COMMENT

THE SEPARATION OF POWERS DOCTRINE IN THE COMMONWEALTH CONSTITUTION
THE BOILERMAKERS' CASE

A new and important plot has been added to the graph of Australian constitutional development by the decisions of the High Court and the Privy Council in the *Boilermakers' Case*.[1] Both courts affirmed the existence of the doctrine of the separation of powers in the Commonwealth Constitution and, in particular, emphasised the independent and exclusive character of the federal judicial power. If developments since that case[2] are to be taken as a guide, the decision is likely to have important consequences in various fields of Commonwealth activity.

I. ANALYSIS OF THE OPINIONS

A. The Facts of the Case.

On 31st May, 1955, the Commonwealth Court of Conciliation and Arbitration made an order[3] requiring the Boilermakers' Society to obey a provision in an award of that Court prohibiting bans, limitations or restrictions on the performance of work in accordance with the award. To this end the Arbitration Court relied on s. 29(1)(b) of the Conciliation and Arbitration Act[4] (which provided that the Court could order compliance with an order or an award proved to its satisfaction to have been broken or not observed), and s. 29(1)(c) of the same Act (which purported to empower the Court to enjoin by order any organisation or person from committing or continuing a breach or non-observance of an order or award). When the Boilermakers' Society failed to comply with the above order, the Arbitration Court made a further order on 28th June, 1955, fining the Society £500 and costs for contempt of court. For the latter order, it relied on s. 29A of the Act, which provided that the Arbitration Court should have the same power to punish contempt of its power, whether in relation to its judicial powers and functions or otherwise, as is possessed by the High Court in respect of contempt of that Court.[5] The prosecuting union thereupon sought a writ of prohibition directed against the orders of 31st May, 1955, and 28th June, 1955, on the ground that it was not competent for the Commonwealth Parliament to confer power on the Arbitration Court to make such orders.

B. The High Court Decision.

The High Court, by a majority of four judges to three, upheld the

[1] *The Queen* v. *Kirby and Others; ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254; *Attorney-General of Australia* v. *Boilermakers' Society of Australia; Kirby* v. *The Same* (1957) *A.L.R.* 489 (P.C.).

[2] These developments are referred to *infra*, pp. 496-99.

[3] It consisted in fact of a series of orders: (1955) 94 C.L.R. 254, 266.

[4] Act No. 13 of 1904 — Act. No. 54 of 1955 (Cwlth.).

[5] Ss. 29(1)(b) and (c) and 29A were amended by ss. 6 and 7 of Act No. 18 of 1952 (Cwlth.) following upon the High Court decisions in *The King* v. *Metal Trades Employers'*

prosecutor's claims and made absolute the order nisi for prohibition in respect of both orders of the Arbitration Court.

The majority judges (Dixon, C.J., McTiernan, Fullagar and Kitto, JJ.[6] found (it) impossible to escape the conviction that Chapter III (of the Constitution)[7] does not allow the exercise of a jurisdiction which of its very nature belongs to the judicial power of the Commonwealth by a body established for purposes foreign to the judicial power, notwithstanding that it is organised as a court and in a manner which might otherwise satisfy ss. 71[8] and 72[9] (of the Constitution), and that Chapter III does not allow a combination with judicial power of functions which are not ancillary or incidental to its exercise but are foreign to it.[10]

Their conclusion was based upon three fundamental propositions. (1) The Commonwealth Constitution embodied a legal distribution of the legislative, executive and judicial powers between Parliament, the Executive and the courts[11] respectively. (2) Chapter III of the Constitution assisted by s. 51(xxxix)[12] was the sole repository of Commonwealth judicial power[13] and the sole determinant of the manner of its exercise. (3) The conciliation and arbitration power[14] was in nature and content foreign to the judicial power.[15]

The division of legislative, executive and judicial powers accomplished by ss. 1,[16] 61[17] and 71[18] of the Constitution could not, they held, be treated as a mere draftsman's arrangement. It followed the plan of the United States Constitution[19] and was intended to establish legal limitations on the powers of the organs of government. "This cannot all be treated as meaningless and of no legal consequence".[20] It was true that American federalism was, in

Association: ex p. Amalgamated Engineering Union (Australian Section) (1951) 82 C.L.R. 208; and *The King* v. *Commonwealth Court of Conciliation and Arbitration; ex p. Federated Gas Employees' Industrial Union* (1951) 82 C.L.R. 267.

[6] They gave a unanimous judgment.

[7] Ch. III of the Constitution (ss. 71-80) governs the Commonwealth judicial powers and is entitled "The Judicature".

[8] S. 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 (State) courts as it invests with federal jurisdiction . . . ."

[9] S. 72 requires that "the Justices of the High Court and of other courts created by the Parliament—

(i) Shall be appointed by the Governor-General in Council;

(ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of Parliament in the same session, praying for such removal on the grounds of proved misbehaviour or incapacity;

(iii) Shall receive such remuneration as the Parliament may fix: but the remuneration shall not be diminished during their continuance in office."

[10] (1956) 94 C.L.R. at 296.

[11] The High Court, the federal courts which the Commonwealth Parliament may create pursuant to s. 71 of the Constitution, and the State courts which it may invest with federal jurisdiction by virtue of s. 77(iii) of the Constitution.

[12] S. 51(xxxix) provides that "the (Commonwealth) Parliament shall, subject to this Constitution, have power to make laws . . . with respect to: "matters incidental to the execution of any power vested by this Constitution in . . . the Federal Judicature . . ."

[13] This is so within the federal structure of Commonwealth and States. Different considerations apply to federal Territories. See *infra.* pp. 485-86.

[14] S. 51(xxxv) empowers the Commonwealth Parliament, subject to the Constitution, to legislate with respect to: "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."

[15] These propositions are, of course, interrelated, particularly the first and second.

[16] S. 1: "The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives . . ."

[17] S. 61 provides that "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative . . . ."

[18] See *supra* n. 8.

[19] The relevant provisions in the United States Constitution are: Art. I, s. 1: "All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." Art. II, s. 1: "The executive power shall be vested in a President of the United States of America." Art. III, s. 1: "The judicial power of the United States shall be vested in one Supreme Court, and in such other inferior courts as the Congress from time to time may ordain or establish."

[20] (1956) 94 C.L.R. at 275.

the Commonwealth Constitution, combined with the British system of Parliamentary government in which the executive was responsible to the legislature. But the system of responsible government was essentially a political relationship between the Legislature and the Executive — it was not a relationship based on legal powers.[21]

> In any case the separation of the judicial powers from other powers is affected by different considerations. 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.[22]

Within the framework of federal powers, the judicial power was regulated by Chapter III, assisted by the incidental power. The initial major premiss, as it were, was the need for an independent autonomous judicature, in a rigid federal system.[23] This both justified and explained the existence and nature of Chapter III.[24] Had there been no such Chapter in the Constitution, "some at least of the legislative powers would have been construed as extending to the creation of courts with jurisdictions appropriate to the subject matter of the power".[25] But this was negatived, firstly by the special provision made in the Constitution for the judicial power and, secondly, by the nature and contents of Chapter III itself. That Chapter, though not expressed in affirmative terms, was "an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested".[26] It was, moreover, an exhaustive treatment of the *whole* judicial power, not merely of a judicial power exercisable by the judicature. "The true contrast in federal powers is not between judicial power lying within Chapter III and judicial power lying outside Chapter III. That is tenuous and unreal. It is between judicial power within Chapter III and other powers."[27] It followed that the Commonwealth Parliament could not confer judicial power or regulate its exercise except in accordance with Chapter III as assisted by s. 51 (xxxix).[28] This conception had various applications[29] but, in the present context, it would deny to the Commonwealth legislature the power to confer non-judicial functions on a court set up as part of the national judicature, and exercising the judicial power of the Commonwealth, except insofar as those non-judicial functions were ancillary or incidental to the exercise of judicial power. *A fortiori*, it was not competent for the legislature to confer judicial power on a body (whether organised as a court or not), the principal functions of which were non-judicial in character.[30]

The majority judges then proceeded to analyse the nature and application of the conciliation and arbitration power to determine whether it was "foreign"

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[21] This statement by the majority needs some qualification, for it is well established that the Commonwealth Parliament may lawfully delegate legislative power to the Executive. See *infra* pp. 489-90.

[22] (1956) 94 C.L.R. at 275-6. [23] See *supra*. n. 22.

[24] See (1956) 94 C.L.R. at 267-8.

[25] *Id.* at 269. The judges cited "bankruptcy and insolvency" (s. 51(xvii)), and "divorce and matrimonial causes" (s. 51(xxii)) as examples of powers which could be so used.

[26] (1956) 94 C.L.R. at 270, and *id.* at 272-4.

[27] *Id.* at 274-5. The judges found support for this view in *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257.

[28] The incidental power, *supra*. n. 12.

[29] E.g., in relation to the type of body competent to exercise the judicial power (tenure of office), or to matters which fell within the compass of that power.

[30] "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 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 a 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." (See (1956) 94 C.L.R. at 271).

to the judicial power. Tracing, in some considerable detail, the history of the Commonwealth industrial arbitration system and discussing the various changes and developments in relation to the powers, functions and composition of the Arbitration Court, they concluded that from its creation in 1904 the dominant functions of that body had been "arbitral" and not judicial.[31] Arbitral functions, it was well established, formed no part of the judicial power of the Commonwealth.[32]

> The two functions . . . are quite distinct. The arbitral function is ancillary to the legislative function and provides the *factum* upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and, if it finds it, then proceeds if necessary to enforce the law. Not only are they different powers, but they spring from different sources in the Constitution. The arbitral power arises under s. 51(xxxv); the judicial power under s. 71.[33]

Since the dominant functions of the Arbitration Court were non-judicial in character it was not competent, on the majority view of the separation of powers and of the nature of Chapter III, for the Commonwealth legislature to endow that Court with judicial power.[34] The orders in respect of which prohibition was sought represented a purported exercise of the judicial power by the Arbitration Court[35] and consequently could not be upheld.

Williams, Webb and Taylor, JJ., dissented from the majority view. Their dissent, however, was only relative, in the sense that "apart from perhaps a conflict as to the applicability of the doctrine of separation of powers in the abstract, the differences appear to be differences of degree and emphasis".[36]

Williams, J., was not prepared to apply the doctrine of the separation of powers as strictly as had the majority judges. It had led to grave difficulties in the United States, and should be applied with great circumspection to the Australian Constitution. It was true that ss. 1, 61 and 71 accomplished a formal division of powers, but this was an arrangement of convenience dictated largely by the need to frame a constitution for a new political entity in conformity with the American model. In any case, as between the legislative and executive powers, the Constitution made no attempt to keep separate the persons who exercised those functions.[37] As regards the judicial power, it was clear that only courts could exercise that power, but there was no express provision in the Constitution that they could exercise no other powers. "If there is a prohibition against their doing so it must rest on some implication in the Constitution arising from the vague concept of the separation of powers."[38] There were certain matters which, of their very nature, could be dealt with

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[31] *Id. at* 282-8.

[32] So held by a majority of the High Court in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1918) 25 C.L.R. 434.

[33] *Alexander's Case* cited *supra* n. 32, at 464-5, *per* Isaacs, J. See also 463.

[34] "It is difficult to see what escape there can be from the conclusion that the Arbitration Court, though under s. 51(xxxv) of the Constitution there is legislative power to give it the description and many of the characteristics of a court, is established as an arbitral tribunal which cannot constitutionally combine with its dominant purpose and essential functions the exercise of any part of the strictly judicial power of the Commonwealth. The basal reason why such a combination is constitutionally inadmissible is that Ch. 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." (See (1956) 94 C.L.R. at 289).

[35] The majority had some doubts as to whether ss. 29(1)(b) and (c) were necessarily part of the Commonwealth judicial power, and could not be treated as the exercise of a power to legislate with respect to "conciliation and arbitration . . . ." The legislature had, however, so treated them, and, in consequence, they probably fell within Ch. III. Section 29A (contempt power), on the other hand, clearly fell within the ambit of the judicial power.

[36] W. A. Wynes: *Legislative, Executive and Judicial Powers in Australia* (2 ed. 1956) 555ff.

[37] On this point he instanced ss. 62 and 64 of the Constitution.

[38] (1956) 94 C.L.R. at 306.

only by the legislature, the executive or the courts as the case may be,[39] but others could be subject to no *a priori* exclusive delimitation. The latter could be treated as incidental to legislation, administration, or to judicial action as circumstances might require.

> In relation to Chapter III the doctrine (of the separation of powers) means that only courts can exercise the judicial power of the Commonwealth, and that nothing must be done which is likely to detract from their complete ability to perform their judicial functions. The Parliament cannot, therefore, by legislation impose on the courts duties which would be at variance with the exercise of these functions or duties and which could not be undertaken without a departure from the normal manner in which courts are accustomed to discharge those functions.[40]

The arbitral function, however, did not permit of any *a priori* exclusive delimitation; it was, as Williams, J., described it, "quasi-judicial administrative" in character.[41] Its exercise was in no way incompatible with the exercise of the judicial power; indeed those powers were complementary to one another. Arbitration, as employed in the Commonwealth jurisdiction, involved a continuing process whereby an award was made in settlement of a dispute and then, if violated, was punished by the imposition of a sanction. There was nothing, either in the Constitution or in decided cases,[42] to suggest that these functions could not be combined in the same tribunal.[43] There was, in the result, no ground for impugning the judicial powers of the Arbitration Court and, in particular, the orders against which prohibition was sought.[44]

Webb, J., relied on the many previous decisions of the High Court which had accepted as valid the combination of arbitral and judicial functions in the Arbitration Court.[45] He relied also on the statements of the Privy Council in *Reg.* v. *Burah*,[46] *Hodge* v. *The Queen*,[47] *Powell* v. *Apollo Candle Co. Ltd.*[48] and *Attorney-General for Ontario* v. *Attorney-General for Canada*[49] as authority for a liberal interpretation of the Commonwealth Constitution, and concluded that Chapter III permitted the combination of arbitral and judicial powers in the Arbitration Court.

Taylor, J., conceded that ss. 1, 61 and 71 of the Commonwealth Constitution represented, to some extent, "an attempt to commit to the three organs of government those powers and functions appropriate to their respective departments".[50] But he went on to add that "the extent to which the doctrine is capable of being employed as an independent practical constitutional principle will, of necessity, depend upon the extent to which legislative, executive and judicial functions are capable of precise definition and identification".[51] Like Williams, J., he stressed that there were a number of powers which did not admit of any *a priori* exclusive delimitation but could be exercised either administratively or judicially without offending the

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[39] He cited as instances an appropriation of public money, a trial for murder and the appointment of a federal judge, quoting Isaacs, J. in *Federal Commissioner of Taxation* v. *Munro* (1926) 38 C.L.R. 153, at 178.

[40] (1956) 94 C.L.R. at 314.

[41] *Id.* at 306. See also p. 307.

[42] (1956) 94 C.L.R. 309-314 for a discussion of the relevant cases.

[43] Williams, J., instanced the Bankruptcy Act (Cwlth.), the Trade Marks Act (Cwlth.), and the Patents Acts (Cwlth.), as other examples of the combination of administrative and judicial powers.

[44] Indeed, Williams, J., believed that if the combination of judicial and arbitral powers could not be sustained it would be the arbitral powers which would be invalid. This attitude which was based on the view that the Arbitration Court was a validly created federal court was not, however, accepted by the other judges. See (1956) 94 C.L.R. at 306.

[45] Discussed *infra.* pp. 485-491.

[46] (1878) 3 App. Cas. 889, at 904-5.

[47] (1883) 9 App Cas. 117, at 132.

[48] (1885) 10 App. Cas. 282, at 289.

[49] (1912) A.C. 571, at 583, 584.

[50] (1956) 94 C.L.R. at 333.

[51] *Ibid.*

broad and fundamental division of powers among the organs of government.[52] It was 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".[53]

Chapter III of the Constitution clearly did not permit the judicial power to be vested in a body which was not a court constituted in accordance with that Chapter. Nor was it permissible to vest in any such court, functions "which so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another".[54] But the latter consideration did not apply to powers which were not indelibly characterised, *a priori*, as legislative or executive. The arbitral functions clearly fell within this category; they were neither essentially legislative nor executive in character. It was, of course, "much too late in the day to contend (as had Barton, J., in *Alexander's Case*)[55] that "arbitral" functions . . . can ever constitute any part of the judicial power of the Commonwealth",[56] but they did possess a special character which bore little resemblance to the legislative or executive functions, as generally conceived.[57] "On the contrary, both in their nature and exercise they present a number of features which are characteristic of judicial functions".[58] For these reasons, Taylor, J., was of the opinion that the prosecutor's submissions should fail.

Independently of the general considerations discussed above, three important submissions were made to the High Court and discussed in some or all of the judgments.

Firstly, it was argued that even if the prosecutor's contentions were accepted, the existing combination of arbitral and judicial functions in the Arbitration Court should be upheld on the ground of *stare decisis*. The majority freely admitted that such a combination had long been accepted and acted upon by the High Court.[59] Indeed, the issue had not been raised until 1952,[60] and had not been formally argued until the present case. The majority, however, rejected this argument — it was their duty to "give effect to the Constitution according to the interpretation which on proper consideration they are satisfied it bears".[61] Needless to say, the minority judges claimed that, on the basis of their reasoning alone, the existing practice should be continued, but Webb and Taylor, JJ., were also prepared to reject the prosecutor's claims on the independent ground of *stare decisis*.[62]

The second issue concerned the relationship of s. 122 of the Constitution (the Territories power)[63] to Chapter III. "It was said that, if s. 122 per-

[52] He instanced (in addition to the Bankruptcy Act, the Patents Act and the Trade Marks Act, cited by Williams, J.) the Navigation, Life Insurance and the Trading with the Enemy Acts, as examples of the combination of judicial and administrative powers in the one body.

[53] (1956) 94 C.L.R. at 336-7.

[54] *Id.* at 338. Taylor, J., also considered the relationship of the incidental power (s. 51(xxxix)) to Ch. III, pointing out that the admitted power under that placitum to confer incidental powers on courts exercising strictly judicial powers constituted a very real and not an apparent exception to the prosecutor's claim that Ch. III was the sole source of power to legislate with respect to the judicial power of the Commonwealth. See (1956) 94 C.L.R. at 338.

[55] Cited *supra* n. 32.

[56] (1956) 94 C.L.R. at 341.

[57] In the process of determining the character of the arbitration power, Taylor, J., referred to the history and development of compulsory arbitration both in Australia and New Zealand. See (1956) 94 C.L.R. 341-6.

[58] *Id.* at 346.

[59] See cases cited in (1956) 94 C.L.R. 293-5, 316, 324.

[60] *Reg.* v. *Foster; ex p. Commonwealth Life (Amalgamated) Assurances Ltd.* (1952) 85 C.L.R. 138, at 155; *Reg.* v. *Wright; ex p. Waterside Workers' Federation* (1955) 93 C.L.R. 528, at 541; *Collins* v. *Charles Marshall Pty. Ltd.* (1955) 92 C.L.R. 529.

[61] (1955) 94 C.L.R. at 297.

[62] *Id.* at 324 (Webb, J.); *Id.* at 346 (Taylor, J.). Williams, J., stated that, in the light of his reasoning, it was unnecessary to consider the question of the application of *stare decisis* in the present case. See (1956) 94 C.L.R. at 316.

[63] S. 122 reads: "The Parliament may make laws for the government of any territory

mitted an addition to the appellate jurisdiction of the High Court beyond the limitations in s. 73[64] (as had been held),[64a] there was no reason why similar reasoning could not be applied to s. 51."[65] The majority, although by no means satisfied with the correctness of the earlier decisions[66] (which brought "their own difficulties") applied the principle enunciated in those cases, namely, that the exclusive character of Chapter III applied only to the federal system,[67] of which the Territories did not form a part.[68] Only Williams, J., was prepared to press the opposite view,[69] insisting that it was irrational to imply a prohibition against the vesting of non-judicial functions in federal courts by virtue of s. 51 when presumably it could be done by s. 122. "In each case the implied limitation must be the same."[70] He made a very real point and one to which the other judges gave no satisfactory answer when he stated:

> The reason why, under Chapter III, courts can only be invested with the judicial power of the Commonwealth may be in the circumstance that under that Chapter State courts as well as Federal courts can be invested with judicial power, and it is necessary strictly to limit the extent to which State courts can have duties imposed on them by federal law. Non-judicial functions cannot be imposed on such courts.[71]

On the broader question, however, of the relationship between Chapter III and s. 122, the minority as well as the majority judges were in a dilemma. To reject the respondent's claim that s. 51 should be interpreted in the same broad fashion as had been s. 122, the majority judges had to rely on or explain away certain decisions which they regarded as unsatisfactory but which they upheld on the ground of *stare decisis*. For the minority, on the other hand, to attack those decisions meant accepting a narrow view of the separation of powers which they had eschewed as the basis of their judgments. It remains to be seen whether the separation of powers doctrine enunciated in this case will, should the occasion arise, invade the Territories power.

The third major additional argument addressed to the High Court concerned the origin and nature of the arbitration power. It was suggested that s. 51 (xxxv) occupied a special place in the Constitution and was therefore not subject to a strict application of the separation of powers doctrine, and, in particular, that of Chapter III. Support for this argument was found in the conception of industrial arbitration as it operated in the various colonies of Australia and New Zealand at the time the Commonwealth Constitution was being framed. It was said that the current notion of industrial arbitration involved an arbitral court possessing some judicial power of enforcement, and that this was the meaning of "arbitration" in 1900 when s. 51 (xxxv) of the Constitution came into being. Taylor, J., attached some importance to this argument,[72] but the majority rejected it out of hand commenting that "no

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surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth . . ."

[64] S. 73 of the Constitution provides, *inter alia*, that the High Court shall have jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences—"(i) of any Justice or Justices exercising the original jurisdiction of the High Court; (ii) of any other federal court or court exercising federal jurisdiction; or of the Supreme Court of any State or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council."

[64a] See *R.* v. *Bernasconi* (1915) 19 C.L.R. 629; *Porter* v. *The King; ex p. Yee* (1926) 37 C.L.R. 432.

[65] *W. A. Wynes, op. cit.* at 555e.

[66] Cited *supra* n. 64a.

[67] The political entity consisting of the Commonwealth and the six States.

[68] See (1956) 94 C.L.R. 289-292.

[69] Webb, J., also referred to the problem but accepted, with some misgivings, the majority viewpoint.

[70] (1956) 94 C.L.R. at 315.

[71] *Id.* at 315-6.

[72] *Id.* at 342-6.

doubt it presented a simple solution of the embarrassments of the problem . . . but unfortunately it has no material basis".[73] When it is remembered that all legislation under s. 51 is made "subject to this Constitution", including Chapter III, while no section in that Chapter has been expressly made subject to the Constitution it is difficult to isolate s. 51 (xxxv) from its context and endow it with special immunity in this regard.[74]

C. The Privy Council Decision.

From the High Court decision the Attorney-General for the Commonwealth and the three judges of the Arbitration Court[75] appealed to the Privy Council. Objection was there raised that the issue was an *inter se* matter[76] and in consequence the Judicial Committee lacked jurisdiction, but their Lordships held to the contrary and entertained the appeal.[77]

The Privy Council's opinion, which upheld the majority view in the High Court, adds little to the decision of the Australian court.[78] It repeats and confirms the majority reasoning in relation to the structure of the Constitution, the exhaustive nature of Chapter III, the application of the doctrine of the separation of powers to the Commonwealth Constitution,[79] the relationship of the Territories power to that Chapter, and their treatment of the doctrine of *stare decisis* in the present case.

The Privy Council opinion broke new ground, however, when discussing the dissenting judgments of Williams, and Taylor, JJ. Both judges, it will be recalled, were of the opinion that the arbitral powers could be combined with judicial powers without offending either the separation of powers doctrine (arising out of the Constitution) or the mandatory requirements of Chapter III. Williams, J., was prepared to allow such a combination on the grounds that the arbitral powers were not incompatible with the effective exercise of the judicial power, while Taylor, J., thought the arbitral functions of the Arbitration Court "did not bear the indelible imprint of legislative or executive character, and accordingly in the absence of any clear provision or implication to the contrary in the Constitution it was competent for Parliament to combine such functions with the exercise of judicial power".[80]

Their Lordships could find no satisfactory basis for Williams, J.'s, test of "incompatibility"[81] — it was too vague[82] — and, in any case, it entailed reading into the Constitution something which was not there. To reject Williams, J.'s view on the basis of the majority conception of Chapter III is, no doubt, supportable, but to claim further that his test of incompatibility was unsatisfactory because it rested on implications was to ignore the fact that the majority construction of Chapter III was itself based on an implication.

[73] *Id.* at 297.

[74] (1956) 94 C.L.R. 319-320. (Webb, J.).

[75] *Viz.* Kirby, Dunphy and Ashburner, JJ. (against whom the writ of prohibition had been directed).

[76] S. 74 of the Constitution prohibits appeals from the High Court to the Privy Council on "any question . . . 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" except with the leave of the High Court.

[77] Cited as: *A.-G. of Australia* v. *Boilermakers' Society of Australia: Kirby* v. *The Same* (1957) A.L.R. 489. The respondent Society was not represented by counsel and submitted formal written argument only.

[78] See comments of F. R. Beasley, "Appeals to the Judicial Committee: The Case for Abolition" (1956) 7 *Res Judicatae* 399.

[79] This matter is discussed *infra* pp. 489-90.

[80] (1957) A.L.R. at 499.

[81] Counsel for the appellants, Mr. D. I. Menzies Q.C., suggested as the criterion for "inconsistency" (incompatibility) the exercise of a power by a judicial authority which would be contrary to natural justice if exercised by it. The Board expressed some difficulty in comprehending the nature of this criterion but assumed that it covered the case where a tribunal was both actor and judge, and this principle was "not (in their view) remote from that which (inspired) the theory of the separation of powers" ((1957) A.L.R. at 498).

[82] The Board also equated the exercise of arbitral power with purely administrative discretions governed by nothing but standards of convenience or, at most, discretionary judgments, by taking, it is suggested, a statement of Williams, J., out of its context. That

For, as Williams, J., pointed out,[83] there was nothing in the Constitution which expressly prevented the combination of judicial and non-judicial functions in the one body. Their treatment of Taylor, J.'s, approach, is, as such, less open to criticism. Even if there were a fourth category of powers,[84] and even if that category included "conciliation and arbitration", this was in the Board's view irrelevant. "The true criterion is not what powers are expressly or by implication excluded from the scope of Chapter III but what powers are expressly or by implication included in it."[85] There would always be questions as to what fell within the judicial power and what was incidental to it, but this did not, in their Lordships' view, affect the validity of the general proposition stated above.[86]

II. COMMENT ON CERTAIN ASPECTS OF THE CASE

The *Boilermakers' Case* raises a number of important legal and extra-legal issues which will be discussed briefly in the following order: A. The separation of powers in the Commonwealth Constitution. B. The nature of the arbitral process. C. The *Boilermakers' Case* in the industrial relations sphere. D. Possible future implications of the decision.

A. The Separation of Powers.

Neither the High Court nor the Privy Council attempted to canvass the contributions of Locke and Montesquieu,[87] or to trace in any detail the tortuous history of the doctrine of the separation of powers in the United States Constitution.[88] Indeed, the High Court judges were cautious in their treatment of American experience in this regard, and doubtful of the extent to which it could be applied to the Commonwealth Constitution. This attitude sprang from a realisation, on the one hand, of the difficulties which the doctrine had occasioned in the United States Constitution and, on the other, of the different politico-legal structure which, in Australia, had resulted from the combination of federalism and responsible government. The judges, for the most part contented themselves with a quotation from Professor Willoughby's treatise on the United States Constitution.[89] To the majority judges, this

this was not that judge's conception of the arbitral function is quite plain.

[83] (1956) 94 C.L.R. at 307.

[84] I.e. in addition to the categories of legislative, executive and judicial powers.

[85] (1957) A.L.R. at 500.

[86] *Ibid.*

[87] For a discussion of Montesquieu's contribution in this regard, see C. K. Allen, *Law and Orders* (1947) c. i.

[88] For an analysis of the separation of powers doctrine in the United States Constitution, see, 3 W. W. Willoughby, *The Constitutional Law of the United States* (2 ed. 1929) 1616-1635; B. Schwartz, *American Constitutional Law* (1955) 12-22; C. B. Gosnell, L. W. Lancaster, R. S. Rankin, *Fundamentals of American National Government* (1955) 31-48; C. B. Swisher, *American Constitutional Development* (2 ed. 1954) 33-34; E. S. Corwin, *The Constitution and What It Means Today* (10 ed. 1948) 2-3, 112-114.

[89] Willoughby, *op. cit.* at 1619, 1620. The quoted passage reads: "Thus it is not a correct statement of the principle of the separation of powers to say that it prohibits absolutely the performance by one department of acts which, by their essential nature, belong to another. Rather, the correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions unless such powers are properly incidental to the performance by it of its own appropriate functions. From the rule, as thus stated, it appears that in very many cases the propriety of the exercise of a power by a given department does not depend upon whether, in its essential nature, the power is executive, legislative or judicial, but whether it has been specifically vested by the Constitution in that department, or whether it is properly incidental to the performance of the appropriate functions of the department into whose hands its exercise has been given. Generally speaking, it may be said that when a power is not peculiarly and distinctively legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested."

passage,[90] coupled with a citation of three United States decisions,[91] served to demonstrate not only the general application of the doctrine of the separation of powers in the American Constitution, but also a certain degree of flexibility in its application, particularly as between the legislative and executive organs of government. Taylor, J., on the other hand, used the same passage from Professor Willoughby's treatise to support his argument that powers which did not admit of any *a priori* assignment could be exercised in conjunction with the judicial power.[92]

The present case is a further reminder that the High Court's policy with regard to American decisions follows no predictable pattern. There have, it is true, been phases when American doctrines have exerted considerable influence in the High Court[93] but, for the most part, their impact has been superficial, serving only to re-inforce existing argument, rarely to direct it into new channels.

The separation of powers doctrine has not been strictly applied in the Commonwealth Constitution. As Williams, J., pointed out in the *Boilermakers' Case,* the Constitution itself permits the exercise of the legislative and executive functions by the same persons.[94] Moreover, it is well-established that the legislature may validly delegate legislative powers to the executive.[95] The legislature's power to delegate is not unfettered.[96] The matters delegated must be referable to some definite head of Commonwealth legislative power, while regulations made in pursuance of the delegation must be authorised by the statute under which the delegation was made.[97] But this merely qualifies, it does not negative, the general proposition.

Faced with this obvious departure from a strict application of the separation of powers doctrine, the majority judges in the *Boilermakers' Case* explained it as "a division of powers whose character is determined according to traditional British conceptions".[98] It could, in their view, also be justified on the basis, that, in English law, subordinate legislation depends for its efficacy on the continued operation of the statute which authorises it. Parliament, in other words, retains the ultimate control over delegated legislation and does not part irretrievably with the delegated powers.[99] At this stage it is sufficient to mention that insofar as the *Boilermakers' Case* may be deemed authority for the proposition that there is a separation of powers doctrine in the Commonwealth Constitution, the principle and practice of delegating legislative powers to the executive is, and is likely to remain, a qualification to that doctrine. If, on the other hand, that case limits the application of the doctrine to the relationship of the judicial power to the

[90] (1956) 94 C.L.R. at 279.

[91] *Hayburn's Case* (1792) 2 Dallas 409; *Yale Todd's Case* (1794) 13 Howard 52; *Western Union Telegraph Co.* v. *Myatt* (1899) 98 Fed. Rep. 335 cited at (1956) 94 C.L.R. at 297, 298.

[92] (1956) 94 C.L.R. at 338-9.

[93] E.g. The doctrine of implied prohibitions enunciated in *McCulloch* v. *Maryland* (1819) 4 Wheat. 316, at 407, and applied in a number of High Court decisions from *D'Emden* v. *Pedder* (1904) 1 C.L.R. 91 until formally rejected by that Court in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd. (Engineers' Case)* (1920) 28 C.L.R. 129. See *W. A. Wynes, op cit,* c. ii.

[94] *Supra* p. 484.

[95] *Baxter* v. *Ah Way* (1909) 8 C.L.R. 626; *Welsbach Light Co. of Australasia Ltd.* v. *The Commonwealth; Roche* v. *Kronheimer* (1921) 29 C.L.R. 329; *Nott Bros. & Co. Ltd.* v. *Barkely* (1926) 36 C.L.R. 20. The above cases were confirmed and the principle stated authoritatively in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan (Dignan's Case)* (1931) 46 C.L.R. 73. It has since been applied in a number of cases, e.g. *Crowe* v. *The Commonwealth* (1935) 54 C.L.R. 69; *Wishart* v. *Fraser* (1941) 64 C.L.R. 470; *Poole* v. *Wah Min Chan* (1947) 75 C.L.R. 218

[96] See Evatt, J., in *Dignan's Case* cited *supra* n. 95 at 120-21.

[97] See e.g., *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (1939) 61 C.L.R. 735; (1940) 63 C.L.R. 338 (P.C.); *Wishart* v. *Fraser* cited *supra* n. 95; *Morton* v. *Union Steamship Co. of New Zealand Ltd.* (1951) 83 C.L.R. 402.

[98] See (1954) 96 C.L.R. at 276, referring to *Dignan's Case* cited *supra* n. 95. They also found support in the quotation from Willoughby *op. cit.* cited *supra* n. 89.

[99] (1956) 94 C.L.R. at 280.

other two main categories of power (and this appears to be the correct view) then the exercise of legislative powers by the executive does not constitute an anomaly.

Although the Commonwealth judicial power had been examined in a number of decisions, no exhaustive treatment of its relationship to the legislative and executive power was made until the *Boilermakers' Case*. The High Court's decision in *New South Wales* v. *The Commonwealth*[100] turned upon non-compliance with s. 72 of the Constitution[101] and not upon the exercise of non-judicial functions by a court. It is true that Isaacs, J., suggested in that case that such a combination of powers could not be valid,[102] but the actual decision was not based on that ground. Again in *Alexanders' Case*[103] Griffith, C.J., stated that "any attempt to vest any part of the judicial power of the Commonwealth in any body other than a Court is entirely ineffective."[104] But this statement was merely *obiter* and the decision was based, in this case also, on non-compliance with s. 72 of the Constitution.

A third decision, and one on which the majority in the *Boilermakers' Case* placed considerable reliance, was *In re Judiciary and Navigation Acts*[105] where the High Court declared invalid Part XII of the Judiciary Act ("which purported to give that court jurisdiction to hear and determine any question of law as to the validity of a federal law which the Governor-General might refer for hearing and determination.")[106] The majority in the *Boilermakers' Case* apparently treated the decision as authority for the view that the Constitution prohibited a combination of judicial and non-judicial powers in the one body,[107] but, it is submitted, that it decided that

> the only judicial power that could be conferred on courts by Chapter III of the Constitution was the power to exercise the judicial power contained in that chapter. It did not decide that the Parliament cannot impose on a federal court functions other than strictly judicial functions. That question was expressly reserved.[108]

Far from supporting the majority view in the *Boilermakers' Case*, most of the case law tends in the opposite direction. Important in this connection is *Ex parte Lowenstein*,[109] where a majority of the High Court held that non-judicial functions could be vested in a federal court provided their exercise was not incompatible with the exercise of judicial powers. The provisions in issue empowered the Bankruptcy Court to be prosecutor and judge at the same time, but nevertheless, the majority in that case took the view that the non-judicial functions were compatible with the exercise of its judicial powers. What is more, *Lowenstein's Case* was subsequently and recently upheld in *Sachter* v. *Attorney-General for the Commonwealth*,[110] where the High Court refused to reconsider the correctness of its earlier decision.

Some of the difficulties involved in *Lowenstein's Case* may well be overcome by the emergence of what appears to be a new category of judicial power, for, as the High Court stated in *Queen Victoria Memorial Hospital* v. *Thornton*[111]—

[100] (1915) 20 C.L.R. 54. In this case the High Court held that the Inter-State Commission could not exercise the judicial power of the Commonwealth since its members (appointed under s. 101 of the Constitution) did not hold office in accordance with s. 72 of the Constitution.

[101] See *supra* n. 9.

[102] (1915) 20 C.L.R. at 93 *per* Isaacs, J. The majority judges in the *Boilermakers' Case* confirmed that view. See (1956) 94 C.L.R. at 271.

[103] *Waterside Workers Federation of Australia* v. *J. W. Alexander Ltd.* (1918) 25 C.L.R. 434.

[104] *Id.* at 442; See also Barton, J. at 451, cited by the Privy Council in (1957) A.L.R. at 496.

[105] (1921) 29 C.L.R. 257.

[106] (1956) 94 C.L.R. at 272-3.

[107] *Id.* at 272-74, citing *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. at 264, 265.

[108] (1956) 94 C.L.R. at 313, *per* Williams, J.

[109] (1938) 59 C.L.R. 556.

[110] (1954) 94 C.L.R. 86.

> Many functions perhaps may be committed to a Court which are not of themselves exclusively judicial, that is to say which considered independently might belong to an administrator. But that is because they are not independent functions but form incidents in the exercise of strictly judicial powers.

There may well be a difference, however (and an important one), between non-judicial powers which are compatible with the exercise of judicial powers and the type of powers referred to in *Thornton's Case* and *Davison's Case*.[111a]

Even assuming that *Lowenstein's Case* can be reconciled with the last-mentioned decisions, there are, as stated earlier,[112] a number of High Court cases where the combination of judicial and non-judicial powers (including in particular, the combination of arbitral and judicial powers) has long been treated and acted upon as valid.[113] These cases, and the assumptions upon which they rest, run completely counter to the majority view in the *Boilermakers' Case*.

Hence it can be shown that the weight of authority is against the decision of the High Court[114] and of the Privy Council in the *Boilermakers' Case*. These judgments rest on a construction of the Constitution which, in large measure, marks a departure from previous development. Nor, it is submitted, do their decisions flow logically from a close analysis of the constitutional framework. The judgment of Williams, J., in particular, demonstrates that an analysis, at least as careful as that of the High Court majority, can lead to a different result, and at the same time not break with a workable (and accepted view) of the relationship of judicial and non-judicial powers.

The effect of the decisions of the High Court and of the Privy Council in relation to the separation of powers may be stated briefly as follows:

(1) There are some powers, whether they be called legislative, executive or judicial, which so clearly belong to one organ of government that they must be exercised by the appropriate organ.

(2) Subject to (1), the legislature may delegate legislative powers to the executive, provided that the matter delegated is referable to a definite head of Commonwealth power and is exercised in accordance with the statute authorising the delegation.

(3) The judicial power is exclusive of the legislative and executive powers, in the sense that such power can be exercised only by courts.[115]

(4) The courts which can exercise the judicial power, and the nature and contents of their judisdiction, are (subject to the exceptions to be mentioned) governed exclusively by Chapter III of the Constitution.

(5) The exclusive character of Chapter III is qualified by the legislature's power with respect to, firstly, Commonwealth territories, and secondly, matters *incidental to* the judicial power. The former constitutes a real exception to the exclusive character of Chapter III,[116] whereas the latter, by its very nature, exists as a nominal qualification only.

(6) It is not competent to combine the exercise of judicial and non-judicial powers in the one body, either by conferring non-judicial powers upon a court

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[111] (1953) 87 C.L.R. 144, at 151; See also *The Queen* v. *Davison* (1954) 90 C.L.R. 353, at 388 (Taylor, J.).

[111a] *Supra* n. 111.

[112] See *supra* p. 485.

[113] See cases referred to in (1956) 94 C.L.R. at 293-4, 316, 324.

[114] I.e. the majority decision.

[115] I.e. the courts specified in s. 71 of the Constitution.

[116] *Supra* pp. 481 ff. c.

or by vesting judicial powers in a body (even if called a court and constituted in accordance with s. 72 of the Constitution), the primary functions of which are non-judicial in character.

(7) Functions which, *in se*, are not strictly judicial but which are both compatible with, and incidental to, the exercise of judicial power may be validly combined with that power.

(8) Arbitral functions are foreign to the Privy Council to the effect that bined validly with that power.

The view of the High Court and the Privy Council to the effect that "courts" must be the only organs of government to exercise "judicial" powers, and that they must exercise no powers but these and powers incidental to or compatible with these, involves reasoning which is clearly circuitous. Since neither court made any real attempt to define what it meant by a "court" or "judicial" power, it is very difficult to extract any meaningful principle from their decisions.

B. *The Nature of the Arbitral Process.*

The problem of characterising the arbitral power arose once again in the *Boilermakers' Case*, where it became necessary to determine its relationship to the judicial power. The judicial dilemma has always been whether to view the power in terms of the manner of its exercise, or in terms of the result (or product) of that exercise.

If characterisation depends on the manner of exercise, the judges can treat "arbitration", if not constituting part of the judicial power of the Commonwealth, at least as having a close affinity to that power. "The arbitral proceedings are proceedings which should be conducted with that fairness and impartiality which should characterise proceedings in courts of justice. They are proceedings proper to the functions of a judge."[117] It was this view of the arbitral function which led Williams, J., in the *Boilermakers' Case* to claim that its exercise was not incompatible with the proper and effective exercise of judicial power.

If, on the other hand, the arbitral power is viewed in terms of the product of its exercise the result may well be different.[118] It is true that in the early days of federation, the High Court emphasised the judicial character of arbitration, (indeed Barton, J. treated it as part of the judicial power of the Commonwealth),[119] but this view no longer prevails. Since *Alexander's Case*,[120] the High Court has emphasised the cleavage between arbitral and judicial power. The judges have, for the most part, been at a loss to pinpoint the exact nature of "arbitration"; it has been described as "ancillary to the legislative function",[121] as "more legislative than judicial",[122] as "quasi-judicial administrative proceedings",[123] or as bearing no "indelible imprint of legislative or executive character".[124] But, despite this absence of positive definition, it is well established that arbitration does not form part of the judicial power of the Commonwealth. It is, for the most part, unimportant whether arbitration is characterised (in terms of its product) as quasi-

[117] (1956) 94 C.L.R. at 317, *per* Williams, J.

[118] It has, of course, been so decided by the High Court.

[119] See: *Australian Boot Trade Employees Federation* v. *Whybrow & Co.* (1910) 10 C.L.R. 266, at 293-5; *Waterside Workers Federation of Australia* v. *J. W. Alexander Ltd.* (1918) 25 C.L.R. 434, at 456-7. Barton, J., it would appear, confused the issue by characterising the product of the arbitral process in terms of the manner of its exercise.

[120] *Supra* n. 119.

[121] *Id.* at 464, *per* Isaacs and Rich, JJ.

[122] *Id.* at 485, *per* Powers, J.

[123] (1956) 94 C.L.R. at 306, 307, *per* Williams, J.

[124] *Id.* at 341, *per* Taylor, J.

legislative or as *sui generis*. In the *Boilermakers' Case*, for instance, the majority judges were content to treat arbitration as "foreign" to the judicial power without further investigation as to its exact character. The matter of characterisation only assumes significance when it is intended to apply either the procedural or the "resultant product" test — this is the real difference in approach between the majority and that of Williams and Taylor, JJ., in the *Boilermakers' Case*.

Problems have also arisen in connection with the meaning of arbitration in the abstract, as it were. In *Australian Railways Union* v. *Victorian Railways Commissioners*[125] the majority of the High Court rejected an attempt by the Commonwealth to employ bodies of the Victorian Wages Board pattern[126] in the federal industrial jurisdiction.

> A law which enables a body of persons to settle a dispute by issuing a decree arrived at by discussion amongst themselves without any hearing or determination between the disputants is . . . not a law with respect to Conciliation and Arbitration . . . and is not authorised by s. 51(xxxv) of the Constitution.[127]

This is, of course, a proposition stated in negative terms, but from it can be implied a positive assessment of some of the basic requirements of the arbitral process. These are: (1) two or more parties between whom there exists, (2) some dispute or difference, (3) the presence, at some stage of the proceedings, of an independent[128] arbitrator.[129] It is also necessary, as the above case decided, that the disputants themselves, or their accredited representatives, should have the right to appear before the arbitrator and state their case.[130] Two important practical consequences of the limitations of the arbitral process, as applied in the Commonwealth jurisdiction, are, firstly, that the legislature is not competent to legislate directly (under s. 51(xxxv)) with regard to labour matters[131] and, secondly, that it is not constitutionally possible under that power to prescribe that an award made in settlement of a dispute between certain disputants shall be made a common rule for all employers and employees (including non-disputants) in the trade or industry concerned.[132]

A refinement in this process of analysing the abstract was introduced in the *Boilermakers' Case*, where it was argued that "compulsory arbitration" (as distinct from arbitration in general had, in the Australian environment, acquired certain additional attributes. It was said that compulsory arbitration, as employed at the turn of the twentieth century in New Zealand and in the (then) colonies of New South Wales[133] and Western Australia, involved a combination of arbitral and judicial functions, and that this conception was embodied in s. 51(xxxv), giving it a somewhat independent position and qualifying the suggested exclusive character of Chapter III in relation to that power.[134]

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[125] (1930) 44 C.L.R. 319.

[126] I.e. bodies consisting of equal numbers of employer and employee representatives (in a particular trade or industry) presided over by an independent chairman.

[127] (1930) 44 C.L.R. at 385 *per* Rich, Starke and Dixon, JJ.

[128] I.e. independent in the sense that the arbitrator does not, in the exercise of his arbitral functions, represent any of the disputants.

[129] An analysis of the conciliation process was made by the present writer in "Conciliation in the Commonwealth Jurisdiction — A Legal Analysis" (1952) 2 *University of Queensland L.J.* 30. The propositions made there with respect to conciliation apply, it is submitted (with certain necessary qualifications) equally to arbitration.

[130] Isaacs, C.J., on the other hand, considered that the requirements of arbitration were satisfied if the disputants were represented *generally* by members of their industrial class. See (1930) 44 C.L.R. 354-362.

[131] *Rex* v. *Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Aust.) Ltd.* (1949) 78 C.L.R. at 401-2 *per curiam*. *Cf.* the position in the State jurisdictions where this limitation does not apply.

[132] *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (1910) 11 C.L.R. 311; *Rex* v. *Kelly; ex parte the State of Victoria* (1950) 81 C.L.R. 64.

[133] The Industrial Arbitration Act (N.S.W.) did not come into force until 1901.

[134] See (1956) 94 C.L.R. 296-7, 343-6.

It will be recalled that only Taylor, J., gave any weight to this argument, while the majority judges dismissed it out of hand.[135] It is, of course, arguable that "compulsory", as distinct from "voluntary" arbitration, or the parent, commercial arbitration, has emerged as a distinct concept involving, *ex necessitate*, the judicial power to penalise breaches of awards. But, even if this is so, it would be difficult in the extreme to accept the view that such a concept had emerged, in an identifiable form, during the first few years in which this new social mechanism was employed. Moreover, the very place of s. 51 (xxxv) among the other legislative powers, which are all stated to be "subject to this Constitution", must surely negative any attempt to endow it with a special and independent character. Compulsory arbitration in the Commonwealth jurisdiction must, it would appear, result from the linking of arbitral with judicial power, although not, since the *Boilermakers' Case*, in the same body.

C. The Boilermakers' Case in the Industrial Relations Sphere.

It is most unlikely that the Boilermakers' Society was prompted by any desire to further the development of the Commonwealth Constitution when it sought a writ of prohibition from the High Court. Its actions were dictated plainly by self-interest. The proceedings were taken to avoid a penalty of £500 a day which had been imposed on it and to further the general trade union policy of abrogating the penal provisions in the Commonwealth Arbitration Act.

The Australian labour movement, particularly the trade unions, has always opposed the use of penal sanctions to secure enforcement of awards.[136] It was a Labour Government which, in 1930, removed the then important penal provisions from the Commonwealth Act, notably those penalising strikes and lockouts, as such,[137] and the old s. 48.[138] The latter, it may be noted, empowered the Arbitration Court and various other courts[139] to make orders in the nature of a mandamus or injunction, compelling observance of an award or restraining its breach under pain of fine or imprisonment. For some reason which does not appear, but which may have stemmed from the notion that they were innocuous, ss. 38(d)(a) and (e) of the 1904-1928 Act (the predecessors of the ss. 29(1)(b) and (c) examined in the *Boilermakers' Case*)[140] were left intact. They continued to live up to their innocuous reputation and were rarely invoked between 1930 and 1948.[141] After 1948, however, the Commonwealth Conciliation Commissioners, in an attempt to put some "teeth" into their awards, resorted to ss. 29(1)(b) and (c) and, in conjunction with the use of its contempt power by the Arbitration Court, produced the penal mechanism in issue in the *Boilermakers' Case*.[142] Orders made in this fashion were challenged in *The King* v. *Metal Trades Employers' Association; ex parte Amalgamated Engineering Union (Australian Section)*[143] and were held invalid, not on constitutional grounds, but because they con-

[135] See *supra* p. 480.

[136] This is true as regards the long term aspect. On the other hand, labour governments have resorted to use of penal sanctions in times of serious industrial crisis. The employment of drastic penal measures by the Chifley (Labour) Government when dealing with the 1949 coal strike and the support of its actions by the bulk of the trade union movement is a case in point.

[137] I.e. ss. 6-8. Commonwealth Conciliation and Arbitration Act 1904-1928.

[138] I.e. s. 48, Commonwealth Conciliation and Arbitration Act 1904-1928.

[139] I.e. the High Court, or a District, County or Local Court.

[140] *Supra* p. 486.

[141] See *Purcell Engineering Co (1940) Pty. Ltd.* v. *Federal Moulders (Metals) Union* (1943) 49 C.A.R. 297; *Federated Ironworkers' Association* v. *Dominion Can Co.* (1943) 49 C.A.R. 215. Reference may also be made to E. I. Sykes "The Injunction in Public Law" 2 *University of Queensland L. J.* 114, 136-39.

[142] They were generally used to make orders requiring organisations to comply with the award provisions requiring employees to work "reasonable overtime". These provisions were inserted following the reduction in 1947 of the standard working hours to forty per week.

[143] (1951) 82 C.L.R. 208; See also *The King* v. *Commonwealth Court of Conciliation*

travened the statutory provisions in question.

The Commonwealth Act was amended in 1951[144] to strengthen the Arbitration Court's powers to make orders in the nature of a mandamus or injunction (ss. 29(1)(b) and (c)), while a new and wider provision empowering it to punish contempt of court (s. 29) was inserted in the Act. By virtue of these wider powers(those in issue in the *Boilermakers' Case*), the Arbitration Court made a number of orders between 1951 and 1956, and imposed fines totalling more than £6,000 on various employee organisations.[145] Not unnaturally, the unions resented the use of this new penal mechanism,[146] their opposition taking various forms. They sought, unsuccessfully, an undertaking from the federal Minister for Labour[147] that the offending provisions would be repealed.[148] They promoted an abortive nation-wide twenty-four hour stoppage in protest against the use of these penal measures.[149] They conducted numerous protest meetings at factories and other places of employment.[150] And, of course, they opposed the making of such orders in the Arbitration Court itself.[151] Having failed to shake the determination of the employers to use, and of the Commonwealth Government to permit the use of, these penal provisions, the unions challenged their constitutional validity in the High Court. As mentioned earlier, that Court had, on several occasions since 1952, cast doubts on the validity of combining arbitral and judicial powers in the Arbitration Court,[152] and the unions (through the Boilermakers' Society) proceeded to act on that judicial hint. It is reasonable to assume, however, that counsel advised the Society that even if it were successful, the penal provisions could, and in view of the Government's policy probably would, be retained and exercised by a separate judicial body. This, in fact, was the course adopted by the Commonwealth Government after the High Court's decision in the *Boilermakers' Case*.[153]

The Conciliation and Arbitration Act was amended[154] to provide for the exercise of arbitral functions by a new body, entitled the Commonwealth Conciliation and Arbitration Commission. In substance, the Commission con-

and Arbitration; ex parte Federated Gas Employees' Industrial Union (1951) 82 C.L.R. 267.

[144] See ss. 7 and 8, Act No. 18 of 1951 (Cwlth.).

[145] Most of the penalties were imposed on unions in the metal trades group. See e.g. *Metal Trades Employers' Association* v. *Amalgamated Engineering Union (Australian Section)* (1954) 79 C.A.R. 79, 165; *Metal Trades Employers' Association* v. *Boilermakers' Society of Australia* (1955) 81 C.A.R. 231.

[146] The unions' position was weakened, however, by a serious faction fight between the "Industrial Groupers" and their opponents within the unions.

[147] I.e. Mr. Harold Holt, Minister for Labour and National Service in the Menzies-Fadden Government.

[148] See *Sydney Morning Herald*, July 19, 1955, p. 5; July 23, 1955, p. 1.

[149] *Id.*, July 20, 1955, p. 1; July 21, 1955, p. 2; July 29, 1955, p. 1.

[150] *Id.*, Sept. 7, 1955, p. 14; Oct. 17, 1955, p. 6; Nov. 26, 1955, p. 1; Nov. 30, 1955, p. 8.

[151] E.g. *Metal Trades Employers Association* v. *Federated Ironworkers' Association of Australia* (1955) 81 C.A.R. 102, 122, 233; *Ford Motor Co. of Australia Pty. Ltd.* v. *Amalgamated Engineering Union (Australian Section)* (1954) 80 C.A.R. 58, 230, 271; *Metal Trades Employers Association* v. *Blacksmiths' Society of Australia* (1954) 79 C.A.R. 65. Refer also to cases cited *supra* n. 145.

[152] See: *Reg.* v. *Foster; ex parte Commonwealth Life (Amalgamated) Assurances Ltd.* (1952) 85 C.L.R. 138 at 155; *Reg.* v. *Wright; ex parte Waterside Workers' Federation* (1955) 93 C.L.R. 528 at 541; *Collins* v. *Charles Marshall Pty. Ltd.* (1955) 92 C.L.R. 529. Refer *supra* n. 60.

[153] Webb. J., in his dissenting judgment felt constrained to remark that, even if he had taken the opposite view, the Government could quite simply overcome the result of the decision by vesting the judicial powers either in a new court or in *personae designatae* of the existing Arbitration Court. See (1956) 94 C.L.R. at 329-330. It may be noted that the Commonwealth Government took this opportunity to make a number of other changes in the Act. In particular, it placed greater emphasis on conciliatory processes by appointing new officials (Conciliators) whose functions were (with certain exceptions) limited to conciliation of disputants. It also re-organised the relationship of the various Commonwealth "Satellite" jurisdictions (i.e. waterfront, maritime, Snowy Mountains Hydro-Electric Scheme, and Commonwealth Public Service) to the Commission. The Arbitration Court was retained for a few purposes, notably the continuation of part-heard matters; it still exists but in practice does not function. For a review of the changes see D. W. Oxman, "Recent Changes in the Federal Arbitration System" 29 *Australian Quarterly* 78.

[154] Act No. 44 of 1956 (Cwlth.). The Arbitration Act was further amended by Act

tinues the award-making and award-varying functions exercised by the Arbitration Court and the Conciliation Commissioners between 1947 and 1956.[155] The various judicial functions associated with compulsory arbitration, notably, the enforcement of awards, the punishment of contempt, the interpretation of awards and the determination of questions of law referred to it by the Commission and other bodies, were vested in a new and separate body, the Commonwealth Industrial Court.[156] In addition, the Industrial Court was given various other functions in connection with the registration and control of organisations,[157] and the investigation of disputed elections in those bodies.[158] A number of these latter functions cannot be characterised easily as judicial; indeed, the validity of their exercise by the Industrial Court has been challenged on various occasions since the 1956 amendment.[159] Presumably, the Commonwealth Government's legal advisers were hoping that if the provisions were challenged they would be upheld, on the basis of *Thornton's Case*,[160] as incidents in the exercise of judicial power.

Before discussing developments in the Commonwealth arbitration jurisdiction since the Boilermakers' Case, attention should be drawn to what are, undoubtedly, the basic industrial relations issues involved in that decision and in the legislative changes consequent upon it. There is, firstly, the question, whether penal sanctions should be employed towards the enforcement of awards and, in particular, whether, in a compulsory arbitration system, the parties should be permitted to have the legal alternatives of arbitration or direct action. Secondly, assuming that penal sanctions should be employed *inter alia* to prevent resort to direct action, should those sanctions take the form of direct punishment of strike[161] activity, as such, or should they be permitted to operate through the indirect method of the injunction coupled with punishment for contempt of the court's order? And, thirdly, whatever method of imposing penal sanctions is employed, should this be done by the body making the award or, as has been the case since the 1956 amendment, by a different tribunal? These are all fundamental issues which go to the very root of the arbitration system, and on which many people have strong and different views. It is not intended to discuss these issues here — sufficient that they be raised and their importance stressed.

The *Boilermakers' Case* and the subsequent amendments to the Act produced little change in the overall working pattern of the Commonwealth arbitration system. The Commission continued to make and vary awards[162] while the Industrial Court made orders requiring compliance with awards or enjoining their breach[163] and punished non-compliance with those orders

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No. 103 of 1956 (Cwlth.) but this amendment does not affect the matters now under discussion.

[155] See ss. 6-70 Conciliation and Arbitration Act (Cwlth.) (hereafter referred to as C. & A. Act (Cwlth.)).

[156] See ss. 98-121, C. & A. Act (Cwlth.).

[157] I.e. employers' associations and unions of employees registered as "organisations" under Part VIII of the C. & A. Act (Cwlth.).

[158] See Part IX (ss. 159-171) C. & A. Act (Cwlth.). [159] Discussed *infra* pp. 497-9.

[160] I.e. *Queen Victoria Memorial Hospital* v. *Thornton* (1953) 87 C.L.R. 144, 151, cited *supra* n. 111. See also *The Queen* v. *Davison* (1954) 90 C.L.R. 353, 388.

[161] The same considerations would apply to lock-outs but, for various reasons which need not be discussed here, they rarely, if ever, occur in Australia.

[162] The arbitral functions of the pre-1956 Arbitration Court are exercised by the Commission sitting in Presidential Session, while those of the pre-1956 Conciliation Commissioners are performed by the various Commissioners. See s. 33 C. & A. Act. (Cwlth.).

[163] See s. 109 (1)(a)(b). These are the counterparts of ss. 29 (1)(b) and (c) of the 1904-1955 Act. For examples of the exercise of this power refer to *Ships Painters and Dockers' Case* reported in *Industrial Information Bulletin* — Department of Labour and National Service (Cwlth.) (hereafter referred to as I.I.B.) (1956) vol. xi, 916; *Metal Trades Award, Ironworkers' Case* (1956) 11 I.I.B. 1024;*Metal Trades Award, Boilermakers' Case* (1956) 11 I.I.B. 1150; *Seamens' Award Case* (1957) 12 I.I.B. 56; *Coal Miners Case* (1957) 12 I.I.B. 137, 253; *Airline Pilots' Case* (1957) 12 I.I.B. 253; *Metal Trades Award, Sheet Metal Workers' Case* (1957) 12 I.I.B. 686.

as contempt of court[164] The unions, however, had as a result of the *Boilermakers' Case*, a new legal weapon in their armoury, and proceeded to use it whenever possible. The Industrial Court's judisdiction, has, in consequence, been challenged on a number of occasions, not only before that Court, but also three times before the High Court. The challenges, moreover, concerned not only the validity of particular provisions in the Arbitration Act, but also the whole legal status of the Industrial Court itself.

In the *Seamen's Union of Australia* v. *Matthews and Another*[165] the applicant union claimed that the Industrial Court had not been validly established. The Court, it was submitted, had been given not only judicial powers but also a number of other functions which fell outside the judicial power of the Commonwealth.[166] The result, it was claimed, had been to establish a body "for the fulfilment of purposes of a mixed character . . . without regard to the question whether by their nature (those purposes) fell within the judicial power of the Commonwealth . . . and with no predominant intention to give it judicial power".[167]

The High Court held unanimously that the Industrial Court had been validly established as a court under ss. 71[168] and 72[169] of the Constitution. Moreover, a number of functions which clearly fell within the judicial power had been vested in it by the Amending Act of 1956;[170] the clear purpose of establishing this Court was to enable it to exercise those judicial powers.[171] The High Court was not prepared to characterise the provisions instanced by counsel for the union as non-judicial, but, if it later transpired that they were such, and could not be validly treated as incidents in the exercise of judicial power by the Industrial Court, then they could be validly severed from the judicial powers.

Apart from this general challenge to the valid establishment of the Industrial Court, a number of provisions in the Arbitration Act purporting to confer jurisdiction on that Court have also been called into question.[172]

In *Re MacSween: ex parte Fraser*[173] the validity of s. 141 of the Conciliation and Arbitration Act (1904-1956 (Cwlth.))[174] was challenged on the ground that it did not involve an exercise of the judicial power of the Commonwealth and, in consequence, the Industrial Court was incompetent to exercise it validly. The High Court thought otherwise, however, and in a very short judgment, stated that "in view of the fact that in enacting s. 141 the legislature has acted upon the decisions of the (High) Court in *Jacka* v. *Lewis*[175] and in *Barrett* v. *Opitz*,[176] we think that s. 141 should be treated as vesting part of the judicial power of the Commonwealth and that we ought not to grant an order *nisi* on a ground which impugns those decisions".[177] In other words, the doctrine

[164] I.e. by s. 111, C. & A. Act. This is the counterpart of s. 29A of the 1904-1955 Act. This power has, since the 1956 amendment, been exercised in *Amalgamated Engineering Union Case* (1957) 12 I.I.B. 253 and in *Seamen's Award Case* (1957) 12 I.I.B. 354.

[165] (1957) 12 I.I.B. 683. The case was an appeal from an order of McTierman, J., refusing an application for a writ of prohibition.

[166] Counsel for the union cited ss. 134, 112, 109(1)(c), 144, 159, 161, 165, 167, 107, 140, 143 of the C. & A. Act (Cwlth.) as examples of non-judicial powers. See (1957) 12 I.I.B. at 683.

[167] *Ibid.* [168] See *supra* n. 8. [169] See *supra* n. 9.

[170] The High Court instanced ss. 108, 109 (1)(a) and (b), 110, 11, 113, 115, 116, 119 (1) and *semble* 107 of the C. & A. Act as examples of judicial power.

[171] See also *Australian Iron and Steel Limited* v. *Australasian Coal and Shale Employees Federation* (1957) 12 I.I.B. 253. In that case the Industrial Court had previously come to the same conclusion as the High Court in the *Seamens Case, supra.* See further *Reg.* v. *Spicer* (1957) A.L.R. 557, where the High Court apparently assumed that the Industrial Court had been validly established.

[172] See *supra* n. 166. See also *Australian Iron and Steel Limited* v. *Australasian Coal and Shale Employees Federation* cited supra n. 171.

[173] (1957) A.L.R. 14. See also (1956) 11 I.I.B., 1141, *sub nom. MacSween* v. *Fraser.*

[174] S. 141 empowers the Industrial Court to make orders directing the performance or observance of the rule of an organisation. Non-compliance with such orders renders the offender liable to a penalty.

[175] (1944) 68 C.L.R. 455. [176] (1945) 70 C.L.R. 141. [177] (1957) A.L.R. at 15.

of *stare decisis* was strictly applied.

Again, in *The Queen* v. *Spicer: ex parte Australian Builders Labourers' Federation*,[178] s. 140 of the Act, which empowers the Industrial Court to disallow the rules of an organisation on the grounds specified in the section, was challenged in the High Court. As the matter is at present before that Court,[179] it is sufficient to mention that the challenge rests on the ground that the High Court previously decided that an almost identical provision in an earlier Arbitration Act[180] did not involve an exercise of the judicial power.[181]

Issues of this nature have also arisen before the Industrial Court. In *Australian Iron and Steel Limited* v. *Australasian Coal and Shale Employees' Federation*,[182] the Industrial Court while not committing itself on this matter, implied that s. 144 of the Arbitration Act[183] might not fall within the judicial power. At least, the judges were not prepared to make an order under this section in the absence of the employee as a party since, in their view, it would not constitute a valid exercise of judicial power.[184]

A different issue arose in the *Australian Railway's Union Case*[185] where the question was whether the review of the Registrars' decisions by the Industrial Court involved an exercise of judicial power.[186] Once again, that Court refrained from giving any final opinion on the matter. It pointed out, however, that the Registrar's functions in registering (or refusing to register) the rules of an organisation did not fall within the judicial power, but added that it did not necessarily follow "that the exercise by this Court of (a) power to review on appeal the relevant act or decision of the Registrar could not be an exercise of judicial power".[187] The Court also drew attention to the fact that s. 143 which empowers it to de-register an organisation, had previously been held not to involve an exercise of judicial power.[188]

From this patchwork of judicial decision and cautious *obiter* two results may be said to emerge. Firstly, it appears that the new Industrial Court has been validly established. Secondly, apart from those functions which are clearly judicial in character, the jurisdiction and powers of that Court rest upon an uncertain and tentative basis, a position most unsatisfactory to all concerned, except perhaps the legal profession. The characterisation of these "quasi-judicial" provisions will have to be worked out by litigation with no reasonable *a priori* guide as to whether or not they can be brought within the ambit of judicial power. The doctrine of *stare decisis* may serve in some cases, but, if strictly applied, it could produce some curious bedfellows for the *Boilermakers' Case.*

The *Boilermakers' Case* will undoubtedly rank as a leading case in the field of Australian constitutional law. Its principles have already been discussed and applied on a number of occasions,[189] and present indications are that this trend will continue for some time. In broad terms, the result will probably be to clarify the scope of the principles enunciated in that case,

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[178] Not yet reported.

[179] I.e. Oct., 1957.

[180] I.e. s. 58D, 1904-1946 Act (Cwlth.).

[181] See *Consolidated Press Limited* v. *Australian Journalists' Association; Penton* v. *Australian Journalists' Association* (1947) 73 C.L.R. 549.

[182] (1957) 12 I.I.B. 253.

[183] Section 144(5) empowers the Industrial Court to hear disputes concerning entitlement to membership of federal organisations. Persons are entitled to become members if they comply with certain very general requirements set out in subsection (1) of that section.

[184] (1957) 12 I.I.B. at 254, *per* Spicer, C.J., Dunphy and Morgan, JJ.

[185] (1956) 11 I.I.B. 1015, reported *sub nom. Australian Railways' Union Judgment.*

[186] See ss. 109(1)(c), 139 C. & A. Act 1904-1956 (Cwlth.).

[187] (1956) 11 I.I.B. at 1023, *per* Spicer, C.J., Dunphy and Morgan, JJ.

[188] *Penton's Case,* cited *supra* n. 181. See also *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (1925) 36 C.L.R. 462.

[189] See *supra* pp. 497-99.

and to indicate the type of matter which exists as an exception to those principles. More particularly, the trend of decisions will no doubt determine the validity of those powers assigned to the Industrial Court which, at this point in time, cannot easily be characterised as "judicial".[190] Admittedly all the questions concerning the application of the *Boilermakers' Case* have, to date, arisen in connection with the arbitration power. But, as mentioned earlier, there are a number of other federal powers where the continuation of judicial and non-judicial functions may give rise to the type of difficulty encountered in the *Boilermakers' Case*. Bankruptcy, copyrights, patents, trade marks and insurance are typically matters where problems of this nature may well occur. Space does not permit a detailed survey of the legislation enacted under such powers. It may be suggested, however, that if such legislation is challenged the principles developed and applied in relation to the arbitration power will, as a general rule, be equally applicable to other relevant heads of power.

It may be objected that much of the foregoing discussion is unreal in the sense that it is concerned more with verbal differences than with differences in substance. It may be argued that the only difference between the views of the majority and those of the minority judges was a somewhat meaningless disagreement about the use of terms, which the judges never clearly defined, and that to categorise something as "judicial", "non-judicial" or "quasi-judicial", means little or nothing for later cases, not on all fours, unless the criteria used are indicated. It may even be claimed that much of the reasoning in the judgments is circuitous, and to say, for instance, that judicial powers are those powers exercisable by a court and that only a court can exercise judicial powers, advances a real understanding of the problem not one step. Much of this criticism is, no doubt, valid. The judges, although occasionally referring to the inherent lack of precision in the terms which they used,[191] appear, for the most part, to have treated them as satisfactory equipment to explain and decide the issues involved. It would appear then, that either the judges believed that their decisions flowed from the formulae used by them to justify those decisions, or else they realised that their decisions were arrived at on grounds extraneous to the formulae employed.[192] Whichever view is accepted, the judgments in the *Boilermakers' Case* will require scholarly attention with reference to the meaningfulness of the verbal formulae used. In future cases, judges will either operate with those formulae at the verbal level, without coming to grips at all with the real issues of policy involved, or else they will use the so-called principles of the *Boilermakers' Case* to cover their decisions on those issues of policy. The real difficulty is that, because the judgments in that case may not have proceeded beyond the verbal level, the formulae used will offer little assistance in the marginal cases where such inherently ambiguous concepts as "judicial", "legislative" and "powers" must be applied to new organs and functions.

The separation of powers doctrine is a political theory based partly on political experience. In general terms, it portrays the structure and functions of government characteristic of the modern democratic State. However, it probably never has been, nor will be, an accurate description of the way in which organs of government do actually operate; there will always be overlapping or plurality of function simply because the needs of society demand it. When, therefore, a separation of powers doctrine is placed within the strait-jacket of a written constitution, particularly a federal one, it is only reasonable to expect that extra-legal forces will continually exert pressure on the formal

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[190] See *supra*.

[191] "This does not mean that there may not be room for controversy (as to) what are powers incidental to the execution of any power . . . (by) the Federal Judicature . . . nor even . . . what is the precise scope and meaning of judicial power." (1957) A.L.R. at 500.

[192] It is not intended to discuss the underlying policy of the High Court or the Privy Council in this comment on the grounds that such a matter should be dealt with in a separate article.

legal structure of the constitution and mould it insofar as judicial decision can. Seen in this light, the *Boilermakers' Case* represents an indication of the general process of adjusting a politico-legal doctrine to contemporary needs.[193]

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[193] Since this comment was written the High Court has given judgment in *The Queen* v. *Spicer; ex parte Australian Builders Labourers' Federation (supra* p. 498*)*. By a majority of four judges to two, that court declared invalid s. 140 of the Conciliation and Arbitration Act (Cwlth.) which, it will be recalled, purported to empower the Commonwealth Industrial Court to disallow the rules of an organisation (union) on certain conditions. The majority held, applying the earlier High Court decision in *Consolidated Press Ltd.* v. *Penton* (1947) 73 C.L.R. 548, that s. 140 did not constitute a grant of Commonwealth judicial power. It followed, on the basis of the decision in the *Boilermakers' Case*, that such a power could not be exercised validly by a federal court, in this case, the Industrial Court. Of the minority, Williams, J. took the view that the discretionary nature of the power conferred by s. 140 did not, *ex necessitate*, characterise that provision as non-judicial, particularly when exercised by a court. Webb, J., who also dissented, assumed that s. 140 was non-judicial in character, but believed that the wording of that provision could be read down by virtue of s. 15A of the Acts Interpretation Act 1901-1950 (Cwlth.), so as not to offend constitutional requirements.

This decision emphasises the difficulty of characterising a number of the powers vested in the Industrial Court. It is reasonable to assume that further litigation will take place to determine the character. In some cases, it may be possible to re-word a provision so as to bring it within the ambit of "judicial power"; indeed Dixon, C.J., suggested that this might be done in the case of s. 140. But there will undoubtedly be other powers where this is not possible and the Commonwealth Parliament may be compelled to re-cast the whole federal arbitration structure. It may also be noted that in the *Builders Labourers' Case*, as in the *Boilermakers' Case*, the judges did not discuss the underlying questions of policy involved.

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THE STATUS AND AUTHORITY OF THE DEPUTY JUDGE-ADVOCATES OF NEW SOUTH WALES †

On the 18th May, 1824, a Supreme Court of New South Wales "having cognizance of all Pleas Civil Criminal or Mixed" was opened in Sydney under the authority of the statute 4 Geo. IV, c.96. At once military control of law and justice which had oppressed the Colony for nearly forty years was swept away. The consequent abolition of the office of Deputy Judge-Advocate (or Judge-Advocate as it was conveniently styled) brought to an end a judicial position which had been, in many ways, "unique in history".[1]

Nine Judge-Advocates were commissioned to the Colony from the time of the first settlement to 1824; of these, only five were in Sydney[2]: Captain David Collins, Richard Dore, Richard Atkins, Ellis Bent and John Wylde. Neither Collins nor Atkins had any legal training. Their common feature was appointment by commission from the Crown, under the terms of which they were treated as military officers. They had to "observe and follow such Orders and Directions" as they might receive from the Governor, the Lieutenant Governor "or any other, your Superior Officer".[3] Only Collins was at the same time commissioned to the military forces, though he considered his status to be "of a civil nature".[4]

The name "Deputy Judge-Advocate" suggests that the appointment was not intended to be entirely of a military character and this is borne out by the duties expected of the appointee[5]. His position as president of the Court was without precedent in British military law, because a judge-advocate served

†References marked with an asterisk in the following notes are drawn from manuscripts in the possession of the Trustees of the Mitchell Library, Sydney, N.S.W., who kindly permitted the writer to inspect such manuscripts and to make quotations from them.

The following abbreviations have been used:

Bartrum: 'Proceedings of a General Court Martial for the Trial of Lieut. Col. Geo. Johnston'. (1811).

Collins Account: David Collins — 'Account of the English Colony of New South Wales', (1798).

H.R.A.: Historical Records of Australia, (citing Series, Volume and page).

H.R.N.S.W.: Historical Records of New South Wales.

R.A.H.S. Journal: *Royal Australian Historical Society Journal.*

S.C.P.: Supreme Court Papers; manuscripts in the possession of the Trustees of the Mitchell Library, (citing the bundle and number of each manuscript).

Wentworth: W. C. Wentworth — '*A Statistical, Historical and Political Description* of the Colony of New South Wales', (1819).

[1] F. Watson. Introduction H.R.A. IV/I, p.xxx.

[2] Edward Abbott, an army officer ignorant of law, was commissioned in 1814 as Judge-Advocate to Van Diemen's Land where he presided over the Lt.-Governor's Court.

In 1803 Benjamin Barbauld was commissioned to the settlement at Port Phillip but, as he declined to leave England, Samuel Bate was drafted in his place to the staff of Lt.-Governor Collins. Collins had then been transferred to Hobart so Bate enjoyed a sinecure because no law Courts existed there at the time. The other Judge-Advocate was Thomas Hibbins who, in 1794, was commissioned to Norfolk Island.

After the suspension of Atkins in 1808, Edward Abbott acted as Judge-Advocate, being followed in turn by Charles Grimes and Captain Anthony Fenn Kemp before the arrival of Bent (H.R.N.S.W. Vol. VII, p. 65).

After the death of Bent, solicitor Frederick Garling acted as Judge-Advocate until the arrival of Wylde (H.R.A. I/IX, p. 31).

[3] H.R.A. IV/I, p. 1.

[4] Collins Account, p. 11.

[5] Apart from the implicit references in 27 Geo. III c.2. (which set up the Criminal Court) no statute governed the appointment, powers or duties of the Judge-Advocate. Collins (Account, *loc.cit*) relates that "the judge-advocate is the judge or president of the court; he frames and exhibits the charge against the prisoner, has a vote in the Court and is sworn, like the members of it, well and truly to try and to make true deliverance between the King and the prisoner, and give a verdict according to the evidence".