " industrial dispute " as including " any such dispute in relation to employment in an

industry carried on by, or under the control of, the Commonwealth or a State or an authority of the Commonwealth or a State." It was held by the High Court in *The Amalgamated Society of Engineers* v. *The Adelaide S.S. Co. Ltd.* 28 C.L.R. 129 that the Commonwealth Parliament has power to make laws binding on the States under Section 51 (xxxv) and that a dispute between an organisation of employees and a Minister of the Crown for a State acting under the authority of a Statute of the State as employer, which, if it existed between the organisation and a private employer would be an " industrial dispute " within the meaning of Sec. 51 (xxxv), is such an industrial dispute. Amongst the questions involved in the present case, therefore, was the question whether a State or a State instrumentality or a State Minister of the Crown might be ordered by the Court of Conciliation and Arbitration to comply with an award, or be enjoined from continuing a breach of an award, and be punished by the Court for contempt of the Court under Sec. 29A of the Act. In this Respondent's submission it is not to the point to say that similar powers might, in accordance with the decision under appeal, be conferred on a Court properly constituted under Chapter III of the Constitution. The question in the present case is whether these powers can be conferred on a body the dominant function of which is non-judicial, and which itself performs the quasi-legislative and administrative function of determining what shall be the industrial obligations of the parties (including the State and its agencies) and which is intimately concerned with the administration of the legislation. The decision of the High Court was that the judicial interpretation and enforcement of awards cannot constitutionally be committed to the authority which is invested with the primary function of award making, and the relief granted by the High Court against the claim that the Commonwealth Parliament has such power enures to the benefit of the States, their Ministers and instrumentalities, equally with the Respondent Boilermakers' Society.

28. A further consideration in support of the second reason is to be found in the provisions of Sec. 27 of the Act. This section provides as follows :—

> " 27.—(1) If it appears to the Court that a State Industrial Authority is dealing or about to deal with an industrial dispute, with part of an industrial dispute or with a matter which is provided for in an award or is the subject of proceedings under this Act, the Court may make such order restraining the State Industrial Authority from dealing with that dispute or any part thereof, or with that matter, as the Court thinks fit, and thereupon the Authority shall, in accordance with that order, cease to proceed in the dispute or part thereof or in that matter.
>
> (2) An order, award, decision or determination of a State Industrial Authority made in contravention of an order made under this section shall, to the extent of the contravention, be void."

The section applies not only to cases in which the Federal authority has made an award, but in cases in which proceedings have been commenced before the Federal authority. The power conferred by this section to restrain a State Industrial Authority is, it is submitted, judicial power, and the section, if valid, would operate to prevent the exercise by State Industrial Authorities of their functions under State legislation.

29. As to the third of the five reasons stated in paragraph 24, Sec. 77 (ii) of the Constitution enables the Parliament to make laws defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States. The jurisdiction which " belongs to " the Courts of the States is that vested in them by State law (*Baxter* v. *Commissioner for Taxation* (N.S.W.), 4 C.L.R. 1087 at 1142–3 ; *Geo. Hudson Ltd.* v. *Australian Timber Workers Union*, 32 C.L.R. 413 at 429 ; *Pirrie* v. *McFarlane*, 36 C.L.R. 170 at 177). The question, what kind of court can be established by the Parliament under Sec. 71 of the Constitution, is an *inter se* question, since the extent of the power to exclude the State Courts from the jurisdiction which belongs to them under the State constitutions and the Statutes passed thereunder is limited by the restrictions which the Constitution imposes on the power to create federal courts, and a question as to the limits of the power to exclude State courts from exercising the jurisdiction which belongs to them is, as already stated, an *inter se* question.

30. As to the fourth of the five reasons stated in paragraph 24, the principles adopted by the majority of the High Court in the judgment appealed from preclude the Commonwealth Parliament from exercising the power to create arbitral machinery by conferring arbitral functions on a federal court, and preclude the Parliament from exercising the power to create courts and to confer judicial power by constituting an arbitral tribunal as a federal court and investing it with judicial power. The powers conferred by Sec. 51 (xxxv) and those conferred by Chapter III of the Constitution are each paramount powers of the Commonwealth in the sense that, when they are exercised, State laws or powers exercised under State laws must yield to the paramount Federal power. The question whether the principles adopted by the majority of the High Court are soundly based is therefore a question of the existence or non-existence of restrictions or limitations on the exercise of one or more paramount powers of the Commonwealth, and is therefore, in accordance with the decision of your Lordships in *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (see paragraph 17 above) an *inter se* question.

31. As to the fifth of the reasons stated in paragraph 24, the constitutional integrity of the States would, it is submitted, be seriously impaired if it were held that the judicial determination of questions arising under the Constitution or involving its interpretation, or arising under any laws made by the Parliament, could be committed to a tribunal which was not separate from, and independent of, the executive government of the Commonwealth. The following passages from the judgment of the majority, it is respectfully submitted, demonstrate the importance of an independent judiciary to the maintenance of the Federal structure.

" In a Federal form of government a part is necessarily assigned to the Judicature which places it in a position unknown in a unitary system or under a flexible constitution where Parliament is supreme. A Federal constitution must be rigid. The government it establishes must be one of defined powers, within those powers it must be paramount, but it must be incompetent to go beyond them. The conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate

94 C.L.R., p. 267.

p. 59, ll. 24 to 43.

responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature. The demarcation of the powers of the Judicature, the constitution of the courts of which it consists, and the maintenance of its distinct
p. 59, ll. 24 to 43. functions become therefore a consideration of equal importance to the States and the Commonwealth. While the constitutional sphere of the Judicature of the States must be secured from encroachment, it cannot be left to the judicial power of the States to determine either the ambit of the federal power or the extent of the residuary power of the States. The powers of the federal Judicature must therefore be at once paramount and limited. The organs to which federal judicial power may be entrusted must be defined, the manner in which they may be constituted must be prescribed and the content of their jurisdiction ascertained."

94 C.L.R., p. 270. " The first contention made in support of the writ of prohibition is that Chapter III contemplates the creation of Courts which will
p. 61, ll. 33 to 45. exist for the exercise of some part of the judicial power and it does not authorise the bestowal of judicial power upon some body the purpose of whose being is not the exercise of federal jurisdiction in the sense of the Constitution notwithstanding that the body is given the character of a court and that the persons who compose it are appointed and secured in their offices in the manner prescribed by Sec. 72. It would not, for example, be within the legislative power of the Commonwealth to constitute the Comptroller or a Collector of Customs a Court, providing him with the security of tenure and remuneration prescribed by Sec. 72, and to confer upon him judicial power to determine matters arising under the Act he administers. Nor could the like be done with the Commissioner of Taxation or the Director of Navigation."

94 C.L.R., p. 271. " There is, of course, a wide difference—and probably it is more than one of degree—between a denial on the one hand of the
p. 62, ll. 14 to 22. possibility of attaching judicial powers accompanied by the necessary curial and judicial character to a body whose principal purpose is non-judicial in order that it may better accomplish or effect that non-judicial purpose and, on the other hand, a denial of the possibility of adding to the judicial powers of a Court set up as part of the national judicature some non-judicial powers that are not ancillary but are directed to a non-judicial purpose. But if the latter cannot be done clearly the former must be then completely out of the question."

" A number of considerations exist which point very definitely
p. 62, ll. 23 to 51. to the conclusion that the Constitution does not allow the use of
p. 63, ll. 1 to 5. Courts established by or under Chapter III for the discharge of functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto. First amongst them stands the very text of the Constitution. If attention is confined to Chapter III it would be difficult to believe that the careful provisions for the creation of a federal Judicature as the institution of government to exercise judicial power and the precise specification of the content or subject matter of that power were compatible with the exercise by that institution of other powers. The absurdity is

manifest of supposing that the legislative powers conferred by Sec. 51 or elsewhere enable the Parliament to confer original jurisdiction not covered by Secs. 75 and 76. It is even less possible to believe that for the Federal Commonwealth of Australia an appellate power could be created or conferred that fell outside Sec. 73 aided possibly by Secs. 77 (ii) and 77 (iii). As to the appellate power over State Courts it has recently been said in this Court : ' On the face of the provisions they amount to an express statement of the federal legislative and judicial powers affecting State Courts which, with the addition of the ancillary power contained in Sec. 51 (xxxix), one would take to be exhaustive ' *Collins* v. *Charles Marshall Pty. Ltd.* [1955] A.L.R. 715, at pp. 720–1. To one instructed only by a reading of Chapter III and an understanding of the reasons inspiring the careful limitations which exist upon the judicial authority exerciseable in the federal Commonwealth of Australia by the federal Judicature brought into existence for the purpose, it must seem entirely incongruous if nevertheless there may be conferred upon the same judicature authorities or responsibilities of a description wholly unconnected with judicial power. It would seem a matter of course to treat the affirmative provisions stating the character and judicial powers of the federal Judicature as exhaustive. What reason could there be in treating it as an exhaustive statement not of the powers but only of the judicial power, that may be exercised by the Judicature ? It hardly seems a reasonable hypothesis that in respect of the very kind of power that the Judicature was designed to exercise its functions were carefully limited but as to the exercise of functions foreign to the character and purpose of the Judicature it was meant to leave the matter at large."

p. 62, ll. 23 to 51. p. 63, ll. 1 to 5. 92 C.L.R. 529, at 543. p. 63, ll. 1 to 5.

" The position and constitution of the judicature could not be considered accidental to the institution of federalism : for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed. This would be enough in itself, were there no other reasons, to account for the fact that the Australian Constitution was framed so as closely to correspond with its American model in the classical division of powers between the three organs of Government, the Legislature, the Executive and the Judicature. But whether it was necessary or not, it could hardly be clearer on the face of the Constitution that it was done. The fundamental principle upon which federalism proceeds is the allocation of the powers of government. In the United States no doubts seem to have existed that the principle should be applied not only between the Federal Government and the States but also among the organs of the national Government itself."

94 C.L.R., p. 276. p. 65, ll. 22 to 36.

32. It will be seen from these passages that the conclusion of the majority is reached by the following steps :—

(i) It is contrary to the Constitution to impose upon a federal court functions which are not either judicial or incidental to judicial functions.

(ii) *A fortiori*, it must be out of the question to attach judicial powers to a body whose principal purpose is non-judicial in order that it may better accomplish that non-judicial purpose.

These conclusions are based on the construction of provisions of the Constitution which the majority of the Justices of the High Court held to be effective to safeguard the States from the judicial determination of constitutional questions, and questions as to the meaning and operation of federal legislation, by bodies which are not independent of the non-judicial organs of the federal government. The constitutional integrity of the States would, it is submitted, be seriously impaired if this limitation of federal power did not exist, and the question involved is therefore a question as to the limits *inter se* of the constitutional powers of the Commonwealth and States.

33. The kind of situation which might arise if the limitation on federal power did not exist may be illustrated by the examples put by this Respondent in argument and referred to in the passages above quoted, namely, that the Commonwealth Parliament might constitute the Comptroller of Customs, the Commissioner of Taxation, or the Director of Navigation, a court for the purpose of deciding questions arising under the Act he administers. It is of course true that Sec. 73 gives the High Court appellate jurisdiction over the decisions of other federal courts and that the High Court also has jurisdiction under Sec. 75 (v) to control officers of the Commonwealth by means of the prerogative writs. But the appellate jurisdiction is subject to such exceptions as the Parliament prescribes. In the case of the Court of Conciliation and Arbitration any appeal to the High Court is expressly excluded by Sec. 32 of the Act, although the validity of such a provision may be open to question (see *Collins* v. *Charles Marshall Pty. Ltd.*, 92 C.L.R. 529 at pp. 544, 557–8). So far as the prerogative writs are concerned, they may not afford an adequate means in any particular case of correcting the defects of a system in which an executive officer of the Commonwealth is made a judge of the meaning and operation of the legislation which he administers. In any event, it is submitted that no logical distinction can be made between inferior federal courts and the High Court itself, and if the inferior courts can be constituted by the appointment of persons having administrative and executive responsibilities, so can the High Court itself. The framers of the Constitution, it is submitted, might have proceeded by ensuring the independence of the High Court committing to it the exclusive power to determine constitutional questions, and leaving the Commonwealth Parliament free to create inferior courts without limitation; but they made no distinction in this respect between the High Court and other federal courts. The question of the limitations which the Constitution imposes as to the functions which may be imposed upon any federal court is accordingly a matter of great importance to the maintenance of the constitutional powers of the States.

34. For the foregoing reasons it is submitted that the present appeal is incompetent. In the following paragraphs the respondent Boilermakers' Society will submit that the decision of the majority of the High Court was correct and that in the event of your Lordships holding that the appeal is competent, the appeal should nevertheless be dismissed.

35. The respondent Boilermakers' Society respectfully adopts and supports in their entirety the reasons given by the majority of the Justices of the High Court for making absolute the order *nisi* for prohibition. pp. 58 to 81.

36. The primary function of the Court of Conciliation and Arbitration is the prevention and settlement of industrial disputes by conciliation and arbitration. It has the function of making awards for the settlement of industrial disputes in respect of the matters enumerated in Sec. 25 of the Act, that is to say, alteration of the standard hours of work, alteration of the basic wages for males and females as therein defined, and long service leave, and it has also a supervisory control over conciliation commissioners who have the primary function of making awards for the settlement of industrial disputes in respect of other industrial matters. No guidance is given by the legislature as to the principles on which such industrial disputes shall be settled and it was common ground in the proceedings before the High Court that the function of Conciliation Commissioners, and of the Court in making awards, is not judicial. In the exercise of the power to make awards the Court considers such matters as the economic capacity of the community as a whole to pay increased wages, the possible inflationary effects of an increase in wages, the effect of a wage increase on overseas trade, the desirability of encouraging exports, the level of employment in the community, company profits and other elements in the national income, the prospects of rural industries, the level of retail trade and other matters of an economic and sociological character. Although the Court is bound to afford the parties to the dispute an opportunity of being heard before it makes an award, it can proceed of its own motion (as in *The Queen* v. *Kelly, ex parte Australian Railways Union*, 89 C.L.R. 461). The function of award making was described by Isaacs and Rich, JJ., in *Waterside Workers' Federation of Australia* v. *J. W Alexander Ltd.*, 25 C.L.R. 434, as being " to ascertain and declare but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other " (p. 463). At p. 464 of the same case their Honours quoted the following passage from the report of a Commission :—

> " It should be remembered that a Court of Arbitration is not like an ordinary court of law. There is no fixed code of law which it interprets, and its decision is only a declaratory statement as to what it thinks just and expedient ; "

and at p. 466 their Honours referred to " the fact that the Court is described as a Court of Conciliation and Arbitration, the functions of which are incompatible with a court of law."

37. If, as this Respondent submits, and the majority of the High Court held, judicial functions cannot, consistently with the Constitution, be entrusted to a body whose primary function is non-judicial, it follows, it is submitted, that the judicial functions of the Court cannot have been validly conferred, for it is impossible to regard the judicial functions of the Court as primary and the arbitral functions as ancillary or incidental to the judicial functions. The judicial functions of the Court are dependent on the exercise of the award-making power either by the Court or by a Conciliation Commissioner. Until 1947 complete award-making power

was vested in the Judges of the Court, although Conciliation Commissioners also had limited powers subject to review by Judges of the Court. The important matters referred to in Section 25 have always been exclusively the concern of the Court, and in 1952 the Court was given a supervisory power by way of appeal over the decisions of the Conciliation Commissioners in respect of matters, which by the legislation of 1947, had been exclusively committed to Conciliation Commissioners. It is, therefore, submitted that the primary function of the Court is that of conciliation and arbitration, which is not a judicial but an executive or administrative function.

38. The limitation on the power of the Commonwealth Parliament for which this Respondent contends flows, it is submitted, from the doctrine of separation of powers. It is not, however, contended that it flows directly from that doctrine as a political principle, but that it is the consequence of the embodiment of the principal of separation of powers in specific provisions of the Constitution which, properly construed, are found to contain the limitation.

39. The provisions of the Chapter III of the Constitution, although expressed in affirmative form, have always been understood as containing negative implications so as to impose restrictions or limitations upon what might otherwise have been considered to be within the legislative powers of the Federal Parliament. Thus in *Dalgarno* v. *Hannah* (1903), 1 C.L.R. 1 at p. 10, the High Court said that Parliament " has no authority to create any additional appellate jurisdiction." In *Federal Commissioner of Taxation* v. *Munro*, 38 C.L.R. 153, at p. 174, Isaacs, J., said : " A suggestion, however, was made that the decision was wrong because the appellate power of this Court is not confined to appellate power within the meaning of Section 73 of the Constitution, but may be extended by Parliament to revision of administrative decisions. The suggestion is contrary to the expressed views of this Court from the very first case decided, namely, in 1903, *Dalgarno* v. *Hannah*, to the *British Imperial Oil Co.'s* case decided last year." In *Steele* v. *Defence Forces Retirement Benefits Board*, 92 C.L.R. 177, the High Court, consisting of Dixon, C.J., Williams, Webb, Fullagar and Kitto, JJ., decided that it could hear a so-called appeal from a decision of the Board, because the function imposed on the High Court by the legislation was strictly judicial in character. In the course of their judgment, their Honours said, at p. 181 : " As might be supposed, the so-called appeal from this administrative body is a proceeding in the original and not the appellate jurisdiction of the Court." At pp. 186–7 their Honours, after citing *In re Judiciary and Navigation Acts*, 29 C.L.R. 257, at pp. 265–7, said :—

> " The foregoing must be read with the discussion in *Reg.* v. *Davison*, 90 C.L.R. 353, on the subject matter of judicial power and what may be incidental to its exercise. But what is a bare administrative function cannot be committed to a Court. Such a function cannot be committed to a Court so to speak in gross as opposed to a thing appurtenant to the performance of a principal judicial duty to which it is an accessory. This is shown by *Queen Victoria Memorial Hospital* v. *Thornton*, 87 C.L.R. 144, a case in which occasion was taken to enumerate the more recent authorities treating of judicial power."

Their Honours then considered the nature of the function entrusted to the High Court by the legislation and concluded that it did not go outside the scope of judicial power. It could, therefore, be conferred on the Court as original jurisdiction under Sec. 76 (ii) of the Constitution. This decision, therefore, proceeded upon the basis that, just as Sec. 73 is an exhaustive statement as to appellate jurisdiction, so Sec. 76 is an exhaustive statement as to the power of Parliament to confer non-appellate functions on the High Court, and excludes the possibility that non-judicial functions could be conferred on the High Court, otherwise than as incidental or accessory to some principal judicial function. The conclusion was reached on the authority of *Queen Victoria Memorial Hospital* v. *Thornton*, 87 C.L.R. 144.

40. In *Queen Victoria Memorial Hospital* v. *Thornton*, the Court unanimously held that Sec. 77 of the Constitution was an exhaustive definition of the power of the Federal Parliament to impose duties on State Courts. The legislation there in question purported to confer non-judicial power on a State court. In a joint judgment Dixon, C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor, JJ., said at p. 151 that the power to impose duties on State courts or to invest them with federal functions was defined by Secs. 77 and 79 of the Constitution, and at p. 152 their Honours said, "It would be strange indeed if the Constitution contained a grant of legislative power which would enable the Parliament to require or authorise State Courts as such to execute duties, functions or powers which were not judicial." Their Honours then quoted the following passage from *Le Mesurier* v. *Connor*, 42 C.L.R. at p. 496 :—

> " Sec. 77 of the Commonwealth Constitution expressly confers upon the Parliament power to make laws investing the Courts of the States with federal jurisdiction. But the provisions of Secs. 77 and 79, which explicitly give legislative power to the Commonwealth in respect of State Courts, make it plain that the general powers of the Parliament to legislate with respect to the subjects confided to it, like the similar powers of Congress, must not be interpreted as authorising legislation giving jurisdiction to State Courts."

41. This decision, is it submitted, shows that Secs. 77 and 79 are to be taken, not only as an exhaustive statement of the power of Parliament to confer judicial power on State Courts, but as an exhaustive statement of the power of Parliament to confer any sort of power on State Courts. In the same way, this Respondent submits that Sec. 77 (i) of the Constitution is not only an exhaustive statement of the power of Parliament to confer judicial power on federal courts other than the High Court, but is an exhaustive statement of the power of Parliament to confer any sort of power on such federal courts. It follows, it is submitted, that non-judicial functions cannot be committed to federal courts, and that an attempt to confer judicial functions on a body which has primary functions of a non-judicial character must fail.

42. The principle adopted by the majority of the High Court in the decision under appeal does not mean that no powers of a non-judicial character can be given to a federal court. As is pointed out in their

94 C.L.R., at p. 278. p. 66, ll. 47 and 48.

Honours' judgment (1956 A.L.R. at p. 172) " the judicial power, like all other constitutional powers, extends to every authority or capacity which is necessary or proper to render it effective."

The dividing line between powers which are either judicial or incidental to judicial power and powers which are wholly non-judicial may be difficult to draw in particular cases, as is shown by such cases as *The Queen* v. *Davison* (1954), 90 C.L.R. 353, but the decisions of the High Court that wholly non-judicial power cannot be conferred on the High Court or on State courts, and that judicial power cannot be conferred on bodies which are not either federal or State Courts, require that the distinction should be drawn, and the difficulty of drawing the boundaries between legislative executive and judicial power cannot in itself be an argument against the acceptance of the principles contended for by this Respondent.

43. The authorities so far cited show, it is submitted, that, subject to an exception later to be made in respect of territories of the Commonwealth :—

(A) Sec. 73 of the Constitution is an exhaustive statement of the appellate jurisdiction of the High Court, so that appellate jurisdiction of a non-judicial character cannot be conferred on the High Court.

(B) Sec. 76 of the Constitution is an exhaustive statement of the powers of the Parliament to commit functions to the High Court, so that non-judicial functions cannot be committed by Parliament to the High Court.

(C) Sec. 77 (iii) is an exhaustive statement of the power of the Federal Parliament to invest State Courts with federal functions, so that functions of a non-judicial character cannot be conferred on State Courts.

44. This Respondent submits that if Chapter III and its several sections are exhaustive in these respects, it must follow that Sec. 77 (i) is an exhaustive statement of the power of the Federal Parliament to confer powers on federal courts, so as to exclude any power to invest such courts with non-judicial functions.

45. This conclusion can be reached by the application of principles of construction which, it is submitted, have been accepted as applying to Chapter III of the Constitution by all seven members of the High Court who heard the present case, and without the necessity of considering such questions as whether, for example, the principle of the separation of powers as expressed in the Constitution requires the demarcation of a boundary between legislative and executive powers. It is submitted, however, that the cases in which the principle of the separation of powers has been discussed in the High Court of Australia support the view that, in relation to judicial power at least, the separation of powers as embodied in the Constitution requires that functions of a non-judicial character cannot be conferred on a federal judicial body unless those non-judicial functions are incidental or accessory to judicial functions.

46. In *N.S.W.* v. *The Commonwealth*, 20 C.L.R. 54 (the Wheat Case), it was held that judicial functions could not be conferred on the Interstate Commission constituted under Sec. 101 of the Constitution. Sec. 101 provides that " there shall be an Interstate Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder." It was contended that the use of the word " adjudication " implied that the Interstate Commission might be given powers of a judicial character, but it was held by a majority of the High Court that Chapter III of the Constitution contained an exhaustive enumeration of the bodies on which judicial power could be conferred, and that, as the Interstate Commission could not, by reason of the tenure prescribed for its members by Sec. 103, be a Federal Court, the word " adjudication " must be read as meaning that class of non-judicial adjudication which may be exercised by administrative tribunals. Isaacs, J. (with whom Powers, J., agreed), at pp. 88–90 and Rich, J., at p. 108 referred expressly to the division of powers in the Constitution. Isaacs, J., at p. 89 said " Chapter III is headed ' The Judicature ' and vests the judicial power of the Commonwealth not in the Sovereign simply, or as he may in Parliament direct, but in specific organs, namely, Courts strictly so called " and further " the distinct command of the Constitution is that whatever judicial power . . is to be exerted in the name of the Commonwealth, must be exercised by these strictly so called judicial tribunals " (pp. 89–90). At p. 93 he said " Courts do not execute or maintain laws relating to trade and commerce. Those words imply a duty to actively watch the observance of those laws, to insist on obedience to their mandates, and to take steps to vindicate them if need be. But a Court has no such active duty : its essential feature as an impartial tribunal would be gone, and the manifest aim and object of the constitutional separation of powers would be frustrated."

47. In *re Judiciary and Navigation Acts*, 29 C.L.R. 257 at p. 264, the majority of the Court said " The Constitution of the Commonwealth is based upon a separation of the functions of government, and the powers which it confers are divided into three classes—legislative, executive and judicial (*New South Wales* v. *The Commonwealth*, 20 C.L.R. at p. 88) ": and at p. 265 their Honours said : " This express statement of the matters in respect of which and the Courts by which the judicial power of the Commonwealth can be exercised is, we think, clearly intended as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction." Their Honours expressly stated (at p. 264) that they were not dealing with the question whether Parliament could impose on the Court or its members non-judicial duties, as they held that the powers attempted to be conferred by the legislation under consideration were judicial powers. But it is submitted that it logically follows from the conclusion above quoted, and from the reasoning by which it was reached, that Chapter III is not only an exhaustive statement of the judicial power which may be conferred on the High Court but that, being so exhaustive, it excludes the possibility that Parliament could impose non-judicial duties. This, as already stated was decided by the High Court in relation to the conferring of appellate power on the High

Court in *Dalgarno* v. *Hannah ;* in relation to the conferring of non-judicial power on the High Court in *Steele's* case ; and in relation to State Courts, in *Queen Victoria Memorial Hospital* v. *Thornton.*

48. In *Victorian Stevedoring Co.* v. *Dignan*, 46 C.L.R. 73, the Court was concerned with the question of delegation of legislative power. Gavan Duffy, C.J., and Starke, J., at p. 84, drew a distinction between legislative and executive power on the one hand and judicial power on the other, as did Evatt, J., at p. 117, although he expressed the view that a court set up by the Federal Parliament might exercise non-judicial functions. Dixon, J., discussed the separation of powers at pp. 89 and the following pages, and at p. 98 said that " The Parliament is restrained both from reposing any power essentially judicial in any other organ or body, and from reposing any other than that judicial power in such tribunals."

49. In *ex p. Lowenstein*, 59 C.L.R. 556, the separation of powers was again discussed. In that case, as is pointed out by the majority in the judgment now under appeal (1956 A.L.R. at p. 183), the majority of the Court in *Lowenstein's* case did not decide that non-judicial powers could be attached to a federal court otherwise than as incidental to judicial power. Latham, C.J., and Starke, J., who with Rich and McTiernan, JJ., constituted the majority, both rejected the idea of a rigid separation of powers. Starke, J., however, expressly approved of the statement by Willoughby in his " Constitution of the United States " 2nd ed. p. 1619, which is adopted by the majority of the Justices of the High Court in the present case as a correct statement of the principle (1956 A.L.R. at p. 173). His Honour concluded that there was no constitutional prohibition against " conferring on the judicial department all powers connected with and incidental to the performance by it of its own functions," and he held that the statutory provisions under attack were " incidental to judicial power and to the functions of a court of bankruptcy " (p. 577).

94 C.L.R. 294.
p. 78, ll. 16 and 17.
94 C.L.R., at p. 279.
p. 67, ll. 24 to 40.

50. Dixon and Evatt, JJ., who dissented, considered that the legislation under attack was invalid because it imposed functions on a federal court which were neither ancillary to the judicial power nor incidental to its exercise (p. 589). McTiernan, J., at p. 590, said that the question was whether the Court would by exercising any of the powers expressed in the provisions under attack take any part in the proceedings other than that of a judge. He continued, " If the answer to that question is yes, it would not be correct to say that the bankrupt was being tried by a court which Sec. 71 intended to exercise the judicial power of the Commonwealth, and it would follow that the provisions of Sec. 217 which brought about that result would be invalid. But I cannot agree that Sec. 217 gives to the Court any power that is inconsistent with the due exercise of its judicial power." This statement means, it is submitted, that Sec. 71 of the Constitution, when it refers to Courts, means courts of justice in the strict sense, and that Sec. 71 itself implies a limitation on the kind of body to which the judicial power can be committed.

51. It is, therefore, submitted that *Lowenstein's* case is not an authority for the rejection of the principle of the separation of powers ; since at least three members of the Court adopted the view that, in the

sense in which the separation of powers is understood to impose constitutional limitations in the United States on the exercise of non-judicial functions by federal courts, a similar limitation exists in the Australian Constitution ; and that the decision of a fourth member, McTiernan, J., is in no way inconsistent with the view that the judicial power of the Commonwealth cannot be committed to a body whose primary functions are not judicial in character.

52. In paragraph 43 above, reference is made to an exception to be made in respect of the territories of the Commonwealth. In the case of appeals from the Courts established by Parliament in the territories of the Commonwealth, an appeal has been permitted to the High Court. It has been decided, however, that such courts are not federal courts within the meaning of Sec. 71 or Sec. 73 of the Constitution and to this extent Sec. 73 is not an exhaustive statement of the kinds of appellate jurisdiction vested in the High Court. This exception, however, emphasises the federal character of the limitations imposed by Chapter III of the Constitution on the exercise of legislative power in respect of the judiciary. The decision that Sec. 73 does not prevent the Parliament from investing the High Court with power to hear appeals from territorial courts is based on the view that whereas Sec. 73 precludes the Parliament from investing the High Court with additional appellate power in respect of federal matters, the power of legislation over the territories conferred by Sec. 122 is plenary, and while Chapter III of the Constitution is exhaustive and exclusive as to federal matters, Sec. 122 is a separate and independent grant of power which carries with it its own power to invest the High Court with appellate jurisdiction. This Respondent adopts with respect what is said by the majority of the High Court in the judgment appealed from as to the cases of *R.* v. *Bernasconi*, 19 C.L.R. 432, and *Porter* v. *The King*, 37 C.L.R. 432 (94 C.L.R., pp. 289–292). The doctrine established by those cases as to the special position of the territories has, it is submitted, no bearing on the present case, and the difficulties created by that doctrine will neither be lessened nor increased by the decision in the present case, since the exception it establishes is an exception to the exclusiveness of the appellate jurisdiction of the High Court under Sec. 73, established in *Dalgarno* v. *Hannah*, and it is an exception which is expressly made to depend on the non-federal character of the legislative power over the territories.

53. The decisions of the Supreme Court of the United States arrive, it is submitted, at the same conclusion as has been reached by the High Court of Australia, both as to the exclusive and exhaustive character of the provisions relating to the Judiciary, and as to the position of the Supreme Court in relation to the territorial courts of the United States. This Respondent does not submit any detailed exposition of those cases, but desires to refer generally to the following authorities :—

Hayburn's case, 2 Dallas 409 ;

Gordon v. *United States*, 117 U.S. Reports, p. 697 ;

Muskrat v. *United States*, 219 U.S. Reports, p. 346 ;

Postum Cereal Co. v. *California Fig Nut Co.*, 272 U.S. Reports, p. 693 ;

O'Donoghue v. *United States*, 289 U.S. Reports, p. 516 ;

Williams v. *United States*, 289 U.S. Reports, p. 553 ;

Pope v. *United States*, 323 U.S. Reports, p. 1 ;

National Mutual Insurance Co. v. *Tidewater Transfer Co. Incorporated*, 337 U.S. Reports, p. 582.

Mr. Justice Williams, pp. 82 to 95.
Mr. Justice Webb, pp. 96 to 107.
Mr. Justice Taylor, pp. 108 to 119.

54. The reasons given by those Justices of the High Court who dissented from the judgment appealed from, it is respectfully submitted, fail to give effect to the principles of construction which have been uniformly adopted by the High Court in construing Chapter III of the Constitution. Williams, J. (94 C.L.R. at p. 306) said :—

> " It is clear that only courts can exercise the judicial power of the Commonwealth. But there is no express provision in the Constitution that they can exercise no other powers. If there is a prohibition against their doing so it must rest on some implication arising from the vague concept of the separation of powers."

p. 87, ll. 24 to 28.

The cases already cited, however, demonstrate, it is respectfully submitted, that it is not necessary to resort to a vague concept to find the limitation in question, since they are based on the principle that the express provisions conferring powers on the Parliament in relation to federal courts exclude by implication any other power in the Parliament to legislate on the same subject matter, just as the express power to legislate for the acquisition of property on just terms (Sec. 51 (xxxi)) excludes by implication any power of the Parliament to legislate for the acquisition of property as incidental to the execution of any other power. In *Steele's* case and *Thornton's* case the High Court unanimously applied this principle in relation to the High Court and to State Courts.

55. Williams, J., also said (94 C.L.R. at p. 314) that *Lowenstein's* case was an express decision that non-judicial functions can be conferred on a federal court. It has already been pointed out that three of the six judges who took part in *Lowenstein's* case expressly approved of a statement of the principle of separation of powers which would prevent the conferring of non-judicial functions on a federal court unless they were accessory to or incidental to the exercise of judicial power (paras. 49–51 above).

56. His Honour further said (94 C.L.R. at p. 315) :—

p. 93, ll. 48 and 49.
p. 94, ll. 1 to 4.

> " Presumably, therefore, functions not of a strictly judicial character could be imposed on federal courts by legislation under Sec. 122 of the Constitution. This being so, it would be irrational to imply a prohibition against the Parliament imposing similar functions on federal courts by legislation under Sec. 51. In each case the implied limitation must be the same."

It is respectfully submitted that this statement does not have regard to the point (see paragraph 52 above) that the position of appeals from territorial courts was based by the Justices of the High Court on the view that Sec. 122 conferred plenary power free from the restrictions which Chapter III of the Constitution imposed on the powers conferred by Sec. 51. His Honour

further suggested that the implied limitation was that the functions imposed on the federal courts must not be functions which courts are not capable of performing consistently with the judicial process and his Honour referred to *Steele's* case as supplying the test. But *Steele's* case was, as already shown (paragraph 39), concerned with defining the test of true judicial power within the meaning of Chapter III of the Constitution and it was at all times conceded in the present case that the arbitral power of the Court of Conciliation and Arbitration is not judicial power in this sense. It is respectfully submitted, therefore, that the decisions in *Steele's* case and *Thornton's* case are inconsistent with the reasons of Williams, J., in the present case.

57. The conclusion reached by Webb, J., is, it is submitted, based on the view that the decisions of your Lordships' Board in *Reg.* v. *Burah*, 3 Appeal Cases 889 ; *Hodge* v. *The Queen*, 9 Appeal Cases 117 ; *Powell* v *Apollo Candle Co.*, 10 Appeal Cases 282, and *A.G. for Ontario* v. *A.G. for Canada* [1912] A.C. 571, would prevent the Court from imposing any limitation on federal legislative power unless it was expressly stated. His Honour considered that what he called the " broad view " in *Bernasconi's* case and in *Porter's* case was based on these authorities. But it is submitted that the decisions in those cases were not regarded by the judges who decided them as in any way inconsistent with the view that Chapter III of the Constitution imposed limitations on the legislative power which the Commonwealth Parliament would otherwise have had under Sec. 51 of the Constitution. It is further submitted that the passages cited by his Honour from the decisions of your Lordships' Board do not in any way exclude the possibility that limitations of a negative character may be inferred from the use in a constitutional document of affirmative words granting power. In this sense this Respondent submits that the expression in *Reg.* v. *Burah* 3 Appeal Cases 889 at p. 904–5 in which occur the words " if it violates no express condition or restriction by which that power is limited " should not be taken too literally (see 94 C.L.R. at p. 326).

58. In the submission of this Respondent the reasons of Taylor, J., fail to take account of the decisions of the Court that non-judicial functions cannot be imposed on the High Court or a State Court unless they are incidental to judicial functions. His Honour said (94 C.L.R. at p. 340) :— pp. 82 to 95.

> " . whilst I see in Chapter III of the Constitution an exhaustive declaration of the judicial power with which the Federal courts may be invested, I see nothing to prohibit Parliament absolutely from conferring other powers or imposing other duties upon them under Sec. 51. But this does not mean that Parliament may confer upon Courts powers and functions which are essentially legislative or executive in character except in so far as they are strictly incidental to the performance of their judicial functions. The investing of courts with such powers would clearly be in conflict with constitutional principles, and in turn, judicial authority." p. 115, ll. 1 to 10.

The reference here made is, it is assumed, to such cases as *Steele's* case and *Thornton's* case. The passage implies that the authority of those cases is limited to the attempt to confer non-judicial power of an essentially

legislative or executive character, and that there may be power of a fourth kind which is not legislative, executive or judicial. But the decisions in those cases, it is submitted, made no such distinction and no such distinction can be made. The Court in *Thornton's* case and *Steele's* case decided that no other functions than judicial functions could be imposed on the State Courts or the High Court and examined the functions involved merely to determine whether they were judicial or not. The function attempted to be imposed on the State Court in *Thornton's* case was not essentially different from that exercised by the Arbitration Court or a Conciliation Commissioner in settling an industrial dispute, and the function of the Board in *Steele's* case was, it is submitted, more closely akin to judicial power than the arbitral functions of the Arbitration Court; yet the High Court in *Thornton's* case held that the power could not validly be conferred, and in *Steele's* case examined the powers of the Board in order to determine whether the function of the High Court in determining the so-called appeal could be said to be " outside the scope of the judicial power " (92 C.L.R. at p. 188).

59. It is further submitted that if, as this Respondent submits, the decisions are based on a construction of Chapter III as an exhaustive statement of legislative power with respect to federal courts (subject only to the exception created by Sec. 122) then Sec. 51 cannot be used, as suggested by Taylor, J. (94 C.L.R. at p. 340) as a source of power to legislate as to the functions of federal courts, and the question whether a non-judicial power attempted to be vested in a federal court is legislative or executive or belongs to some fourth category can have no relevance.

60. In argument before the High Court the present Appellants laid stress on the number of cases in which the assumption had been made that the Court of Conciliation and Arbitration could validly exercise both arbitral and judicial functions. It was conceded, however, that the matter had never been the subject of express decision.

This Respondent, however, submits that to reverse the decision appealed from would involve the overthrow of the numerous decisions relied on by this Respondent as to the exhaustive character of Chapter III of the Constitution.

Furthermore, it cannot be suggested that the decision under appeal ought to be reversed on the ground that to affirm it would have serious consequences in the disruption of the established system of arbitration. In *Alexander's* case the judicial powers of the Court were held to be invalidly conferred in 1918, and were not attempted to be restored until 1926. Since the decision of the High Court in this present matter legislation has been passed by the federal Parliament setting up an Industrial Court to exercise the judicial powers formerly exercised by the Court of Conciliation and Arbitration. It is submitted, therefore, that the existence of both judicial and arbitral powers in the same tribunal is not an essential condition of the operation of the system. Moreover, many of the arbitral functions have for many years past been vested in Conciliation Commissioners, who cannot exercise judicial power.

61. This Respondent accordingly submits firstly, that this appeal should be dismissed as incompetent and secondly that the decision of the majority of the Justices of the High Court of Australia was correct and should be affirmed for the following, amongst other

REASONS

(1) BECAUSE the subject matter of the appeal is an *inter se* question within the meaning of Sec. 74 of the Constitution, and no certificate has been granted by the High Court of Australia under that Section.

(2) BECAUSE on the true construction of Chapter III of the Constitution, it precludes the legislature from conferring, on a court established under that Chapter, any other power than judicial power, or power which is incidental or ancillary to such judicial power.

(3) BECAUSE the legislative powers of the Federal Parliament under Sec. 51 of the Constitution do not authorise legislation with respect to the High Court, State Courts or Federal Courts, except in so far as Sec. 51 (xxxix) may authorise legislation as to matters incidental to the execution of powers vested by the Constitution in the Federal Judicature.

(4) BECAUSE if the Parliament cannot invest a federal court with non-judicial power except as above stated, then Parliament cannot confer judicial power on a body whose primary functions are non-judicial in character.

(5) BECAUSE the principle of the separation of powers, as embodied in the Constitution of the Commonwealth of Australia, precludes the Parliament from legislating so as to combine in one body judicial functions and functions which are neither judicial nor ancillary or incidental thereto.

(6) BECAUSE a body whose primary and dominant functions are the settlement of industrial disputes by conciliation and arbitration, and the making of awards prescribing rates of wages and terms and conditions of employment, is not a court within the meaning of Chapter III of the Constitution.

(7) BECAUSE the decisions of the High Court of Australia from 1903 to the present time have established that the provisions of Chapter III of the Constitution are to be treated as exhaustive and exclusive, save in so far as Sec. 122 confers plenary powers in relation to territories of the Commonwealth.

(8) BECAUSE the reversal of the decision appealed from would require your Lordships to overrule a number of decisions of the High Court, including the decisions in *The Queen Victoria Memorial Hospital* v. *Thornton*, 87 C.L.R. 144, and *Steele* v. *Defence Forces Retirement Benefits Board*, 92 C.L.R. 177, which were unanimous decisions of seven and five Justices of the Court respectively.

(9) BECAUSE the reasons of the majority of the Justices in the decision appealed from correctly state the principles to be applied to the determination of the questions involved in this Appeal.

R. M. EGGLESTON.

No. 27 of 1956.

In the Privy Council

ON APPEAL

from the High Court of Australia.

BETWEEN

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

AND

HER MAJESTY THE QUEEN and Others *Respondents.*

AND BETWEEN

THE HONOURABLE RICHARD CLARENCE KIRBY and Others (Respondents) *Appellants*

AND

HER MAJESTY THE QUEEN and Others *Respondents.*

(Consolidated Appeals.)

Case for the Respondent

THE BOILERMAKERS' SOCIETY OF AUSTRALIA.

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