the initial annuity payments and ultimately in her refusals to continue the payments in view of the unexpected depletion of the estate, she was taking advantage of the position created by the absence from the will of anything to qualify the apparently absolute bequest to her, and was going back upon an undertaking which was part of the inducement to the testator to leave his estate in her hands.

For these reasons the judgment of *Barry* J. should be affirmed and the appeal dismissed with costs.

Vary the judgment appealed from by substituting for the words "upon trust" where they occur in the first declaration the words "subject to a trust". Subject to such variation dismiss the appeal with costs.

Solicitors for the appellant, *Wm. J. Clarke & Co.*

Solicitors for the respondents, *Cameron & Lowenstern*, Hamilton by *Lynch & MacDonald*.

R. D. B.

THE QUEEN

AGAINST

KIRBY AND OTHERS;

EX PARTE BOILERMAKERS' SOCIETY OF AUSTRALIA.

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1955, SYDNEY, *Aug.* 15-19, 22, 23;

1956, MELBOURNE, *Mar.* 2.

Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

Constitutional Law (Cth.)—Industrial arbitration—Court of Conciliation and Arbitration—Arbitral power—Judicial power—Combination of powers in one body—Validity—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*xxxv.*), (*xxxix.*), 71, 72, 73, 76 (*ii.*), 77—*Conciliation and Arbitration Act* 1904-1952 (*No.* 13 *of* 1904—*No.* 34 *of* 1952), *ss.* 29 (1) (*b*), (*c*), 29A.

Industrial Law (Cth.)—Court of Conciliation and Arbitration—Vested with judicial and arbitral powers—Combination of powers—Constitutional validity—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*xxxv.*), (*xxxix.*), 71, 72, 73, 76 (*ii.*), 77—*Conciliation and Arbitration Act* 1904-1952 (*No.* 13 *of* 1904—*No.* 34 *of* 1952), *ss.* 29 (1) (*b*), (*c*), 29A.

Chapter III of the Constitution does not permit of 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 such power, notwithstanding that such body is organized as a court and in a manner which might otherwise satisfy ss. 71 and 72 of the Constitution, nor does it allow a combination with judicial power of functions not ancillary or incidental to its exercise but foreign to it. Thus the Commonwealth Court of Conciliation and Arbitration, 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.

Paragraphs (*b*) and (*c*) of s. 29 (1) of the *Conciliation and Arbitration Act* 1904-1952 which respectively empower the Court of Conciliation and Arbitration to order compliance with an order or award broken or not observed and to enjoin any organization or person from committing or continuing any contravention of the Act, and s. 29A thereof which confers upon such court the same power to punish for contempt of its powers and authorities, judicial or otherwise, as is possessed by the High Court in respect of contempt of that

Court, provide for the exercise by such court of powers essentially judicial in character and are accordingly invalid.

So *held* by *Dixon* C.J., *McTiernan*, *Fullagar* and *Kitto* JJ. (*Williams*, *Webb* and *Taylor* JJ., dissenting).

Semble, by the majority, that s. 29 (1) (*a*), s. 59 so far as it relates to the Court of Conciliation and Arbitration and s. 119 of such Act are for like reasons invalid.

The judicial power of the Commonwealth in relation to appeals to the High Court from courts of the Territories, discussed.

PROHIBITION.

Upon an application made on behalf of the Boilermakers' Society of Australia *McTiernan* J. on 30th July 1955 granted an order nisi for a writ of prohibition directed to the Honourable Richard Clarence Kirby, the Honourable Edward Arthur Dunphy and the Honourable Richard Ashburner, judges of the Commonwealth Court of Conciliation and Arbitration, and the Metal Trades Employers' Association, calling upon the respondents to show cause why they should not be prohibited from further proceeding with or upon orders made by the Court of Conciliation and Arbitration on 31st May 1955 and 28th June 1955 respectively upon the applications of the respondent the Metal Trades Employers' Association whereby the prosecutor was ordered to pay certain costs and a fine of £500. The grounds of the order nisi were that "the provisions of ss. 29 (1) (*b*) and (*c*) and 29A of the *Conciliation and Arbitration Act* 1904-1952 are ultra vires and invalid in that (a) the Court of Conciliation and Arbitration is invested by statute with numerous powers, functions and authorities of an administrative, arbitral, executive and legislative character; (b) the powers which ss. 29 (1) (*b*), (*c*) and 29A respectively of such Act purport to vest in the said court and exercised by it in making the said orders are judicial, and (c) that the said ss. 29 (1) (*b*), (*c*) and 29A are accordingly contrary and repugnant to the provisions of the Constitution of the Commonwealth and, in particular, Chap. III thereof".

The order to show cause came on for hearing before the Full Court of the High Court.

Further facts and the relevant statutory provisions appear in the judgments of the Court hereunder.

R. M. Eggleston Q.C. (with him *Dermot Corson*), for the prosecutor. It is not constitutionally permissible for the legislature to vest in a body having non-judicial functions any part of the judicial power of the Commonwealth. A strictly judicial body may, as ancillary to its judicial functions and in aid thereof, be given some functions

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of a legislative character, but where a body is primarily established for non-judicial purposes, or has independent non-judicial functions, it cannot also be invested with part of the judicial power of the Commonwealth. Two kinds of power are conferred by the *Conciliation and Arbitration Act* 1904-1952 upon the Arbitration Court: (1) power to act as an industrial arbiter specifying industrial conditions, a power of a non-judicial character, and (2) power to enforce compliance with orders and awards under penalty and to punish for contempt, a power of a judicial character. Such a combination of powers is unconstitutional and it follows that the judicial powers cannot be exercised by the court, the judicial function being ancillary to the primary function which is to settle disputes. The combination being unlawful, the judicial power must be discarded. The alternative to this view would seem to be that whereas either judicial or arbitral power but not both can be conferred on the court, and there is no means of determining which the legislature would have chosen if put to the choice, the whole of the provisions relating to the court must be held invalid leaving the legislature to make a fresh choice. One possibility not open is to conclude that the legislature had a primary intention to create a judicial authority to exercise part of the judicial power of the Commonwealth independently of its arbitral functions and the judicial part can remain and the arbitral functions destroyed. The arbitral powers of the court are not part of the judicial power: *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1); *Ex parte McLean* (2). The basis of this fundamental proposition is the division of powers under the Constitution as recognized in this country and the United States.

[DIXON C.J. What do you say on the lapse of time in relation to this point which has been available to be taken for the past twenty-nine years and which everyone has thought fit to avoid?]

That should not restrain the Court from coming to a correct conclusion now. The difficulties giving rise to the present application have become acute in recent times. [He referred to *Reg.* v. *Foster*; *Ex parte Commonwealth Life (Amalgamated) Assurance Ltd.* (3).] Cases in which the point has never been taken should not be permitted to prevent a review, having regard to the far-reaching consequences which would flow from a judicial affirmation of the principle that it is legitimate for Parliament to set up an administrative organization and then, provided the members thereof are invested with proper security of tenure, to confer judicial power

(1) (1918) 25 C.L.R. 434.
(2) (1930) 43 C.L.R. 472.
(3) (1952) 85 C.L.R. 138, at p. 155.

which may in large measure be exclusive of the judicial power of the ordinary courts set up under Chap. III. If that is permissible, it goes far to nullify the safeguards to be found in the Constitution. Just as on the one hand it may be said that this combination has been assumed to be proper and the difficulties never raised, on the other the authorities which support the invalidity of such a combination have equally stood for a very long time without being questioned. The implications of such authorities require the Court to declare such a combination of functions invalid. [He referred to *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1).] The proposition that judicial power can be vested only in federal courts need not in itself involve the conclusion that such courts cannot be given other functions, but it does mean that a body primarily non-judicial cannot be given judicial functions as an incident of its non-judicial functions and ancillary thereto. A body even with the tenure required for a federal court cannot be invested with functions of a judicial character as ancillary to a part of its general non-judicial functions. It is an infringement of the judicial independence and contrary to the division of powers provided for in the Constitution to confer non-judicial functions on a federal court. [He referred to *Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (2).] If as a result of *In re Judiciary and Navigation Acts* (3) the High Court is precluded from exercising any power of a judicial character other than the judicial power of the Commonwealth, it necessarily follows that it is precluded from being invested with any non-judicial power. Chapter III is an exhaustive statement of the kind of judicial power which may be conferred on federal courts. [He referred to *National Mutual Insurance Co.* v. *Tidewater Transport Co.* (4).] Included in the grant of judicial power may be included authority to confer such other powers as are necessary to give effect to judicial power, such as the power to make rules. Unless the power is incidental to judicial power, the doctrine of the separation of powers forbids the amalgamation of judicial and non-judicial functions. [He referred to *Hayburn's Case* (5); *Gordon* v. *United States* (6); *Muskrat* v. *United States* (7); *Postum Cereal Co.* v. *California Fig*

(1) (1908) 8 C.L.R. 330, at pp. 355, 382.
(2) (1931) 46 C.L.R. 73, at pp. 89 et seq., 94.
(3) (1921) 29 C.L.R. 257.
(4) (1949) 337 U.S. 582, at pp. 590, 591, 604, 607, 615, 616, 628, 647, 648 [93 Law. Ed. 1556, at pp. 1567, 1574, 1575, 1576, 1580, 1581, 1587, 1597].
(5) (1792) 2 Dall. 409 [1 Law. Ed. 436].
(6) (1864) 117 U.S. 697, at pp. 700, 703 [29 Law. Ed., notes p. 136, at p. 137].
(7) (1911) 219 U.S. 346, at pp. 351, 353, 356 [55 Law. Ed. 246, at pp. 248, 249, 250].

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Nut Co. (1).] The authorities show that an Act which creates a federal court and attempts to impose upon it in its curial capacity functions of an administrative or legislative character would be held invalid under the United States Constitution. Conversely, if a non-judicial body is set up, as here where the primary function is arbitral, judicial power cannot be conferred upon it. In one sense the judicial functions do not come into operation until the arbitral functions have been performed; thus the tribunal making the law under which the obligation arose is the tribunal which punishes for breach of the obligation. This is the very vice which the separation of powers was designed to avoid. As the *Arbitration Act* now stands, and has always stood, the judges have had arbitral functions logically and historically anterior to their judicial functions. The only judicial functions given to the court are functions to enforce the very laws created by it or its subordinate bodies. [He referred to *Pope* v. *United States* (2); *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.* (3).] The United States authorities are particularly valuable on this question, and although the doctrine of separation of powers may have received a different interpretation here from that received in the United States the basic principle of separation is accepted and produces fundamentally the same result. [He referred to *New South Wales* v. *The Commonwealth* (4).]

The courts of the federal territories may provide an anomaly in the construction of Chap. III but it does not impinge upon the principle of judicial independence. [He referred to *New South Wales* v. *The Commonwealth* (5); *Queen Victoria Memorial Hospital* v. *Thornton* (6).] Section 77 (iii.) of the Constitution is the only source of Commonwealth judicial power for State courts and the point of *Thornton's Case* (7) is that the attempt there made was to confer not judicial power but administrative power on a State court. [He referred to *Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (8).] Decisions which say it is proper to confer legislative power on the executive do not necessarily afford any light on the power to impose other functions on the judiciary or to impose judicial functions on bodies not primarily judicial even though the members of such bodies have the same tenure as that

(1) (1927) 272 U.S. 693, at pp. 700, 701 [71 Law. Ed. 478, at p. 481].
(2) (1944) 323 U.S. 1 [89 Law. Ed. 3].
(3) (1913) 17 C.L.R. 644, at pp. 652, 653].
(4) (1915) 20 C.L.R. 54, at p. 62.
(5) (1915) 20 C.L.R., at pp. 88, 89.
(6) (1953) 87 C.L.R. 144, at pp. 151, 152.
(7) (1953) 87 C.L.R. 144.
(8) (1931) 46 C.L.R., at pp. 84, 101, 116, 117.

prescribed for judicial bodies. [He referred to *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1).]

[WILLIAMS J. referred to *Lowenstein's Case* (2).]

The principle there enunciated is, if accepted, fatal to the exercise by the Arbitration Court of judicial power and concludes the present case in the prosecutor's favour. Once the arbitral power is found to provide the rule which the judicial power in the same body enforces then such combination of powers is directly in conflict with *Lowenstein's Case* (2). As to the consequences of holding such combination invalid the prosecutor adopts what was said in *Reg.* v. *Wright*; *Ex parte Waterside Workers' Federation of Australia* (3) and the judicial powers of the court at least must be held to be invalidly conferred. This is a case in which a fundamental constitutional safeguard is at stake and the Court cannot on any ground of inconvenience or lapse of time avoid the task of deciding that question of constitutional principle, and once having decided that principle, of giving effect to it.

D. I. Menzies Q.C. (with him *C. I. Menhennitt*), for the respondent judges of the Court of Conciliation and Arbitration, and for the Attorney-General of the Commonwealth intervening by leave. This Court has rejected the notion that the distortion of the British doctrine of separation of powers which took place when it was adopted and carried forward into the United States Constitution has ever formed part of the Constitution of this country, and also the notion that the Executive cannot exercise legislative power derived from Parliament. There is embodied in our Constitution a very real doctrine of separation of powers, but it is the British not the American doctrine. *Isaacs* J. referred to the former doctrine in *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (4) and in *New South Wales* v. *The Commonwealth* (5). Whilst the framework of the Australian Constitution follows that of the United States, it nevertheless takes over the British practice and theory in relation to the organs of government rather than the American mutually exclusive division. There is nothing in the American Constitution comparable with the position of the Crown under our Constitution, and the adoption of the principle of responsible government in Australia is the antithesis of the American system. Once our Constitution departs from the American by requiring a very close identification between the executive and the legislative, which requires a minister to be a member of Parliament

(1) (1938) 59 C.L.R. 556.
(2) (1938) 59 C.L.R., at p. 576.
(3) (1955) 93 C.L.R. 528.
(4) (1908) 8 C.L.R. 330, at p. 382.
(5) (1915) 20 C.L.R. 54, at pp. 88, 89.

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if he is to remain a minister for longer than three months, then there is a precise and definite negation of the very basis for the American doctrine. [He referred to *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1).] These fundamental differences appearing, there is no place in the interpretation of the Australian Constitution for the acceptance of the derived notions of separation of powers which do not arise from any words in the Constitution and which have been attributed to the words of the American Constitution only because of the background there existing and which had disappeared by the time our Constitution was established. The principles adopted by this Court in the *Engineers' Case* (2) in rejecting the doctrine of the implied immunity of instrumentalities, which was formerly entrenched in the United States and had been adopted here from the earliest days of the Constitution, by reason of the great differences between the two constitutions tell strongly against this Court now reversing existing trends and embodying the American doctrine as part of the constitutional theory and practice of the Commonwealth. It is apparent from s. 9 of the covering clauses of the Constitution that British theory and practice have been followed, and where there are limits on the powers conferred such limits are to be found in the express words of the Constitution and not merely by implication from the fact that there are distinct organs of government dealt with separately by the Constitution. Under the American Constitution the executive takes no part in the legislative process, whereas under our Constitution legislative power is vested in the Queen and the two Houses of Parliament. There is nothing in Chap. II by way of implication which prevents Parliament from giving non-executive power to the Executive. That is an essential element of *Dignan's Case* (3). That decision is not merely a rejection of the doctrine of the separation of powers, but is the rejection of any view that there is in these various chapters not merely a grant of power but an implied prohibition against giving further powers if Parliament has legislative power to make such a grant. Nothing in Chap. III either necessitates or suggests that the American doctrine should be applied or that courts should not have other functions not derived from that chapter but from elsewhere within the Constitution. Section 71 does not suggest that the courts shall have only judicial powers, nor is there anything in s. 73 (iii.) which indicates that the framers of the Constitution had any hard and fast notions on divisions of power. The position

(1) (1920) 28 C.L.R. 129, at p. 147.
(2) (1920) 28 C.L.R. 129.
(3) (1931) 46 C.L.R. 73.

reached by the American courts under Art. III is set out in *Corwin*: *The Constitution of the United States of America* (1952), pp. 533-536. This Court has not reached the same sort of conclusions on Chap. III and it is wrong to suggest that so far as the American decisions on courts are concerned they are in line with the local authorities on the same subject. The distinction is sufficiently great to afford substantial grounds for denying that the courts of the two countries occupy similar positions. The separation of powers doctrine as implicit in our Constitution differs from that in the American Constitution: see *Johnston Fear & Kingham & Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (1); *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (2). The Constitution separates the functions of government into legislative, executive and judicial but apart from the actual provisions of the Constitution the doctrine of the separation of powers has no legal consequences in this Court. [He referred to *Reg.* v. *Davison* (3); "*The Law and the Constitution*" by Mr. Justice *Dixon* (4).] There are decisions of this Court inconsistent with the existence in our constitutional law of the separation of powers doctrine as known in the United States, e.g. cases of delegation of legislative power to the executive. [He referred to *Roche* v. *Kronheimer* (5); *Dignan's Case* (6).] The latter case shows that there is not in our Constitution, by virtue of the separation of powers doctrine or otherwise, any restriction confining law-making to Parliament or preventing the Executive from receiving powers not executive in the sense of Chap. II. *In re Judiciary and Navigation Acts* (7) expressly reserved the question here arising and does not decide that this Court is incapacitated by Chap. III from having other than judicial power conferred upon it but that Chap. III is itself the exclusive grant of power to confer judicial power on the Court and that the power there sought to be conferred was not the judicial power of the Commonwealth and therefore the grant failed. The case of *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (8) shows that non-judicial powers may be conferred upon a federal court, and thus it is easy to understand why this point has not earlier been raised in relation to the Arbitration Court. [He

(1) (1943) 67 C.L.R. 314, at p. 326.
(2) (1944) 69 C.L.R. 185, at pp. 210, 211.
(3) (1954) 90 C.L.R. 353, at pp. 380-382.
(4) (1935) L.Q.R. 1, at pp. 13, 21, 22.
(5) (1921) 29 C.L.R. 329, at pp. 331, 334, 335, 336, 337.
(6) (1931) 46 C.L.R., at pp. 79, 83, 86, 89, 90, 91-94, 96, 97, 98, 99, 100, 101, 113-123.
(7) (1921) 29 C.L.R. 257, at pp. 264, 265, 269-274.
(8) (1938) 59 C.L.R. 556, at pp. 559, 564-567, 575-577, 580, 581, 585, 586, 587-589, 590, 591.

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referred to *Sachter* v. *Attorney-General (Cth.)* (1).] The theory that the High Court is not competent to receive from Parliament anything but the judicial power of the Commonwealth has been rejected in cases on s. 122 of the Constitution: see *R.* v. *Bernasconi* (2); *Porter* v. *The King*; *Ex parte Yee* (3). The jurisdiction of this Court is not exhausted by Chap. III but even as to judicial matters it can be added to by an appropriate Commonwealth law if power in Parliament can be found, and by parity of reasoning non-judicial powers not inconsistent with the exercise of judicial powers can also be added to the functions of this Court. Another instance of Parliament having conferred on this Court something other than judicial power which was acted upon by this Court is to be found in the *Commonwealth Electoral Act* 1918-1949, ss. 183, 184: see *Holmes* v. *Angwin* (4); *Webb* v. *Hanlon* (5). The *Conciliation and Arbitration Act* 1904-1952 depends upon ss. 51 (xxxv.), 71 and 77 of the Constitution. The Arbitration Court has at all material times been a federal court invested with part of the judicial power of the Commonwealth. Act No. 13 of 1904, although primarily an Act dealing with the settlement of industrial disputes by concilation and arbitration did establish a court with powers of enforcement essentially judicial in their nature: ss. 38D (*a*), (*e*), 48, 50, 83. In 1918 in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (6) it was decided that the grant of judicial power to the court was invalid in that the President had not the required constitutional tenure, but that the Act was otherwise valid: *Alexander's Case* (7). Between 1918 and 1926 the court continued to act as a tribunal for the determination of industrial disputes and the powers of enforcement were largely taken over by this Court: Act No. 31 of 1920. The 1926 Act brought judicial and arbitral power to the court: ss. 3, 9, 10, and Parliament acted under Chap. III. It chose a body which could constitutionally be a federal court, enacted that such body should be a court and vested in it part of the judicial power of the Commonwealth. The fact that Parliament in addition to giving judicial power also gave other power does not warrant a conclusion that Parliament did not intend this new court to be a federal court. The judicial functions were not intended to be ancillary to the arbitral, nor the arbitral ancillary to the judicial. The two func-

(1) (1954) 94 C.L.R. 86.
(2) (1915) 19 C.L.R. 629, at pp. 635, 636, 637.
(3) (1926) 37 C.L.R. 432, at pp. 435, 438, 440-442, 446, 447, 448, 449.
(4) (1906) 4 C.L.R. 297.
(5) (1939) 61 C.L.R. 313, at pp. 334, 335.
(6) (1918) 25 C.L.R. 434.
(7) (1918) 25 C.L.R., at pp. 447-449, 471, 481-483.

tions were complementary. [He referred to *Jacka* v. *Lewis* (1); *Australian Workers' Union* v. *Bowen* [*No.* 2] (2); *Harrison* v. *Goodland* (3); *Barrett* v. *Opitz* (4); *Consolidated Press Ltd.* v. *Australian Journalists' Association* (5).] These decisions, all on the 1926 Act with minor amendments, recognize that the court was then a federal court exercising part of the judicial power. Act No. 10 of 1947 repealed Pt. III of the earlier Act dealing with the constitution of the court and introduced a new Pt. III dealing with the court itself. Cases such as *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres (Aust.) Ltd.* (6); *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union (Australian Section)* (7); *R.* v. *Taylor*; *Ex parte Roach* (8); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Federated Gas Employees Industrial Union* (9); *Federated Iron Workers' Association of Australia* v. *The Commonwealth* (10); *Reg.* v. *Kelly*; *Ex parte Waterside Workers' Federation of Australia* (11); *Reg.* v. *Kelly*; *Ex parte Berman* (12); *Reg.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Amalgamated Engineering Union (Australian Section)* (13) show that the Arbitration Court has exercised a wide variety of judicial power and that this Court has from time to time not merely assumed that it could do so constitutionally but has said so in clear terms. Since *Alexander's Case* (14), and in reliance upon the judgment of this Court, Parliament has acted on the footing that it may confer judicial power on the court. Sections 71 and 77 of the Constitution support Pt. III of the *Conciliation and Arbitration Act*. [He referred to *R.* v. *Taylor*; *Ex parte Federated Ironworkers' Association* (15); *Reg.* v. *Wright*; *Ex parte Waterside Workers' Federation of Australia* (16); *Collins* v. *Charles Marshall Pty. Ltd.* (17).] No American case can be found to support the argument as indicated in the last-mentioned case, and so to put it is contrary to *R.* v. *Taylor*; *Ex parte Roach* (18). If contrary to

(1) (1944) 68 C.L.R. 455, at pp. 457, 461, 462, 463, 464.
(2) (1948) 77 C.L.R. 601, at p. 619.
(3) (1944) 69 C.L.R. 509, at pp. 515, 519, 521.
(4) (1945) 70 C.L.R. 141, at pp. 149, 159, 164, 171.
(5) (1947) 73 C.L.R. 549, at pp. 553, 554, 563, 564.
(6) (1949) 78 C.L.R. 389, at p. 399.
(7) (1951) 82 C.L.R. 208, at pp. 240, 241, 256.
(8) (1951) 82 C.L.R. 587, at pp. 597-599, 601.
(9) (1951) 82 C.L.R. 267, at pp. 271, 272.
(10) (1951) 84 C.L.R. 265, at pp. 278, 279.
(11) (1952) 85 C.L.R. 601.
(12) (1953) 89 C.L.R. 608.
(13) (1953) 89 C.L.R. 636, at pp. 650-652.
(14) (1918) 25 C.L.R. 434.
(15) (1949) 79 C.L.R. 333.
(16) (1955) 93 C.L.R. 528.
(17) (1955) 92 C.L.R. 529.
(18) (1951) 82 C.L.R. 587.

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the foregoing submissions a federal court cannot have any power other than the judicial power of the Commonwealth then the consequences here might be that the attempt to confer non-judicial power will fail. In the event of the Court coming to the conclusion that the present attack on the legislation should succeed the Court is asked to consider whether in the circumstances it should not treat the matter as determined by earlier decisions and independently of its view now of their correctness refuse to review them.

B. P. Macfarlan Q.C. (with him *R. J. A. Franki*), for the respondent the Metal Trades Employers' Association. The *Conciliation and Arbitration Act* 1904-1952 is wholly valid and the Court of Conciliation and Arbitration properly and lawfully constituted. *Jumbunna Coal Mine N.L.* v. *Victorian Coal Miners' Association* (1) is a distinct ruling by this Court that the Arbitration Court as then established was a federal court within s. 73 of the Constitution and this statement has been departed from only to the limited extent on the point of tenure referred to in *Alexander's Case* (2). [He referred to *Alexander's Case* (3).] That case is outside the instant case, for there the decision of the Court was that the award was valid though it might not be enforced, so that from 1908 onwards there has been no suggestion that the Act was invalid for any reason here suggested, indeed the decisions up to 1918 are either distinct rulings or distinctly involve the opinion of the Court that the Act was valid. [He referred to Act No. 39 of 1920, s. 20 and to *Waddell* v. *Australian Workers' Union* (4); *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (5).] It has already been held by this Court that the prosecutor's submissions are not sound, and if the Court were now to be of opinion that they are sound, then the weight of the earlier decisions is a valid reason for not disturbing the position. [He referred to *Hughes & Vale Pty. Ltd.* v. *New South Wales* [*No.* 1] (6).] Upon the doctrine of *stare decisis* the wide area of industry covered by the *Metal Trades Award* and the numbers of persons affected thereby must be considered should the prosecutor's arguments find favour with the Court. If the Court should take the view that the American doctrine of separation of powers controls the interpretation of our Constitution, the doctrine of *stare decisis* and the considerations just mentioned justify the Court after nearly fifty years in regarding the situation as paradoxical and not

(1) (1908) 6 C.L.R. 309, at pp. 323, 324.
(2) (1918) 25 C.L.R. 434.
(3) (1918) 25 C.L.R., at p. 479.
(4) (1922) 30 C.L.R. 570, at p. 574.
(5) (1944) 69 C.L.R. 185, at pp. 215, 216.
(6) (1953) 87 C.L.R. 49, at p. 76.

declaring the Act invalid. [He referred to *Waters* v. *The Commonwealth* (1).] The decisions in *R.* v. *Bernasconi* (2) and *Porter* v. *The King*; *Ex parte Yee* (3) are a denial that only judicial power of the type referred to in Chap. III may be conferred upon this Court or any other federal court. [He referred to *Federal Capital Commission* v. *Laristan Building & Investment Co. Pty. Ltd.* (4); *Edie Creek Pty. Ltd.* v. *Symes* (5); *Douran* v. *Whisker* (6).] The *Conciliation and Arbitration Act* finds its justification in ss. 51 (xxxv.) and 71. Section 51 (xxxv.) is directed to the elements of conciliation, arbitration in relation to disputes, and the settlement of those disputes by prescribed means, and each of such elements must be understood and construed according to the understanding and concept not only of conciliation and arbitration but conciliation and arbitration as accepted at the date of the enactment of the Constitution. [He referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (7).] It is inherent in the original concept of this power in s. 51 (xxxv.) that there shall be both arbitral and judicial powers complementary to one another. This Court in construing par. (xxxv.) has taken into account the history and sources available to the framers of the Constitution in 1900: *Stemp* v. *Australian Glass Manufacturers Co. Ltd.* (8) In 1900 provision had been made both in New Zealand and Western Australia for the enforcement of the awards by the arbitral tribunals which made the awards. [He referred to the *Industrial Conciliation and Arbitration Act* 1894-1898 (N.Z.); *Industrial Conciliation and Arbitration Act* 1900 (W.A.), ss. 80, 83, 87-89.] If contrary to our submissions the American doctrine of separation of powers did in some way inspire or control the framing of our Constitution, the ultimate question always for the Court is the interpretation of the Constitution. If the general nature of the power under s. 51 (xxxv.) upon the historical approach to the understanding of the power does involve both the ideas of arbitral and judicial functions, then it is a legitimate construction of the Constitution to say that in the case of this power the two processes may be combined in the one tribunal if Parliament so desires. The order nisi should be discharged as the Act in its present form is wholly valid.

R. M. Eggleston Q.C., in reply.

Cur. adv. vult.

(1) (1951) 82 C.L.R. 188, at pp. 190, 191.
(2) (1915) 19 C.L.R. 629.
(3) (1926) 37 C.L.R. 432.
(4) (1929) 42 C.L.R. 582.
(5) (1929) 43 C.L.R. 53, at pp. 56, 57.
(6) (1946) 72 C.L.R. 595.
(7) (1910) 11 C.L.R. 1, at pp. 36, 44.
(8) (1917) 23 C.L.R. 226, at pp. 237-239.

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March 2, 1956.

The following written judgments were delivered :—

DIXON C.J., MCTIERNAN, FULLAGAR AND KITTO JJ. This order nisi for a writ of prohibition calls in question certain orders of the Court of Conciliation and Arbitration. First there is an order of 31st May 1955 falling into a number of parts. It consists in fact of a series of orders. The purpose in making them was to require obedience on the part of the Boilermakers' Society to a provision in an award of the Arbitration Court prohibiting bans, limitations or restrictions on the performance of work in accordance with the award. To effect the purpose the Arbitration Court relied upon the power which par. (*b*) of s. 29 (1) of the *Conciliation and Arbitration Act* 1904-1952 purports to confer of ordering compliance with an order or award proved to the satisfaction of the court to have been broken or not observed and upon the power which par. (*c*) of the same sub-section purports to confer of enjoining by order any organization or person from committing or continuing a contravention of the Act or a breach or non-observance of an order or award. The first order in respect of which a writ of prohibition is sought takes various forms of disobedience of the provision of the award and deals with them in turn, first, in each case, making an order for compliance and, next, two orders enjoining different aspects of breach or non-observance of the provision. Finally, there is a more general order enjoining breach or non-observance. The second order which it is sought to restrain by a writ of prohibition is dated 28th June 1955 and is expressed as finding the Boilermakers' Society guilty of contempt of the Arbitration Court by wilfully disobeying the order of 31st May 1955. The order goes on to impose a fine of £500 upon the society, which is a registered organization of employees, and to order it to pay the costs of the proceedings. This order was made in reliance upon s. 29A of the Act, the first sub-section of which provides that the Arbitration Court has the same power to punish contempt of its power and authority, whether in relation to its judicial powers and functions or otherwise, as is possessed by the High Court in respect of contempt of the High Court. Sub-section (4) limits the penalty to £500 in the case of contempt committed by an organization which consists in failure to comply with an order made under par. (*b*) or par. (*c*) of s. 29 (1).

The attack upon the jurisdiction to make these orders is based upon the ground that they could be made only in the exercise of the judicial power of the Commonwealth and that the Constitution does not authorize the legislature to establish a tribunal which at once performs the function of industrial arbitration and exercises

part of the judicial power of the Commonwealth. There may be a question whether powers such as those which s. 29 (1) (*b*) and (*c*) purport to give are necessarily part of the judicial power of the Commonwealth and cannot be referred simply to the power to legislate with respect to industrial conciliation and arbitration. But there can be no such question with reference to s. 29A which plainly could not be enacted except in conformity with Chap. III of the Constitution. Indeed it must rest on s. 76 (ii.) and ss. 71 and 77. It is possible to state the form of the argument very briefly. The primary function for which the Court of Conciliation and Arbitration is established is the prevention and settlement of industrial disputes by conciliation and arbitration. It involves the discharge for that purpose of the responsibility of determining directly the fundamental questions enumerated in s. 25, of maintaining a supervisory and appellate control over other matters and of exercising certain powers to secure the due and orderly conduct of the affairs of registered industrial organizations which may be or commonly are disputants. So much, it is said, appears not only from the history of the court and from the character of the powers from time to time entrusted to it, but from a mere perusal of the Act as it now stands. From that can be seen clearly enough that the reason for seeking to attach to the Arbitration Court powers or jurisdictions forming part of the judicial power of the Commonwealth was because they were regarded as accessory to its principal function. Desirable or important as it may have been considered in point of policy to place such powers in the hands of the Arbitration Court, they nevertheless were in truth but incidental to or consequential upon the primary or chief functions of that court. These propositions formed the basis of the argument against the validity of the orders. For it is denied that Chap. III of the Constitution authorizes or permits the legislature to confer any part of the judicial power of the Commonwealth upon a body fufilling such purposes and it is asserted that Chap. III does not authorize or permit a combination or confusion of strictly judicial power with entirely different functions.

In a federal form of government a part is necessarily assigned to the judicature which places it in a position unknown in a unitary system or under a flexible constitution where Parliament is supreme. A federal constitution must be rigid. The government it establishes must be one of defined powers; within those powers it must be paramount, but it must be incompetent to go beyond them. The conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined

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by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature. The demarcation of the powers of the judicature, the constitution of the courts of which it consists and the maintenance of its distinct functions become therefore a consideration of equal importance to the States and the Commonwealth. While the constitutional sphere of the judicature of the States must be secured from encroachment, it cannot be left to the judicial power of the States to determine either the ambit of federal power or the extent of the residuary power of the States. The powers of the federal judicature must therefore be at once paramount and limited. The organs to which federal judicial power may be entrusted must be defined, the manner in which they may be constituted must be prescribed and the content of their jurisdiction ascertained. These very general considerations explain the provisions of Chap. III of the Constitution which is entitled " The Judicature " and consists of ten sections. It begins with s. 71 which says 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 courts as the Parliament creates or it invests with federal jurisdiction. There is not in s. 51, as there is in the enumeration of legislative powers in Art. I, s. 8, of the American Constitution, an express power to constitute tribunals inferior to the Federal Supreme Court. No doubt it was thought unnecessary by the framers of the Australian Constitution who adopted so definitely the general pattern of Art. III but in their variations and departures from its detailed provisions evidenced a discriminating appreciation of American experience. On the other hand, the autochthonous expedient of conferring federal jurisdiction on State courts required a specific legislative power and that is conferred by s. 77 (iii.). What constitutes judicial power is not stated. But the subject matter of its exercise is defined with some particularity. Judicial power is divided between appellate and original jurisdiction. Section 73 delimits the appellate power by reference to the tribunals from whose judgments, decrees, orders and sentences an appeal is to lie. Sections 75 and 76 confine the original jurisdiction which may be exercised in virtue of the judicial power to certain matters chosen in virtue of their relation to the Constitution or to federal law or to some supposed advantage in submitting them to the national judicial power. Section 77 (i.) gives a legislative power of defining with respect to the subjects of original jurisdiction the jurisdiction of the courts which Parliament creates. Section 77 (ii.) authorizes

the legislature to say with respect to those matters how much of the jurisdiction of a federal court shall be exclusive of that exercisable by the courts of the States. Section 79 gives to the Parliament a power to prescribe the number of judges by whom the federal jurisdiction of a court may be exercised. Section 78 has reference to matters in which the Commonwealth is a party and matters between States or between a State and a resident of another State. They are of course matters which fall within the original jurisdiction that is conferred upon the High Court and may be conferred on other courts. Section 74 concerns appeals to the Privy Council. Section 80 is an attempt, very unsuccessful it has proved, to adopt or adapt portion of the American provision in Art. III, ss. 2 and 3. Section 72 secures the tenure and remuneration of the judges and prescribes the mode of appointment.

Among the legislative powers enumerated in s. 51, par. (xxxix.) alone mentions the judicature. It takes the powers vested by the Constitution respectively in the three branches of government, that is to say by s. 1, by s. 61 and by s. 71, and gives a power to make laws with respect to matters incidental to the execution of these various powers, and adds, apparently for the purposes of such provisions as ss. 64 and 69, a reference to the powers vested in any department or officer of the Commonwealth.

Had there been no Chap. III in the Constitution it may be supposed that 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. This could hardly have been otherwise with the powers in respect of bankruptcy and insolvency (s. 51 (xvii.)) and with respect to divorce and matrimonial causes (s. 51 (xxii.)). The legislature would then have been under no limitations as to the tribunals to be set up or the tenure of the judicial officers by whom they might be constituted. But the existence in the Constitution of Chap. III and the nature of the provisions it contains make it clear that no resort can be made to judicial power except under or in conformity with ss. 71-80. An exercise of a legislative power may be such that "matters" fit for the judicial process may arise under the law that is made. In virtue of that character, that is to say because they are matters arising under a law of the Commonwealth, they belong to federal judicial power. But they can be dealt with in federal jurisdiction only as the result of a law made in the exercise of the power conferred on the Parliament by s. 76 (ii.) or that provision considered with s. 71 and s. 77. Section 51 (xxxix.) extends to furnishing

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courts with authorities incidental to the performance of the functions derived under or from Chap. III and no doubt to dealing in other ways with matters incidental to the execution of the powers given by the Constitution to the federal judicature. But, except for this, when an exercise of legislative powers is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chap. III. For that reason it is beyond the competence of the Parliament to invest with any part of the judicial power any body or person except a court created pursuant to s. 71 and constituted in accordance with s. 72 or a court brought into existence by a State. It is a proposition which has been repeatedly affirmed and acted upon by this Court: see *New South Wales* v. *The Commonwealth* (1); *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (2); *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (3); *Silk Bros. Pty. Ltd.* v. *State Electricity Commission (Vict.)* (4); *Reg.* v. *Davison* (5). Indeed to study Chap. III is to see at once that it is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested. It is true that it is expressed in the affirmative but its very nature puts out of question the possibility that the legislature may be at liberty to turn away from Chap. III to any other source of power when it makes a law giving judicial power exercisable within the Federal Commonwealth of Australia. No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap. III. The fact that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise was noted very early in the development of the principles of interpretation: (6). In Chap. III we have a notable but very evident example.

The first contention made in support of the writ of prohibition is that Chap. III contemplates the creation of courts which will exist for the exercise of some part of the judicial power and it does not authorize the bestowal of judicial power upon some body the purpose of whose being is not the exercise of federal jurisdiction in the sense of the Constitution notwithstanding that the body is given the character of a court and that the persons who compose it are appointed and secured in their offices in the manner prescribed by s. 72. It would not, for example, be within the legislative power of the Commonwealth to constitute the Comptroller or a Collector

(1) (1915) 20 C.L.R. 54, at pp. 62, 89, 90, 108, 109.
(2) (1918) 25 C.L.R. 434.
(3) (1925) 35 C.L.R. 422.
(4) (1943) 67 C.L.R. 1.
(5) (1954) 90 C.L.R. 353.
(6) 1 Plow. 113 [75 E.R. 176].

of Customs a court, providing him with the security of tenure and remuneration prescribed by s. 72, and to confer upon him judicial power to determine matters arising under the Act he administers. Nor could the like be done with the Commissioner of Taxation or the Director of Navigation. Had it been allowable under the Constitution to give the members of the Inter-State Commission a life appointment, nevertheless the commission could not on this view have been constituted a court and armed with judicial power: for its dominant functions would still have been those described by s. 101, viz. the execution and maintenance of the provisions of the Constitution relating to trade and commerce and laws made thereunder. What *Isaacs* J. said in *New South Wales* v. *The Commonwealth* (1) with reference to this description of its functions would have remained true: "Those words denote the purpose and nature of the power to be conferred, and mark their limit. Courts do not execute or maintain laws relating to trade and commerce. Those words imply a duty to actively watch the observance of those laws, to insist on obedience to their mandates, and to take steps to vindicate them if need be. But a Court has no such active duty: its essential feature as an impartial tribunal would be gone, and the manifest aim and object of the constitutional separation of powers would be frustrated. A result so violently opposed to the fundamental structure and scheme of the Constitution requires, as I have before observed, extremely plain and unequivocal language" (2). Therefore, if the argument be right, the decision in that case must have been the same, even without the fatal deficiency of tenure found in s. 103 (ii.).

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 part of the national judicature some non-judicial powers that are not ancillary but are directed to a non-judicial purpose. But if the latter cannot be done clearly the former must be then completely out of the question.

A number of considerations exist which point very definitely to the conclusion that the Constitution does not allow the use of courts established by or under Chap. III for the discharge of functions which are not in themselves part of the judicial power and are not

(1) (1915) 20 C.L.R. 54.

(2) (1915) 20 C.L.R., at p. 93.

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auxiliary or incidental thereto. First among them stands the very text of the Constitution. If attention is confined to Chap. III it would be difficult to believe that the careful provisions for the creation of a federal judicature as the institution of government to exercise judicial power and the precise specification of the content or subject matter of that power were compatible with the exercise by that institution of other powers. The absurdity is manifest of supposing that the legislative powers conferred by s. 51 or elsewhere enabled the Parliament to confer original jurisdiction not covered by ss. 75 and 76. It is even less possible to believe that for the Federal Commonwealth of Australia an appellate power could be created or conferred that fell outside s. 73 aided possibly by s. 77 (ii.) and (iii.). As to the appellate power over State courts it has recently been said in this Court: "On the face of the provisions they amount to an express statement of the Federal legislative and judicial powers affecting State courts which, with the addition of the ancillary power contained in s. 51 (xxxix.), one would take to be exhaustive": *Collins* v. *Charles Marshall Pty. Ltd.* (1). To one instructed only by a reading of Chap. III and an understanding of the reasons inspiring the careful limitations which exist upon the judicial authority exercisable in the Federal Commonwealth of Australia by the federal judicature brought into existence for the purpose, it must seem entirely incongruous if nevertheless there may be conferred or imposed upon the same judicature authorities or responsibilities of a description wholly unconnected with judicial power. It would seem a matter of course to treat the affirmative provisions stating the character and judicial powers of the federal judicature as exhaustive. What reason could there be in treating it as an exhaustive statement, not of the powers, but only of the judicial power that may be exercised by the judicature? It hardly seems a reasonable hypothesis that in respect of the very kind of power that the judicature was designed to exercise its functions were carefully limited but as to the exercise of functions foreign to the character and purpose of the judicature it was meant to leave the matter at large. Unfortunately, as perhaps it has turned out to be, the joint judgment delivered in *In re Judiciary and Navigation Acts* (2), by the majority of the Court, distinguished between the two conclusions. The joint judgment which took this course was that of *Knox* C.J., *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ. The legislation the validity of which was in question, viz. Pt. XII of the *Judiciary Act* 1903-1920, purported to give this Court jurisdiction to hear and determine any question of law as to the validity

(1) (1955) 92 C.L.R. 529, at p. 543. (2) (1921) 29 C.L.R. 257.

of a federal law which the Governor-General might refer for hearing and determination and to make the determination final and conclusive and subject to no appeal. The learned judges treated it as an attempt to confer judicial power but judicial power which fell outside Chap. III of the Constitution. Their Honours appear in effect to have regarded it as a provision seeking to impose upon this Court a duty to pronounce a judgment *in rem* on the abstract question of the constitutional validity of federal legislation. Their Honours do not use the expression "*in rem*" but "authoritative declaration". It is possible that no more is meant than authoritative precedent, which seems to have been the understanding of *Higgins* J. However that may be, if it was anything it was original jurisdiction and, as there was no "matter" within s. 76 made the subject of jurisdiction, it was outside the power to confer original jurisdiction. On the view that it was a kind of judicial power, it was enough to decide that the provision was an invalid attempt to enlarge the judicial power of the Commonwealth. The joint judgment contains these passages which sufficiently explain the position adopted in the joint judgment: "After carefully considering the provisions of Part XII, we have come to the conclusion that Parliament desired to obtain from this Court, not merely an opinion, but an authoritative declaration of the law. To make such a declaration is clearly a judicial function, and such a function is not competent to this Court unless its exercise is an exercise of part of the judicial power of the Commonwealth. If this be so, it is not within our province in this case to inquire whether Parliament can impose on this Court, or on its members, any, and if so what, duties other than judicial duties, and we refrain from expressing any opinion on that question. What, then, are the limits of the judicial power of the Commonwealth? The Constitution of the Commonwealth is based upon a separation of the functions of government, and the powers which it confers are divided into three classes—legislative, executive and judicial (*New South Wales* v. *The Commonwealth* (1)). In each case the Constitution first grants the power and then delimits the scope of its operation (*Alexander's Case* (2)). . . This express statement (scil. in ss. 75 and 76) of the matters in respect of which and the Courts by which the judicial power of the Commonwealth may be exercised is, we think, clearly intended as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction. The question then is narrowed to this: Is authority to be found

(1) (1915) 20 C.L.R. 54, at p. 88.

(2) (1918) 25 C.L.R. 434, at p. 441.

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under sec. 76 of the Constitution for the enactment of Part XII of the *Judiciary Act*?" (1).

The question thus propounded was answered by the learned judges in the negative.

Given a court which satisfies s. 71 and s. 72, the line is by no means broad or easily discerned between judicial power, not being of an appellate nature, which under s. 76 and s. 77 the Parliament may confer upon it and the judicial power which, had there been no implication from Chap. III restricting the meaning or operation of s. 51, a legislative power contained in that section might have enabled the Parliament to confer. Inasmuch as s. 76 (ii.) extends to all matters arising under any laws made by the Parliament, there could hardly be much difference so long as it is all within the conception of judicial power. So far as a difference exists it would seem to depend upon the word "matter" and upon some failure on the part of the Parliament to confine the jurisdiction it attempts to confer to some "matter" or "matters". But such a failure will usually mean either that the power it is sought to confer is not judicial or that it is so wide that it goes outside the subjects of federal power. Perhaps it will be enough by way of illustration to mention the unsuccessful argument in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Barrett*; *Barrett* v. *Opitz* (2), and the grounds for rejecting it (3). There is in truth much to be said for the view that the function which the legislation, held invalid in *In re Judiciary and Navigation Acts* (4), attempted to confer was either not judicial or not only outside Chap. III but outside all affirmative legislative powers. If the legislation meant no more than that the Court was to give an opinion which would be treated as an authoritative precedent, that does not seem to amount to judicial power. If it meant that the Court was to pronounce a judgment on a question of constitutional validity legally concluding everybody, so that no one thereafter might resort to the Constitution as the test of competence but must be governed by the determination of the Court exclusively, then it may well be doubted whether s. 51 (xxxix.) or any other legislative power could support such a measure.

With reference to the federal judicature, the true contrast in federal powers is not between judicial power lying within Chap. III and judicial power lying outside Chap. III. That is tenuous and unreal. It is between judicial power within Chap. III and

(1) (1921) 29 C.L.R. 257, at pp. 264, 265.
(2) (1945) 70 C.L.R. 141, at p. 145.
(3) (1945) 70 C.L.R., at pp. 154, 165-169, 172, 173.
(4) (1921) 29 C.L.R. 257.

other powers. To turn to the provisions of the Constitution dealing with those other powers surely must be to find confirmation for the view that no functions but judicial may be reposed in the judicature. If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inferences from Chaps. I, II and III and the form and contents of ss. 1, 61 and 71. It would be difficult to treat it as a mere draftsman's arrangement. Section 1 positively vests the legislative power of the Commonwealth in the Parliament of the Commonwealth. Then s. 61, in exactly the same form, vests the executive power of the Commonwealth in the Crown. They are the counterparts of s. 71 which in the same way vests the judicial power of the Commonwealth in this Court, the federal courts the Parliament may create and the State courts it may invest with federal jurisdiction. This cannot all be treated as meaningless and of no legal consequence.

Probably the most striking achievement of the framers of the Australian instrument of government was the successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism. This meant that the distinction was perceived between the essential federal conception of a legal distribution of governmental powers among the parts of the system and what was accidental to federalism, though essential to British political conceptions of our time, namely the structure or composition of the legislative and executive arms of government and their mutual relations. The fact that responsible government is the central feature of the Australian constitutional system makes it correct enough to say that we have not adopted the American theory of the separation of powers. For the American theory involves the Presidential and Congressional system in which the executive is independent of Congress and office in the former is inconsistent with membership of the latter. But that is a matter of the relation between the two organs of government and the political operation of the institution. It does not affect legal powers. It was open no doubt to the framers of the Commonwealth Constitution to decide that a distribution of powers between the executive and legislature could safely be dispensed with, once they rejected the system of the independence of the executive. But it is only too evident from the text of the Constitution that that was not their decision. In any case the separation of the

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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. This would be enough in itself, were there no other reasons, to account for the fact that the Australian Constitution was framed so as closely to correspond with its American model in the classical division of powers between the three organs of government, the legislature, the executive and the judicature. But, whether it was necessary or not, it could hardly be clearer on the face of the Constitution that it was done. The fundamental principle upon which federalism proceeds is the allocation of the powers of government. In the United States no doubts seem to have existed that the principle should be applied not only between the federal Government and the States but also among the organs of the national Government itself.

It is not necessary to trace the course of constitutional development in the United States with respect to the separation of powers. It is enough to say that an unfortunate rigidity in the conception of the boundaries between the three great functions of government led for a time to difficulties both of practice and of theory and that the practical expedients by which the difficulties have been met have left the constitutional theorists somewhat at a loss in reconciling them with *a priori* principle. It is, however, a broad division of power and the division, although it was taken immediately from an American original, is a division of powers whose character is determined according to traditional British conceptions: see *Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1). So understood difficulties as between executive and legislative power are not to be expected and none has arisen. It is in connection with judicial power that questions are apt to occur. But it is hardly consistent with the form and contents of Chaps. I, II and III to assign no legal consequence to the division. That was the contemporary view of at least two writers entitled to speak with authority. Mr. Justice *Inglis Clark* in his *Studies in Australian Constitutional Law*, 2nd ed. (1905), at p. 28, deals with the matter. His understanding appears from the following passages: "The Constitution of the Commonwealth expressly and distinctly distributes between the Parliament of the Commonwealth, the Crown, and the Federal Judiciary together with such courts of the States as

(1) (1931) 46 C.L.R. 73, particularly at pp. 101, 102.

shall be invested with federal jurisdiction, the legislative, the executive and the judicial powers exercisable under its authority. A similar distribution of legislative, executive and judicial powers is made by the Constitution of the United States of America. But within the limits of the British Empire it is only in the Constitution of the Commonwealth of Australia that such a distribution of governmental function is made by a written organic law." Having dealt with the separation of functions secured in practice in Great Britain he wrote: "Therefore the distribution of governmental functions which is made by the Constitution of the Commonwealth of Australia is not an innovation upon British constitutional practice; but the provisions of the Constitution of the Commonwealth which distributively and categorically vest the legislative, the executive, and the judicial powers in three separate organs of government, impose upon the legislative authority of the Parliament of the Commonwealth a legal limitation which does not exist in regard to the Parliament of any other portion of the British Empire." (p. 31). Sir *William Harrison Moore*, in his *The Constitution of the Commonwealth of Australia*, 2nd ed. (1910), begins his discussion (p. 93) by observing: "The Constitution follows the plan of the United States Constitution in committing the functions of government—legislative, executive, and judicial—to three separate departments." Having stated the provisions of ss. 1, 51, 61 and 71, he writes (p. 94): "The allotment of functions by the Constitution is thus not merely an allotment between State and Commonwealth; it is also an allotment amongst the organs of the Commonwealth Government." He concludes (p. 96): "In the case of the Commonwealth Parliament it is impossible to avoid the conclusion that the separation of powers was intended to establish legal limitations on the powers of the organs of government, and that the Courts are required to address themselves to the problem of defining the functions of those organs."

Strong judicial confirmation for these views is to be found in *New South Wales* v. *The Commonwealth* (1). The question was whether the Inter-State Commission established under s. 101 of the Constitution and consisting of members holding office on the tenure prescribed by s. 103 might be created a court and given judicial powers. *Isaacs* J. said: "When the fundamental principle of the separation of powers as marked out in the Australian Constitution is observed and borne in mind, it relieves the question of much of its obscurity" (2). His Honour then refers to it as "the dominant principle of demarcation" (3). When this dominant principle is applied to

(1) (1915) 20 C.L.R. 54.
(2) (1915) 20 C.L.R., at p. 88
(3) (1915) 20 C.L.R., at p. 90.

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Chap. III it confirms the inference to which its terms, independently considered, give rise, namely that courts established by or under its provisions have for their exclusive purpose the performance of judicial functions and that it is not within the legislative power to impose or confer upon them duties or authorities of another order.

The judicial power, like all other constitutional powers, extends to every authority or capacity which is necessary or proper to render it effective. The judicial power of which s. 71 speaks is not to be defined or limited in any narrow or pedantic manner. With respect to the matters comprised within ss. 76, 77, 78 and 79, it rests with the Parliament to make laws affecting its content or exercise. Legislative powers too are involved in some of the provisions of ss. 71, 72, 73 and 74. And it must not be forgotten that s. 51 (xxxix.) expressly empowers the Parliament to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the federal judicature. What belongs to the judicial power or is incidental or ancillary to it cannot be determined except by ascertaining if it has a sufficient relation to the principal or judicial function or purpose to which it may be thought to be accessory. On more than one occasion of late attempts have been made in judgments in this Court to make it clear that a function which, considered independently, might seem of its own nature to belong to another division of power, yet, in the place it takes in connection with the judicature, falls within the judicial power or what is incidental to it: see *Queen Victoria Memorial Hospital* v. *Thornton* (1); *Reg.* v. *Davison* (2). There are not a few subjects which may be dealt with administratively or submitted to the judicial power without offending against any constitutional precept arising from Chap. III. It may be too that the manner in which they have been traditionally treated or in which the legislature deals with them in the particular case will be decisive: see *Davison's Case* (3).

The point might be elaborated and many illustrations, particularly from the bankruptcy jurisdiction, might be given. But enough has been said to show how absurd it is to speak as if the division of powers meant that the three organs of government were invested with separate powers which in all respects were mutually exclusive. The true position has been well stated in a brief paragraph by Professor *Willougby* in his *Constitutional Law of the United States*,

(1) (1953) 87 C.L.R. 144, at p. 151.
(2) (1954) 90 C.L.R. 353, at pp. 366-370.
(3) (1954) 90 C.L.R. 353, at pp. 369, 370, 376-378, 382-384, 388, 389.

2nd ed. (1929), pp. 1619, 1620, § 1062: "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 distinctly legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested." This principle and the conceptions of English law and tradition and British constitutional practice may explain what to some has appeared a contradiction of the view that the distribution of powers possessed a legal significance. That is to say it may explain the fact that it is the settled constitutional doctrine of the Commonwealth that the legislature, by a law otherwise within its competence, may empower the executive Government to make statutory rules and orders possessing the binding force of law. The war is too recent to make it necessary to refer to the immense use of the power conferred by the *National Security Act* 1939-1940. The foundation of the doctrine as well as the course of authority by which it was established were examined in *Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1). *Gavan Duffy* C.J. and *Starke* J. said: "It does not follow that, because the Constitution does not permit the judicial power of the Commonwealth to be vested in any tribunal other than the High Court and other Federal Courts, therefore the granting or conferring of regulative powers upon bodies other than Parliament itself is prohibited. Legislative power is very different in character from judicial power: the general authority of the Parliament of the Commonwealth to

(1) (1931) 46 C.L.R. 73, at pp. 84, 86, 87, 89-102, 116, 117.

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make laws upon specific subjects at discretion bears no resemblance to the judicial power" (1). An explanation that was ventured in that case was found in the nature of the power which the division prevents the legislature handing over. "It may be acknowledged that the manner in which the Constitution accomplished the separation of powers does logically or theoretically make the Parliament the exclusive repository of the legislative power of the Commonwealth. The existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law. In English law much weight has been given to the dependence of subordinate legislation for its efficacy, not only on the enactment, but upon the continuing operation of the statute by which it is so authorized. The statute is conceived to be the source of obligation and the expression of the continuing will of the Legislature. Minor consequences of such a doctrine are found in the rule that offences against subordinate regulation are offences against the statute (*Willingale* v. *Norris* (2)) and the rule that upon the repeal of the statute, the regulation fails (*Watson* v. *Winch* (3)). Major consequences are suggested by the emphasis laid in *Powell's Case* (4) and in *Hodge's Case* (5) upon the retention by the Legislature of the whole of its power of control and of its capacity to take the matter back into its own hands. After the long history of parliamentary delegation in Britain and the British colonies, it may be right to treat subordinate legislation which remains under parliamentary control as lacking the independent and unqualified authority which is an attribute of true legislative power, at any rate when there has been an attempt to confer any very general legislative capacity" (6). *Rich* J. concurred in the judgment (7). *Evatt* J., however, expressed a view that is opposed to the conclusion reached in this judgment and he specifically referred to the Arbitration Court (8).

Perhaps the most serious difficulty in the case arises from dicta of a like tendency which have fallen from other judges in the Court or on other occasions and from the great length of time which has elapsed since it first became possible for a litigant to raise the contention upon which the Boilermakers' Society now relies. But it is desirable to postpone that difficulty for separate consideration.

(1) (1931) 46 C.L.R., at p. 84.
(2) (1909) 1 K.B. 57, at p. 66.
(3) (1916) 1 K.B. 688.
(4) (1885) 10 App. Cas. 282, at p. 291.
(5) (1883) 9 App. Cas. 117, at p. 132.
(6) (1931) 46 C.L.R., at pp. 101, 102.
(7) (1931) 46 C.L.R., at pp. 86, 87.
(8) (1931) 46 C.L.R., at pp. 116, 117.

One point, however, should be mentioned here which is the subject of decision. When in *Alexander's Case* (1) it was decided by a majority of the Court that no part of the judicial power of the Commonwealth could be exercised by the Arbitration Court as then constituted, it was held that there was no objection to the exercise of the functions of industrial conciliation. The President forming the Arbitration Court was a judge of this Court and it is said that it was therefore impliedly decided that it was competent for the legislature to combine the duties of an industrial arbitrator with the duty of exercising the judicial power. The Act established a separate office of President of the Arbitration Court and to that office the judge had accepted an appointment. It is true that the qualification prescribed by the statute for the office of President was that he should be a judge of this Court. All that seems to have been involved is that the office of President was not incompatible with the exercise of his duties as a judge, which duties it may be observed in some respects at least arose under the Constitution. It was not a matter that was investigated or considered. It was simply assumed. No doubt no actual inconsistency had been experienced. But whether the view impliedly adopted can or cannot be sustained, it is quite a different situation from that now presented. One thing that *Alexander's Case* (1) did decide once and for all is that the function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order. Upon that subject *Isaacs* and *Rich* JJ. said of it: "That is essentially different from the judicial power. Both of them rest for their ultimate validity and efficacy on the legislative power. Both presuppose a dispute, and a hearing or investigation, and a decision. But the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other" (2). After describing the nature of the powers and duty of the industrial arbitrator and of the source of the binding force his determination possesses, *Isaacs* and *Rich* JJ. proceeded: "The two functions therefore 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

(1) (1918) 25 C.L.R. 434.

(2) (1918) 25 C.L.R., at p. 463.

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ascertains whether the alleged right or duty exists in law, and, if it binds 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 sec. 51 (xxxv.); the judicial power under sec. 71. The latter section contains, in the words 'such other Federal Courts as the Parliament creates,' the implied grant of power to create Courts other than the High Court. There is no other grant of that power in the Constitution—except as to territories (sec. 122). The two powers being distinct and separate in nature and origin, it follows that, when an award is once made, the dispute is settled and the arbitral function is at an end. Variation of the award is, of course, an act of the same nature. And when the award is made and the right established, the law presumes the parties will obey it. Enforcement by a Court is an entirely separate matter. It arises on breach or threatened breach. But that is the case with every right. A right of property or a contractual right may exist, and, if violated, the law provides for its enforcement. But breach is not presumed. It follows that enforcement is in its nature an entirely separate process from the creation of the right" (1).

When the Court of Conciliation and Arbitration was first established by Act No. 13 of 1904, which was described in its long title as an Act relating to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State, few powers were given to the Court which necessarily formed part of the judicial power of the Commonwealth. The chief objects of the Act were expressly stated under seven headings in s. 2. They concerned the prevention of strikes and lockouts, the establishment of an Arbitration Court "having jurisdiction for the prevention and settlement of industrial disputes", the providing for conciliation and in default for settlement by award, the organization of representative bodies of employers and employees and the making and enforcement of industrial agreements. The objects set out did not refer to the enforcement of awards or any other judicial process. Section 11 enacted that there should be a Commonwealth Court of Conciliation and Arbitration which should be a court of record and should consist of a President. The President was to be appointed from among the Justices of the High Court and hold office for seven years: s. 12. The jurisdiction and powers with which the court and the President were armed were, with the exceptions to be mentioned, altogether concerned with the functions of industrial arbitration and conciliation. With

(1) (1918) 25 C.L.R., at pp. 464, 465.

powers and authorities of this description the court was very fully equipped. The Act included a number of provisions creating specific offences. Thus strikes and lockouts and certain analogous acts were penalized: ss. 6-10. Obstructing the court (s. 42), insulting and disturbing the court and like action (s. 82), wilfully making default in compliance with an award (s. 49), refusal and failure to give evidence (s. 84), certain disclosures of evidence and evidentiary information (ss. 85 and 86), all these were made offences. But all offences were punishable in the ordinary way by summary proceedings before courts exercising federal jurisdiction: see *Acts Interpretation Act* 1904, ss. 3, 5 and 6. The provisions which did assume to confer authority on the Arbitration Court which either must or might form part of the judicial power of the Commonwealth include a power to impose penalties for breach or non-observance of orders or awards proved to the satisfaction of the Arbitration Court to have been committed: s. 38 (*d*). The same jurisdiction exactly is conferred on courts of summary jurisdiction (s. 44) and, of course, it is plainly judicial power.

As the Act was amended up to the time of *Alexander's Case* (1)—in that condition it is reprinted in *Commonwealth Acts*, vol. 13, App. A, p. 205—there were three other provisions which may be regarded as involving judicial power, viz. pars. (*da*) and (*e*) of s. 38 and s. 48. Paragraph (*da*) corresponds with the present s. 29 (*b*) and par. (*e*) with the present s. 29 (*c*). Section 48 provided that the Arbitration Court might, on the application of a party to an award, make an order in the nature of a mandamus or injunction to compel compliance with an award or restrain its breach under pain of fine or imprisonment. A contravention of the award after written notice of such an order was then made an offence punishable by fine or imprisonment.

How far the policy or principle of these provisions can be carried into effect under s. 51 (xxxv.) without invoking Chap. III may be worthy of consideration, but the provisions as they stood, so it was claimed in *Alexander's Case* (1) gave a judicial character to the power. One further power has apparently been assumed to be judicial. It is the power which the President derived from s. 17 to review, annul, rescind or vary any act or decision of the Industrial Registrar. In *Jumbunna Coal Mine N.L.* v. *Victorian Coal Miners' Association* (2) this Court without giving reasons overruled an objection to the competence of an appeal from a decision given by the President under s. 17. If, as seems to be the case, this implies an assumption that s. 17 involved judicial power and that

(1) (1918) 25 C.L.R. 434.

(2) (1908) 6 C.L.R. 309, at p. 324.

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the President was a court within s. 73 (ii.) of the Constitution, these are propositions which would not now be likely to find any support. *Alexander's Case* (1) was decided upon a case stated which asked categorical but rather general questions. The result of the answers was in effect that the seven years' tenure of the President meant that the powers of his court to enforce awards were invalid but his powers to arbitrate and make awards were valid. At that time s. 15A of the *Acts Interpretation Act* 1901-1950 had not been enacted and there was no " severability clause ". But *Isaacs*, *Rich* and *Powers* JJ. considered that the primary and dominating object in establishing the court had been industrial conciliation and arbitration and that the main provisions of the Act were not dependent on the provisions giving powers of enforcement to the court, and that the latter formed no condition of the operation of the other provisions and were not compensatory or otherwise essential to them. *Barton* J. went further than these judges and held the Act totally invalid. These learned judges appear to have regarded the Arbitration Court as a body whose creation, form, constitution and status were referable to s. 51 (xxxv.). They did not ascribe to the legislature any purpose of exercising the legislative power contained in s. 71. The failure of the provisions for the president's tenure to comply with s. 72 on the footing that the tenure prescribed by that section was for life was used by their Honours as a ground for supposing that no intention to rely on s. 71 existed. It is to be noted, however, that *Higgins* and *Gavan Duffy* JJ. interpreted s. 72 as allowing an appointment for a period less than life but forbidding the termination of the appointment (except on the grounds the section mentions) before the period expires, and *Griffith* C.J. considered that the fact that the President held his office as a judge of this Court for life, was sufficient compliance with s. 72. No reason therefore existed for imputing to the legislature an understanding that under s. 72 the President must be appointed for life, if the court was to be established under s. 71, and without that the failure to provide such a tenure can throw no light on the actual intention of the draftsman to rely or not to rely on s. 71.

After *Alexander's Case* (1) the Act was amended for the evident purpose of removing to courts exercising the judicial power that jurisdiction to enforce the Act or awards which the invalid provisions had sought to confer on the Arbitration Court. By Act No. 39 of 1918 amendments were made which had the effect of transferring from the Arbitration Court to a District, County or

(1) (1918) 25 C.L.R. 434.

Local Court or Court of summary jurisdiction the power given by s. 44 to impose penalties for a breach or non-observance of an award and from the Arbitration Court to a District, County or Local Court the power given by s. 48 to make an order in the nature of a mandamus or injunction to compel compliance with an award or to restrain its breach under pain of fine or imprisonment. Act No. 31 of 1920 added the High Court or a justice thereof to the courts mentioned in s. 48 and extended the section to include contraventions of the Act as well as awards. The High Court acted more than once on the provision so amended while it was in force, which no doubt implies that it involved judicial power: see *Waddell* v. *Australian Workers' Union* (1): *Whittaker Bros.* v. *Australian Timber Workers' Union* (2); *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australia* (3). Strange as it may seem, neither pars. (*d*), (*da*) nor (*e*) of s. 38 were amended or repealed. Possibly it was thought that pars. (*da*) and (*e*) might stand and that the judgments made it clear enough that par. (*d*) was void.

After nearly eight years had elapsed, during which the Arbitration Court had exercised its industrial powers under the law resulting from *Alexander's Case* (4) and the amendments that immediately followed that case, the legislature passed provisions for the reconstitution of the court. By Act No. 22 of 1926 the office of President was abolished. Section 11 was amended so as to read that the court it established should consist not of a President but of a Chief Judge and such other judges as should be appointed. New provisions were substituted for ss. 12 and 14 giving the judges a tenure which complied with s. 72 and fixed a remuneration. In s. 44 and s. 48 the Arbitration Court was added to the other courts therein named. Throughout the Act where the President was mentioned "Chief Judge" or, as the case might be, "judge" was substituted. It was the same court; a new court was not created but the composition of the old one was changed. To cure the invalidity of any provisions which, had the Act been in its amended form *ab ovo*, would have been valid, s. 3 of Act No. 22 of 1926 provided that the Act as amended should be construed as if from the commencement of No. 22 it were confirmed and re-enacted to the intent that any provision that would otherwise have been construed as in excess of legislative power should from the commencement of No. 22 be read with and deemed to be enacted in relation to that Act. This provision does not create a new and

(1) (1922) 30 C.L.R. 570.
(2) (1922) 31 C.L.R. 564.
(3) (1925) 35 C.L.R. 462.
(4) (1918) 25 C.L.R. 434.

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different court, if that matters, and it is difficult to see in what respect the section can affect the question. Plainly the Arbitration Court remained a tribunal established and equipped primarily and predominantly for the work of industrial conciliation and arbitration. Thus the attempt to restore the Arbitration Court to a place in the enforcement provisions contained in ss. 44, 48, and no doubt s. 38 (*d*), (*da*) and (*e*), assumed that it was constitutionally possible to treat the possession of judicial power as something necessary or proper for the effectuation of functions of an altogether different order and on the footing of its being incidental to the main function to annex part of the judicial power to other powers. If this could not be validly done under the Constitution, either because of the dominant purpose and character of the tribunal or because a court established under Chap. III cannot exercise dual functions, then the attempt must be held to fail. Its failure could result only in its being held for a second time that such provisions as seek to attach to the arbitral powers powers of judicial enforcement are invalid. It could not result in the invalidity of the entire Act or the arbitral provisions of the Act. That would run counter to the whole intention of the legislature. Whether in 1918 it was *Barton* J. who was right or it was *Isaacs*, *Powers* and *Rich* JJ., once s. 15A of the *Acts Interpretation Act* came into force there could be no doubt of the severance.

By Act No. 43 of 1930 the provisions penalizing strikes, lockouts and analogous acts were repealed and at the same time s. 48 was repealed. This Act provided for the appointment of three Conciliation Commissioners who were to have certain of the powers of the court including that of making awards, but subject to appeal to the court. When in 1947 by Act No. 10 of that year the system of Conciliation Commissioners was strengthened and their jurisdiction enlarged, the provisions dealing with those officers and with the court were repealed and re-enacted in a form giving effect to the changes. Those dealing with the constitution and composition of the court were not altered except for some paragraphing and the alteration of "court of record" to "superior court of record". But because of the course taken it was thought necessary to include a provision, s. 4 of No. 10 of 1947, that notwithstanding the repeal of the Part containing those sections the Commonwealth Court of Conciliation and Arbitration existing immediately prior to the commencement of the Act should not cease to exist but should continue as the court referred to in the principal Act as amended. It is therefore the same court from beginning to end, if that is a relevant consideration. Act No. 10 of 1947 directed that the

sections of the principal Act as amended by that Act should be renumbered and it is convenient to refer to the provisions by the numbers by which they are now known and to deal with the Act as it is amended up to and including Act No. 54 of 1955. By s. 25 the court is empowered for the purpose of settling industrial disputes to make awards on the basal matters which the provision enumerates. The Conciliation Commissioners make awards on all else: ss. 13, 14 and 38. But a commissioner may refer an industrial dispute or a matter in dispute to the court with the concurrence of the Chief Judge or a judge appointed by him to deal with the matter, and if the commissioner refuses to do so the Chief Judge or the judge so appointed may on appeal to him refer the dispute or matter to the court if he thinks that it is of such importance that in the public interest it should be dealt with by the Arbitration Court: see ss. 14A and 14B. These provisions are enough to show that while the powers and functions of the Conciliation Commissioners were increased the responsibility of the Arbitration Court was not lessened as the supreme authority in the settlement of industrial disputes. The arbitral and industrial functions of the court have indeed been extended in not a few directions but it would be tedious to go through the provisions of the Act of an arbitral or industrial character. It is better to mention the provisions which either are or may be thought to be capable of reference only to the judicial power of the Commonwealth. Conspicuous among these are s. 119, s. 29 (1) (*a*) and s. 29A. These plainly confer jurisdictions which belong to judicial power. Section 29A is not directed to what, in the language used in *Barton* v. *Taylor* (1), may be called the protective and self-defensive powers of the Arbitration Court. It is punitive. Section 119 is an ill-framed attempt to vest summary jurisdiction over offences. Paragraph (*a*) of s. 29 (1) is but a version of s. 38 (*d*) of the Act of 1904-1946 empowering the court to impose penalties for breach or non-observance of an order or award. Section 29A gives power to punish for contempts of all descriptions. These provisions plainly must rest upon Chap. III. Section 59, which was formerly s. 44, includes the Arbitration Court among other courts which it mentions and gives them severally jurisdiction to impose penalties for breach or non-observance of an order or award. This provision is in the same category. It is to be noticed that the invalidity of such provisions affects the operation, according to its own terms, of s. 86. The provisions of Div. 3 of Pt. VI relating to disputed

(1) (1886) 11 App. Cas., at p. 203.

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elections in organizations seem for the most part to depend on s. 51 (xxxv.), including what is incidental to that paragraph and not to be touched by Chap. III. This may be true of much of s. 96G but sub-s. (3) (*a*) and (*b*) of that section and s. 96H, with which s. 96J is linked, may be thought to be cast in the mould of judicial power even although the same purpose may be achieved by provisions differently conceived. But that is not a matter now before us. A question not without difficulty is raised by s. 16 (2) and (3) which provide for the determination, on a reference from a commissioner, of any question of law. Possibly it may be treated as advisory and not judicial: see *Knight* v. *Tabernacle Permanent Building Society* (1). Possibly some doubt may exist whether sub-s. (6) of s. 16 is necessarily invalid as involving judicial power. Sections 13 and 25, considered independently, have been held to involve a mutually exclusive division of power between commissioners and court according to an objective standard that is imperative: see *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Ozone Theatres (Aust.) Ltd.* (2); *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineers' Union* (3). But it may be possible to base the division on the opinion of the controlling arbitral tribunal rather than upon an objective standard. Whether sub-s. (6) could be construed as doing no more than this is another matter: see *R.* v. *Galvin*; *Ex parte Metal Trades Employers' Association* (4). But again the validity of sub-s. (6) is a question that is not before us. It is needless to say too that we cannot now pass upon the characterization of sub-s. (5) of s. 83A relating to the determination of disputes as to a title to membership of an organization. But it would be unreal to treat all or any of these powers as anything more than consequential, accessory or incidental authorities annexed to the powers and functions in the performance of which the Arbitration Court finds the real or dominant purpose of its being.

The foregoing lengthy examination of the considerations governing the meaning and effect of Chap. III and of the history and nature of the legislation determining the nature, purpose and function of the Arbitration Court discloses no ground for regarding it, consistently with the provisions of the Constitution, as possible to combine in one body the arbitral powers and functions which s. 51 (xxxv.) empowers the Parliament to create and any part of the judicial power of the Commonwealth; and it discloses no ground

(1) (1892) 2 Q.B. 613.
(2) (1949) 78 C.L.R. 389, at pp. 400, 401.
(3) (1951) 82 C.L.R. 208, at p. 248.
(4) (1949) 77 C.L.R. 432, at pp. 444, 445.

for treating the Arbitration Court as a court the purpose of whose creation or existence is the exercise of judicial power of the Commonwealth. The institution was created and exists as and for an authority entrusted with the full power and functions which s. 51 (xxxv.) authorizes. It is beside the mark to ask whether the legislature would in the beginning have given it the character of the court or persevered in maintaining that character had it not desired to give the institution some judicial power. We do not know and it does not matter; for it is a question of the power of the legislature to effect the object. There is no reason why s. 51 (xxxv.) should not suffice to enable the legislature to clothe the arbitral authority with the designation and character of a court and provide a status and tenure for the arbitrators of the same description as that required by s. 72 for judges. What it could not do if the Constitution is to be applied according to the meaning which its text conveys is to exercise the power conferred by s. 71 for the creation of a court for the fulfilment of the functions and objects forming the subject of the legislative power conferred by s. 51 (xxxv.). To create such a tribunal it must rely upon s. 51 (xxxv.) because those functions are outside Chap. III. Nor would it matter if the intention of the legislature was to rely upon s. 71 and s. 77. You do not determine questions of ultra vires except by reference to the sufficiency of the powers that actually exist to support what has actually been done.

Independently, therefore, of certain considerations which it will be necessary to discuss, 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 Chap. 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.

To this interpretation of Chap. III an objection is made which rests upon the decisions given under s. 122 with respect to the appeal to this Court that has been given from the courts of Territories. It has been decided that the courts of the Territories falling under s. 122 are not governed by the judicature provisions. A trial on indictment for an offence against a law of a Territory need not be

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by jury: for s. 80 has no application. A law of the Territory is not a law of the Commonwealth within that section. It was so held in *R.* v. *Bernasconi* (1). Nevertheless by an exercise of legislative power derived from s. 122 an appeal may be given to this Court from a court of a Territory. That was decided in *Porter* v. *The King*; *Ex parte Yee* (2) by *Isaacs*, *Higgins*, *Rich* and *Starke* JJ., *Knox* C.J. and *Gavan Duffy* J. dissenting. This seems at first sight to be inconsistent with the decision in *In re Judiciary and Navigation Acts* (3) which was that the jurisdiction of the High Court, as of other federal courts when created, arises wholly under Chap. III of the Constitution. The reconciliation depends upon the view which the majority adopted that the exclusive or exhaustive character of the provisions of that chapter describing the judicature and its functions has reference only to the federal system of which the Territories do not form a part. *Isaacs* J. expressed this view as follows: "I accordingly accept the later case (*scil. In re Judiciary and Navigation Acts* (3)) as authoritatively determining that 'the judicial power of the Commonwealth', within the meaning of Chapter III., and both original and appellate, cannot be increased by Parliament. But the judicial power of the Commonwealth is, as defined by *R.* v. *Bernasconi* (1), that of the Commonwealth proper, which means the area included within States. Beyond that the decision in the later case does not apply. It follows that, if there be appropriate parliamentary enactment, this Court is competent to entertain appeals from the territorial Courts" (4). It would have been simple enough to follow the words of s. 122 and of ss. 71, 73 and 76 (ii.) and to hold that the courts and laws of a Territory were federal courts and laws made by the Parliament. As s. 80 has been interpreted there is no difficulty in avoiding trial by jury where it does apply and otherwise it would only be necessary to confer upon judges of courts of Territories the tenure required by s. 72. But an entirely different interpretation has been adopted, one which brings its own difficulties: see, for example, *Waters* v. *The Commonwealth* (5); *Federal Capital Commission* v. *Laristan Building & Investment Co. Pty. Ltd.* (6) and the comment thereon by Mr. *Ewens* (7). It is an interpretation, however, which finds support in the course adopted in the United States in relation to the analogous Art. III and Art. IV, s. 3, cl. 2. "The laws of Congress organizing the different Territories from time to time have always provided for the constitution of appropriate courts in those

(1) (1915) 19 C.L.R. 629.
(2) (1926) 37 C.L.R. 432.
(3) (1921) 29 C.L.R. 257.
(4) (1926) 37 C.L.R., at p. 441.
(5) (1951) 82 C.L.R. 188.
(6) (1929) 42 C.L.R. 582.
(7) (1951) 25 A.L.J., at pp. 537, 538.

Territories; but it is settled that these are not courts of the United States under the Constitution of the United States. They are what are called 'Congressional Courts,' established by force of the authority conferred on Congress to make all needful rules and regulations concerning the territory and other property of the United States. The judges of those courts do not hold during good behaviour; they hold for a term of years. And there are various other provisions in the acts constituting the courts, which distinguish them from the courts of the United States. Nevertheless, there is an appeal from the highest courts of the Territories to the Supreme Court of the United States."—*Curtis, Jurisdiction etc. of the Courts of the United States*, (1896) 2nd ed., p. 105. Such courts, in common with the Court of Claims and other courts possessing an analogous basis of authority, are now commonly called legislative courts rather than Congressional courts to distinguish them from the constitutional courts exercising the judicial power of the United States. In a sense it is all placed on the supreme and unrestricted power with reference to Territories, as appears from the following passage in a judgment of the Supreme Court delivered by *Fuller* C.J.: "And as wherever the United States exercise the power of government, whether under specific grant, or through the dominion and sovereignty of plenary authority as over the territories . . . that power includes the ultimate executive, legislative, and judicial power, it follows that the judicial action of all inferior courts established by Congress may in accordance with the Constitution be subjected to the appellate jurisdiction of the supreme judicial tribunal of the government"—*United States* v. *Coe* (1). The situation is described in the *Annotated Constitution of the United States* (1952), at p. 536, as a judicial paradox. Under that heading the Annotation says that in *De Groot* v. *United States* (2) the Court tacitly rejected an opinion of *Taney* C.J. prepared in the case of *Gordon* v. *United States* (3) and posthumously printed twenty years later in which the Chief Justice expressed the view that judgments of legislative courts could never be reviewed in the Supreme Court. The text proceeds that since then "the authority of the Supreme Court to exercise appellate jurisdiction over legislative courts has turned not upon the nature or status of such courts, but rather upon the nature of the proceeding before the lower court and the finality of its judgment. Consequently in proceedings before a legislative court which are judicial in nature

(1) (1894) 155 U.S. 76, at p. 86 [39 Law. Ed. 76, at p. 79].
(2) (1867) 5 Wall. 419 [18 Law Ed. 700].
(3) (1865) 2 Wall. 561 [17 Law. Ed. 921].

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and admit of a final judgment the Supreme Court may be vested with appellate jurisdiction. Thus there arises the workable anomaly that though the legislative courts can exercise no part of the judicial power of the United States and the Supreme Court can exercise only that power, the latter nonetheless can review judgments of the former." But it must not be forgotten that, in the language of *Story* J., "The appellate power is not limited by the terms of the third article to any particular courts . . . It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends"—*Martin* v. *Hunter's Lessee* (1). In this respect s. 73 of the Commonwealth Constitution differs entirely: it makes the appellate power depend upon the court or tribunal to be appealed from. What in truth has been done in Australia is to treat the negative implication arising from the enumeration by that section of such courts as confined wholly to the courts of the federal system consisting of States and Commonwealth. That is the decision in *Porter* v. *The King*; *Ex parte Yee* (2). Once this is perceived it becomes apparent that the qualification has no influence on the question in hand. For the question is concerned wholly with the federal system consisting of States and Commonwealth. Wherever else the jurisdiction of the Arbitration Court may extend it was for that field that it was established, as indeed the very words with which s. 51 (xxxv.) concludes illustrate. In the United States, both in that field and in that of sovereign power over the Territories the exclusion concerns rather the judicial or non-judicial quality of the power; what is excluded from the Supreme Court is the performance of functions which are foreign to the judicial power. "The power conferred on this court is exclusively judicial and it cannot be required or authorized to exercise any other"—*Muskrat* v. *United States* (3). In respect of this singleness of function Chap. III must surely mean that the judicature of the Commonwealth should stand in the same position.

But it is one thing to feel the great strength of the reasons for this conclusion which appear on the face of the Constitution and receive such confirmation from every admissible consideration of history of analogy and of principle. It is another thing to give effect to it by holding at this date that the enactment was invalid of s. 29A and by consequence of others too: certainly s. 29 (*a*),

(1) (1816) 1 Wheat. 304, at p. 338 [4 Law. Ed. 97, at pp. 105, 106].
(2) (1926) 37 C.L.R. 432.
(3) (1911) 219 U.S. 346, at p. 355 [55 Law. Ed. 246, at p. 249].

s. 59, so far as it includes the Arbitration Court, and s. 119. During a great length of time, indeed ever since the Act No. 22 of 1926 took effect, it has been open to any litigant affected by the exercise by the Arbitration Court of any powers of the description conferred by these provisions to attack their validity. No such attack has come before this Court. It is perhaps not hard to understand why. Section 29A was inserted only in 1951 after the decision of this Court in *R.* v. *Metal Trades Employers' Association*; *Ex parte Amalgamated Engineering Union (Australian Section)* (1). It was not until that decision that provisions such as cl. 19 (*ba*) of the Award now before us were sustained in this Court. The provisions of the Act penalizing strikes had long been removed from the Act and the punishment of breaches of other provisions of the Act and of other provisions of awards may have seemed less important. In any case they were punishable in other courts even if an objection to the jurisdiction of the Arbitration Court were made successfully by a defendant. Doubtless constitutional lawyers were not unaware of the difficulty. But for whatever reason it may have been no party raised the question and it is not the practice for the Court to raise questions of constitutional validity. The validity of the provisions was assumed. Not only was the assumption made but the character of the provisions was referred to once or twice by way of illustration on the footing that they were valid. Observations were made, particularly by *Latham* C.J. and *Starke* J., concerning the doctrine of the separation of powers tending against either its existence or its practicability or its possessing any practical significance: see per *Starke* J. in *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (2); *Johnston, Fear & Kingham and Offset Printing Co. Pty. Ltd.* v. *The Commonwealth* (3); *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (4). In the last-mentioned case *Latham* C.J. (5) in a passage too extensive to quote at length, expressed the view that there could not be said to be a strict doctrine of separation of powers, saying that the executive government and the legislature are not in Australia, as they are in the United States, kept apart. His Honour ended his observations as follows:—"Thus, in my opinion, it is not possible to rely upon any doctrine of absolute separation of powers for the purpose of establishing a universal proposition that no court or person who discharges Federal judicial functions can lawfully discharge any other function which has been entrusted to him by

(1) (1951) 82 C.L.R. 208.
(2) (1944) 69 C.L.R. 185, at p. 210.
(3) (1943) 67 C.L.R. 314, at p. 326.
(4) (1938) 59 C.L.R. 556, at p. 576.
(5) (1938) 59 C.L.R. 556, at pp. 564-566.

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statute. This proposition, however, does not involve the further proposition that any powers or duties, of any description whatsoever, may be conferred or imposed upon Federal courts or Federal judges. If a power or duty were in its nature such as to be inconsistent with the co-existence of judicial power, it might well be held that a statutory provision purporting to confer or impose such a power or duty could not stand with the creation of the judicial tribunal or the appointment of a person to act as a member of it" (1). Reliance was placed during the present argument on the actual decision of the Court in *Lowenstein's Case* (2) as amounting to an adoption of the proposition that non-judicial powers could be attached to a federal court. But this is not so. On the view which the majority of the Court took as to the role of the judge under s. 217 of the *Bankruptcy Act* 1924-1933 and the manner in which the proceedings thereunder against the bankrupt for an offence were to be carried on, there was no repugnance to the exercise of the judicial power and as there could be no doubt of the matter being incidental to a proceeding arising in bankruptcy, the provision was sustained accordingly under the incidental power. If on a recent occasion the Court had not interpreted the decision as dependent on the view taken of the operation of s. 217 rather than of constitutional principle, one may be sure that the Court would not have declined to allow the decision to be re-opened: see *Sachter* v. *Attorney-General for the Commonwealth* (3). Of the cases cited to illustrate the fact that the Court has repeatedly proceeded on the tacit assumption that a strictly judicial power was well conferred on the Arbitration Court, perhaps the most striking is *R.* v. *Taylor*; *Ex parte Roach* (4). For there an order nisi for a writ of prohibition challenging the validity of two orders finding the prosecutor in prohibition guilty of contempts and fining him was refused. The grounds upon which it was claimed that there was an excess of jurisdiction were examined and rejected and, although the question of validity now before us was not raised, it is said correctly enough that the refusal of prohibition implies in point of logic the existence in the Arbitration Court of a judicial power. But still further to emphasize the undesirability of disturbing the assumption that the Arbitration Court might exercise a part of the judicial power of the Commonwealth a number of reported cases were cited where the Court without question had accepted the assumption and proceeded accordingly. No purpose would be served by discussing them in detail. It is enough to state their nature. Five of them are cases

(1) (1938) 59 C.L.R., at pp. 566, 567.
(2) (1938) 59 C.L.R. 556.
(3) (1954) 94 C.L.R. 86.
(4) (1951) 82 C.L.R. 587.

in which during the period when for some reason the long standing prohibition of appeals from the Arbitration Court was not in operation (see *Jacka* v. *Lewis* (1)) this Court entertained appeals from orders of a judicial nature as orders made by a court within s. 73. Some five others treat the Arbitration Court in one way or another as if it was the repository of judicial power, either by refusing to prohibit orders made under s. 29 (*b*) or (*c*) or failing in some other way to take occasion to treat the Court as possessing no such jurisdiction. These cases, and perhaps other examples exist, do no doubt add to the weight of the general considerations arising from lapse of time, the neglect or avoidance of the question in previous cases and the very evident desirability of leaving undisturbed assumptions that have been accepted as to the validity of the provisions in question. At the same time, the Court is not entitled to place very great reliance upon the fact that, in cases before it where occasion might have been made to raise the question for argument and decision, this was not done by any member of the Court and that on the contrary all accepted the common assumption of the parties and decided the case accordingly. Undesirable as it is that doubtful questions of validity should go by default, the fact is that the Court usually acts upon the presumption of validity until the law is specifically challenged. Once or twice of late, however, when questions of the validity of provisions of the Act have been before it in which the confusion or combination of arbitral with judicial power appeared to be actually or potentially involved, members of the Court have felt that some caveat was called for: see *Reg.* v. *Foster*; *Ex parte Commonwealth Life (Amalgamated) Assurances Ltd.* (2); *Reg.* v. *Wright*; *Ex parte Waterside Workers' Union* (3). In *Collins* v. *Charles Marshall Pty. Ltd.* (4) it was formally raised by the Solicitor-General for Victoria but it proved unnecessary for him to argue it (see (4)).

The accumulated weight of the foregoing considerations is very great. But it is necessary to stop short of treating them as relieving this Court of its duty of proceeding according to law in giving effect to the Constitution which it is bound to enforce. It proceeds according to law in this duty when it is governed by the authority of prior judicial decisions in ascertaining the meaning and operation of the Constitution and carrying it into effect. If, as is the case here, the principle or the particular application of principle that is in question has not been settled by the authority of a judicial decision in which it has been raised, considered and dealt with, the

(1) (1944) 68 C.L.R. 455.
(2) (1952) 85 C.L.R. 138, at p. 155.
(3) (1955) 93 C.L.R. 528, at p. 541.
(4) (1955) 92 C.L.R. 529.

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judges must give effect to the Constitution according to the interpretation which on proper consideration they are satisfied that it bears. But in arriving at a conclusion they not only are entitled, but ought, to attach weight to such matters as are dealt with in the foregoing discussion, treating them as considerations which should influence their judgment upon the meaning and application of the Constitution. Such matters as judicial dicta, common assumptions tacitly made and acted upon, and the fact that legislation has passed unchallenged for a considerable period of time, may be regarded as raising a presumption which should prevail until the judicial mind reaches a clear conviction that consistently with the Constitution the validity of the provisions impugned cannot be sustained. But they cannot be regarded as doing more.

Notwithstanding the presumptive force which has been given to these matters in the consideration of the present case, it has been found impossible to escape the conviction that Chap. III 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 organized as a court and in a manner which might otherwise satisfy ss. 71 and 72, and that Chap. 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.

One suggestion made in support of the validity of the provisions impugned in this case is that, conceding the conclusion just stated, it can be no more than a principle the application of which must be subject to any special provision of the Constitution qualifying its operation by express words or necessary intendment, and that in s. 51 (xxxv.) such a special provision is to be found.

In support of this contention reliance was placed upon industrial legislation existing in New Zealand and some of the Australian colonies before and shortly after the adoption of the Constitution. It was relied upon as evidence that the conception of industrial arbitration that was current involved an arbitral court possessing some judicial power of enforcement. The contention finds some analogy in the argument in support of the validity of the statutory provisions as to the Inter-State Commission which was rejected in *New South Wales* v. *The Commonwealth* (1). Much less material can be found in s. 51 (xxxv.) than in ss. 101 and 103 in support of the suggestion that an exception to the operation of Chap. III was intended. In truth there is nothing in the form, content or subject

(1) (1915) 20 C.L.R. 54.

matter of s. 51 (xxxv.) indicating any such necessary intendment. The uncertain inferences drawn from colonial legislation as to the conceptions afloat in the decade during which the Constitution was adopted form no foundation on which implications of grave significance can be read into the Constitution. The argument no doubt presents a simple solution of the embarrassments of the problem raised by this litigation but unfortunately it has no material basis.

In the foregoing reasoning no specific reliance has been placed upon the course of judicial history in the United States concerning the impossibility of mixing judicial and non-judicial functions. It is a long history stretching from the end of the eighteenth century. The first enunciation of the principle may be seen in *Hayburn's Case* (1) and the communications of the judges subjoined to the report of that case and in the note of *Yale Todd's Case* (2). The judicial paradox concerning appeals from territorial and other legislative courts has already been referred to. In addition, some controversial opinions have been expressed judicially as to the use of the power over territories to enlarge the diversity of citizenship jurisdiction to cover residents of the District of Columbia. But unless these be exceptions, there has never been any departure from the principle that the courts established by or under the Constitution for the exercise of judicial power cannot be authorized to go beyond the limits marked out by Art. III, and that the substantive powers of Congress do not extend to vesting in such courts powers or functions which are not judicial and are not auxiliary to the judicial power. In *Collins* v. *Charles Marshall Pty. Ltd.* (3) the judgment of six of the judges of this Court contains a passage which discusses the differences, so far as material to the purpose then in hand, between Chap. III and Art. III. It is unnecessary to repeat the passage. It is enough to say that to read it is to see that Chap. III reflects an attempt to meet many of the difficulties or deficiencies in Art. III that, in the history of that provision in the United States, had been encountered. It is the evident result of an understanding of at least certain important matters on which the Supreme Court had pronounced. It would be indeed difficult to believe that the framework of Chap. III was not adopted because the effect of the framework of Art. III was known and it was intended that the same broad principles affecting the judicial power should govern the situation of the judicature in the Commonwealth Constitution. One American case should perhaps be

(1) (1792) 2 Dallas 409 [1 Law. Ed. 436].

(2) (1794) 13 Howard 52 [14 Law. Ed. 47].

(3) (1955) 92 C.L.R., at pp. 544-546.

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mentioned because it supplies an example of a similar application of principle. It concerned an attempt to establish a court to determine freights and charges in connection with transportation and to regulate that activity in specified respects. Certain judicial powers were given to the court. The case arose under a State Constitution based upon a separation of powers but it was decided by a United States District Court—*Western Union Telegraph Co.* v. *Myatt* (1). The judgment contains a full discussion both of the constitutional principle and of its application to the legislation, the nature and effect of which is examined. The material points of the decision are these:—(a) that to regulate the conduct of a business and to fix for future observance the rates and charges for services rendered therein is wholly a legislative or administrative function and is entirely and vitally different from a judicial function; (b) that the court of visitation, as it was called, was, in the exercise of such powers, a legislative and administrative body, its character being unaffected by the fact that it was denominated a court and provided with the machinery of one or that it was empowered to conduct investigations under the forms of legal procedure before taking action in such matters; and (c) that the Act creating the court of visitation was invalid, at least in so far as it attempted to confer upon that body judicial powers in respect of the same matters of which it was given legislative and administrative jurisdiction.

It is necessary now to return to the orders which it is sought to prohibit and the provisions of the *Conciliation and Arbitration Act*, s. 29A and s. 29 (1) (*b*) and (*c*), in purported pursuance of which the orders were made. The foregoing reasons necessarily mean that s. 29A is invalid and the order of 28th June 1955 cannot be supported. Concerning s. 29 (1) (*b*) and (*c*) there may be more doubt. The legislative power contained in s. 51 (xxxv.) carries with it all that is incidental to the subject matter. Since it enables the legislature to provide for an award or order with respect to a two state industrial dispute, why, it may be asked, should it not support a provision authorizing the industrial tribunal to repeat or amplify its award or order in respect of a particular matter for the purpose of exposing parties who thereafter contravene the directions of the tribunal in that matter to a greater penalty or to prosecution for a more specific offence? Nothing said in this judgment warrants a negative answer to the question. But is the power given by s. 29 (1) (*b*) and (*c*) simply of this description? It is to be noticed that under par. (*b*) a breach must be proved to the satisfaction of the court. Paragraph (*c*) appears to provide for the well-known judicial remedy of an

(1) (1899) 98 Fed. Rep. 335.

injunction against a wrongful act. There is no increased or other penalty specifically attached to breach of an order made under par. (*b*) or par. (*c*). It is left to the same sanctions which s. 29A, s. 59 and s. 62 contemplate or name. The powers which s. 29 (1) enumerates are no longer introduced by the words "as regards every industrial dispute of which (the Court) has cognizance". It is not easy to give to these provisions a purely arbitral character. They seem rather to be powers of enforcement for the protection of rights arising from the award or order compliance with which is to be ordered or breach of which is to be enjoined. Though it perhaps might have dealt with the matter differently, the legislature has in truth provided for the exercise of judicial powers. From this it follows that s. 29 (1) (*b*) and (*c*) cannot be sustained. The order of 31st May 1955 is consequently bad.

The order nisi for a writ of prohibition should be made absolute in respect of both orders.

WILLIAMS J. This is an application by the Boilermakers' Society of Australia, an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1952, to make absolute a rule nisi for the issue of a writ of prohibition prohibiting the three respondents, who are judges of the Commonwealth Court of Conciliation and Arbitration, from further proceeding with or upon orders made by that court on 31st May 1955 and 28th June 1955 upon the application of the respondent, the Metal Trades Employers' Association, an organization of employers registered under that Act. The details of these orders are not important. It is sufficient to say that they were made by the Arbitration Court consisting of the above three judges under the provisions of s. 29 (1) (*b*) of the *Arbitration Act* which provides that the court shall have power to order compliance with an order or award proved to the satisfaction of the court to have been broken or not observed, s. 29 (1) (*c*) which provides that the court shall have power by order to enjoin an organization or person from committing or continuing a contravention of the Act or a breach or non-observance of an order or award, and s. 29A which confers on the court the same powers to punish for contempts of its power and authority, whether in relation to its judicial powers and functions or otherwise, as is possessed by the High Court in respect of contempts of the High Court. The ground on which the validity of the orders is attacked is that these provisions of the *Conciliation and Arbitration Act* 1904-1952 are ultra vires and invalid in that (a) the Commonwealth Court of Conciliation and Arbitration is invested by statute with

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numerous powers, functions and authorities of an administrative, arbitral, executive and legislative character, (b) the powers which these provisions purport to vest in that court and exercised by it in making the said orders are judicial, and (c) these provisions are accordingly contrary and repugnant to the provisions of the Constitution of the Commonwealth and in particular Chap. III thereof.

It is common ground and quite clear that in exercising the powers conferred by these provisions the court was purporting to act as a federal court created under Chap. III of the Constitution and to exercise part of the judicial power of the Commonwealth. It is not contended that the Parliament may not validly vest in the High Court or in any other federal court which it creates some functions of a legislative or executive character provided they are merely incidental and ancillary to its judicial functions. It is conceded, for instance, that such courts may be empowered to make rules governing their procedure. But it is contended that it is not constitutionally permissible for the Parliament to vest any part of the judicial power of the Commonwealth in a body having non-judicial functions. If the body is primarily established for non-judicial purposes or has independent non-judicial functions, it cannot also be invested with part of the judicial power of the Commonwealth. The combination of such powers in one body is not permitted under the Constitution. If one set of functions is found to be predominant (in this case the arbitral functions) and the other subsidiary (in this case the judicial functions), the judicial functions must be discarded and the arbitral powers alone remain. Alternatively, if the combination is invalid, and there is no means of ascertaining which functions are predominant, the whole of the provisions must fail.

These contentions raise constitutional issues of first-class importance and the argument has occupied a considerable time. The whole history of the Commonwealth *Conciliation and Arbitration Act* in its various forms has been investigated and every reference that has been made in this Court to the Act and the Arbitration Court has been cited. But I only find it necessary to refer to some of this material. The argument for the prosecutor is based on the doctrine of the separation of powers and it is contended that the structure of our Constitution is such that the functions of the three organs of government, the Parliament, the Executive and the Judiciary must be kept as separate and distinct as they have been in the case of the Constitution of the United States of America. Accordingly, a body performing functions of a non-judicial character

cannot be created a federal court under Chap. III of the Constitution, and a court so created cannot have conferred upon it any functions which are not part of the judicial power of the Commonwealth within the meaning of that Chapter. With that argument I cannot agree. The doctrine of the separation of powers has led to grave difficulties in the United States and we should apply it with great circumspection to the Australian Constitution. The *Commonwealth of Australia Constitution Act* is an Act of the Imperial Parliament and should be interpreted as such. In English constitutional history the doctrine means little more than that effective government requires that there should be a Parliament elected by the people to make the laws, an executive responsible to Parliament to execute them, and an independent judiciary to interpret and enforce them. It requires that in a broad sense the legislative, executive and judicial functions of government should be kept separate and distinct. The position is succinctly stated by *Isaacs* J. in *Le Mesurier* v. *Connor* (1): "It is altogether a mistaken notion that because the Constitution distinguishes between the legislative and the executive and the judicial departments of the Commonwealth, there can ever in the practical working of any Constitution be a rigid demarcation placing each class of acts in an exclusive section" (2). I agree with the statement of *Kitto* J. in *Reg.* v. *Davison* (3) that at the time the Australian Constitution was being formed neither in England nor elsewhere had any precise tests by which the respective functions of the three organs of government might be distinguished ever come to be generally accepted. Chapter I of the Constitution headed "The Parliament" provides (s. 1) that 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, and which is hereinafter called "The Parliament", or "The Parliament of the Commonwealth". Chapter II headed "The Executive Government" provides (s. 61) that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth. Chapter III headed "The Judicature" provides (s. 71) that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The three

(1) (1929) 42 C.L.R. 481.
(2) (1929) 42 C.L.R., at p. 519.
(3) (1954) 90 C.L.R. 353, at p. 381.

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organs of government are therefore created by separate chapters of the Constitution. But the Constitution could hardly have been conveniently framed otherwise when its purpose was to create a new statutory political entity. And with the model of the Constitution of the United States as a guide, its authors were almost bound to frame it in this way. But the persons elected or appointed to exercise the legislative and executive powers are not kept separate and distinct. The position is exactly to the contrary. Section 62 of the Constitution provides that there shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure. It is true that under this power the Governor-General could theoretically appoint as members of the Federal Executive Council persons who are not in Parliament but in accordance with constitutional practice he appoints the members of the government of the day and he must appoint some members of Parliament because s. 64 provides that the Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish, that they shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth, and that after the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives. Chapter III defines how the judicial power of the Commonwealth shall be exercised and the extent of that power. Section 71 has already been set out. The judicial power of the Commonwealth can only be exercised by the courts to which it refers. It cannot be exercised by any federal court the judges of which are not appointed for life. That is because s. 72 provides that the Justices of the High Court and of the other courts created by the Parliament (i.) shall be appointed by the Governor-General in Council, and (ii.) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

The Arbitration Court, if it be a court, is a federal court and its judges must therefore be appointed for life. Section 72 (iii.) provides that the Justices of the High Court and other federal courts shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office. No Act creating a federal court need say specifically that

the judges shall be appointed for life. It is sufficient if Parliament creates the court and fixes the remuneration of the judges. The Constitution itself provides for the appointment of the judges and for their life tenure of office, subject only to removal as there prescribed. An Act providing for the creation of a federal court the judges of which were to be appointed for a period, whether it be for a term of years or until they attain a certain age, would be inconsistent with s. 72 and would be invalid. A court consisting of judges so appointed would not be a federal court within the meaning of Chap. III and could not exercise any part of the judicial power of the Commonwealth. Section 11 of the Commonwealth *Conciliation and Arbitration Act* 1904 provided that there should be a Commonwealth Court of Conciliation and Arbitration, which should be a court of record, and should consist of a President. Section 12 provided that the President should be appointed by the Governor-General from among the justices of the High Court. He should be entitled to hold office during good behaviour for seven years, and should be eligible for re-appointment, and should not be liable to removal except on addresses to the Governor-General from both Houses of the Parliament during one session thereof praying for his removal on the ground of proved misbehaviour or incapacity. The Act also provided for the appointment by the President of any justice of the High Court or judge of the Supreme Court of a State to be his deputy in any part of the Commonwealth. The Act was amended from time to time. By Act No. 31 of 1920, s. 11 of the principal Act was amended so that the court should consist of the President and such Deputy Presidents as were appointed in pursuance of the Act. The qualifications of a Deputy President continued to be that he should hold the office of a justice of the High Court or a judge of the Supreme Court of a State. By Act No. 29 of 1921, s. 14 of the principal Act was amended so as to provide for the appointment as Deputy Presidents of barristers or solicitors of the High Court or of the Supreme Court of a State of not less than five years standing. The duties of the court under the Commonwealth *Conciliation and Arbitration Act* 1904, as amended up to 1921, were predominantly of an arbitral character, but the court was also invested with some powers that were strictly judicial, for instance the power under s. 38 (*d*) to impose penalties for any breach or non-observance of any term of an order or award proved to the satisfaction of the court to have been committed. In *Alexander's Case* (1) it was held that the Arbitration Court was incompetent to exercise the judicial power of the Commonwealth

(1) (1918) 25 C.L.R. 434.

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because the Presidents and Deputy Presidents were not appointed for life but that the arbitral powers were severable and still exercisable. For eight years after this decision the court remained an arbitral body shorn of its judicial powers. The Commonwealth *Conciliation and Arbitration Act* 1926 repealed ss. 12, 13 and 14 of the principal Act and inserted three new sections in their stead. The effect of the amendments was to provide for the substitution of judges for the President and Deputy Presidents. The Act provided that the court should consist of one or more judges one of whom should be the Chief Judge, that the judges should be appointed by the Governor-General in Council, and that they should not be removed except by the Governor-General in Council on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity. The Act provided that the qualifications of the Chief Judge and of each other judge should be that he must be a barrister or solicitor of the High Court or of the Supreme Court of a State of not less than five years' standing. The Act also provided for the remuneration of the judges.

Accordingly, this Act provided for the appointment of judges for life and in that respect the appointment complied with s. 72 of the Constitution. The Act also attempted to breathe fresh life into the whole of the sections of the principal Act, supposing any of these sections needed it. Section 3 provided that :—" 3. The Principal Act, as amended by this Act, and every provision of that Act as so amended shall be construed as if that Act were, as from the commencement of this Act, confirmed and re-enacted as so amended ; to the intent that where any provision of the Commonwealth Conciliation and Arbitration Act 1904, or of that Act as amended by any Act or Acts, has before the commencement of this Act been, or would, but for this Act, have been, construed as being in excess of the legislative power of the Parliament, that provision shall, as from the commencement of this Act, be read with and deemed to have been enacted in relation to the amendments made by this Act ". By the same Act, s. 48 of the principal Act was amended by inserting before the words " The High Court " the words " The Court ". That section provided that the High Court or a justice thereof or a County, District or Local Court might, on the application of any party to an award, make an order in the nature of a mandamus or injunction to compel compliance with the award or to restrain its breach or to enjoin any organization or person from committing or continuing any contravention of this Act or of the award under pain of fine or imprisonment, and no

person to whom such order applied should, after written notice of the order, be guilty of any contravention of the Act or the award by act or omission. Penalty : £100 or three months' imprisonment. Accordingly, the Act not only provided for the appointment of judges of the Arbitration Court for life. It also conferred on the court a new power which was plainly judicial. But the functions of the court continued to be predominantly arbitral.

The Commonwealth *Conciliation and Arbitration Act* 1947 made important changes in the principal Act, particularly with respect to the appointment of conciliation commissioners and the division of the arbitral functions between the commissioners and the court. The effect of these amendments was to diminish the arbitral functions of the court and increase its judicial functions. Part III of the principal Act which provided for the creation of the court was repealed. But s. 4 provided that notwithstanding the repeal of Pt. III of the principal Act the Commonwealth Court of Conciliation and Arbitration existing immediately prior to the commencement of this Act should not cease to exist but should continue as the Commonwealth Court of Conciliation and Arbitration referred to in the principal Act as amended by this Act. The Act then proceeded to re-enact Pt. III of the principal Act and in that part to re-enact similar provisions relating to the appointment of the Chief Judge and the other judges and to their qualifications and remuneration to those inserted in the principal Act by the amending Act of 1926. Section 17 of the principal Act now provides that there shall be a Commonwealth Court of Conciliation and Arbitration, that the court shall consist of a Chief Judge and such other judges as are appointed in pursuance of this Act, and that the court shall be a superior court of record. Section 18 provides that the Chief Judge and each other judge shall be appointed by the Governor-General; and shall not be removed except by the Governor-General, on an address from both Houses of the Parliament in the same session, praying for his removal on the ground of proved misbehaviour or incapacity. Since 1947 the Act has been amended in 1948, 1949, 1950, 1951 and 1952, the effect of the latest amendment being to increase the arbitral functions of the court in comparison with those existing after the Act of 1947. It can fairly be said, as Mr. *Eggleston* contended, that the court now stands as the ultimate arbiter in all industrial disputes.

But I am unable to see how these swings of the pendulum between the two sets of functions can affect the question whether the court has been validly created a federal court by the Parliament under Chap. III of the Constitution. If the Constitution means that

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the High Court and other federal courts created under that chapter cannot be invested with any powers other than judicial powers, then the arbitral functions of the Arbitration Court must be the functions that are invalidated. The intention of the Parliament in 1926 to create the Arbitration Court a federal court under Chap. III of the Constitution is clear. It amended the Act so as to provide that the judges should be appointed by the Governor-General for life for that very purpose. It was really unnecessary so to provide because the Constitution itself provides for the life tenure of office, so that this express provision must have been intended to make assurance doubly sure. It provided a qualification for appointment fit only for appointment to judicial office. By s. 3 it re-enacted, *inter alia*, the sections of the principal Act conferring judicial power on the court so that it could not be claimed that those sections had died by misadventure in the meantime, and no court could have been created because, although it was called a court and its members were appointed for life, there was no judicial power of the Commonwealth vested in it. By the same Act, s. 48, it conferred on the court a fresh judicial power. It has since conferred further judicial powers. The whole purpose of amending the Act of 1926 was to qualify the court to exercise judicial power and presumably to exercise such judicial power, more or less, as the Parliament should think fit to invest it with from time to time pursuant to s. 77 (i.) of the Constitution. The conclusion seems to me to be inevitable that since 1926 the Arbitration Court has been validly created as a federal court.

But does this mean that its arbitral powers must fail? It is clear that only courts can exercise the judicial power of the Commonwealth. But there is no express provision in the Constitution that they can exercise no other powers. If there is a prohibition against their doing so it must rest on some implication in the Constitution arising from the vague concept of the separation of powers. It has been said that in making awards the Arbitration Court is exercising legislative power. In reality it is simply exercising the particular form of power which the Parliament is authorized to confer on arbiters by s. 51 (xxxv.) of the Constitution. If it be necessary to classify such proceedings as legislative, executive or judicial I would prefer to classify them as quasi-judicial administrative proceedings. But it is sufficient to refer to them as the exercise of arbitral power. If the Parliament cannot under the Constitution validly confer that power on a federal court then the arbitral provisions of the *Arbitration Act*, so far as they relate to the court, must be invalid. But the Constitution like any other written

instrument must be construed as a whole and it appears to me that, far from any implication arising from its provisions as a whole that this Court and other federal courts that the Parliament creates cannot be invested with other than judicial powers, the implication in the case of some of the powers conferred on the Parliament by s. 51 of the Constitution, arising from their character and language, if implication be needed, is to the contrary. There are at least four legislative powers contained in s. 51: par. (xvii.)—bankruptcy and insolvency; par. (xviii.)—copyrights, patents and trade marks; par. (xxii.)—divorce and matrimonial causes, and in relation thereto, parental rights, and the custody and guardianship of infants; and par. (xxxv.)—conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State, which would appear to require a mixture of administrative and judicial functions for their effective exercise. Such functions would be complementary of one another. Unless there is something tacit in the Constitution which prevents the whole of these functions being performed by the one tribunal it would appear to be convenient that the one tribunal should perform them. But the tribunal would have to be created a court before it could be made the receptacle of the judicial functions. The meaning of judicial power as used in s. 71 of the Constitution has been discussed in many cases in this Court. There is the classic definition by *Griffith* C.J. in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (1) which has received the approval of the Privy Council in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (2) and in *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (3). "The power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action" (4). But this definition is not exhaustive. It defines what lies at the very centre of judicial power. There are many functions of a quasi-judicial administrative character which have achieved recognition as functions suitable for courts to undertake and have become part of the ordinary business of courts because they are proper to the functions of a judge. Examples of these forms of judicial power, which must form part of the judicial power of the Commonwealth under s. 71 of the Constitution, where duties

(1) (1909) 8 C.L.R. 330.
(2) (1931) A.C. 275; (1930) 44 C.L.R. 530.
(3) (1949) A.C. 134.
(4) (1909) 8 C.L.R., at p. 357.

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of this kind can be created by the exercise by the Parliament of its legislative powers under the Constitution, will be found in *Peacock* v. *Newtown Marrickville & General Co-operative Building Society No. 4 Ltd.* (1) and *Reg.* v. *Davison* (2). They are exercisable by the Court because they are proper subjects for the exercise of the judicial process. Under the Federal *Bankruptcy Act* 1924-1954 many administrative functions are conferred on the Court of Bankruptcy examples of which will be found in ss. 15 (*b*) and (*d*), 68, 69, 71 and in many of the sections comprised in Pts. V, VI, VII, VIII, XI and XII of the Act. Indeed it can be said that the greater part of the duties imposed upon the Bankruptcy Court after the making of the sequestration order or in connection with the administration of the estate of a bankrupt under Pt. XI or Pt. XII of the *Bankruptcy Act* are of an administrative character and that, taking the *Bankruptcy Act* as a whole, the administrative functions predominate over the strictly judicial functions of the court. Under the *Trade Marks Act* 1905-1948 and the *Patents Act* 1952, particularly the latter Act, many duties of an administrative nature are imposed on this Court. Apart from the *Matrimonial Causes Act* 1945 there is, of course, no legislation yet enacted under s. 51, par. (xxii.) of the Constitution but it is clear that, if a uniform divorce and matrimonial causes law was enacted for the Commonwealth, a great part of the functions which would have to be performed to make such legislation effective, such as the provision of alimony and maintenance, the variation of settlements and the custody of the children of the marriage, would be of an administrative character and the legislation might well include provisions for attempts to be made to effect a reconciliation between the spouses pending the curial proceedings for a divorce. Coming to s. 51, par. (xxxv.) of the Constitution it is apparent that the complete arbitral process produces a similar duality of functions. The purpose of the power is to authorize Parliament to legislate to prevent disputes by conciliation and settle disputes by arbitration. An award can only be made effective and the dispute settled if there is some sanction to compel the parties to obey the award made in settlement of the dispute. It is within the content of the power to provide not only for the making but also for the enforcement of awards. The whole process of making the awards and enforcing them is a continuous process just like the duties imposed upon the Bankruptcy Court to superintend the administration of the estate of the bankrupt and its distribution amongst his creditors after the sequestration order has been made. In settling an

(1) (1943) 67 C.L.R. 25.

(2) (1954) 90 C.L.R. 353.

industrial dispute the part of the continuous process that calls for the greatest display of knowledge, commonsense, fairness and impartiality is the making of the award. It is then simply a question of determining whether the award has been broken and applying the appropriate sanction. There is no incompatibility in the one tribunal making the award and afterwards seeing that it is obeyed. That is normal judicial procedure—to make an order and to see that it is obeyed. All these administrative and judicial functions, whether created under the *Bankruptcy Act*, the *Trade Marks Act*, the *Patents Act*, under legislation such as that already suggested if enacted under the divorce power, or under the *Arbitration Act*, are administrative and judicial functions that can conveniently be combined in the one tribunal. If the Parliament thinks fit to combine them, and if the combination requires that the tribunal should be created a federal court in order that it should have the complete capacity to perform them all, I can find nothing expressed or unexpressed in the Constitution to prevent Parliament resorting at the same time to its powers under s. 51 and under Chap. III of the Constitution for that purpose.

Is there any decision of the Court that militates against this conclusion? In my opinion there is none. On the contrary there are decisions that support it. It has been decided that the doctrine of the separation of powers does not mean that under the Australian Constitution the Parliament cannot delegate legislative powers to the executive. The *Treaty of Peace Act* 1919, s. 2, provided that the Governor-General might make such regulations as appeared to him to be necessary for carrying out and giving effect to the provisions of Pt. X (*Economic Clauses*) of the Treaty of Peace. Regulations were made under this delegation by the Governor-General —S.R. 1920 No. 25. The validity of these regulations was impeached in *Roche* v. *Kronheimer* (1). The argument that under the Constitution the Parliament could not delegate legislative power to the executive was clearly raised by Mr. *Owen Dixon* (as the Chief Justice then was). He is reported to have said: "Just as the Constitution does not permit the judicial power of the Commonwealth to be vested in any tribunal other than the High Court and other Federal Courts (*New South Wales* v. *The Commonwealth* (2); *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (3)), so the vesting of the legislative power in any other body than Parliament is prohibited" (4). Sir *Robert Garran* is reported to have said in reply that where the Parliament has vested in it a

(1) (1921) 29 C.L.R. 329.
(2) (1915) 20 C.L.R. 54.
(3) (1918) 25 C.L.R. 434.
(4) (1921) 29 C.L.R., at p. 331.

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power of legislation it may exercise that power by assigning portion of the power to a subordinate rule-making body (1). That is a recognized constitutional usage. *Knox* C.J., *Gavan Duffy*, *Rich* and *Starke* JJ. in a joint judgment said: "Next, it was said that, even if the Federal Parliament had authority to legislate for the purpose of carrying out and giving effect to the provisions of Part X. of the Treaty, it had no power to confer that authority on the Governor-General . . . It is enough to say that the validity of legislation in this form has been upheld in *Farey* v. *Burvett* (2), *Pankhurst* v. *Kiernan* (3), *Ferrando* v. *Pearce* (4) and *Sickerdick* v. *Ashton* (5), and we do not propose to enter into any inquiry as to the correctness of those decisions" (6). The same question arose again in *Dignan's Case* (7). There, s. 3 of the *Transport Workers Act* 1928-1929 purported to confer a power upon the Governor-General of making regulations not inconsistent with that Act with respect to the employment of transport workers. Regulations so made were to have the force of law notwithstanding anything in any other Act except the *Acts Interpretation Acts* 1901-1918 and 1904-1916. It was held that it is within the legislative power of the Commonwealth Parliament to confer upon the Governor-General the power to make such regulations. *Roche* v. *Kronheimer* (8) was followed. *Gavan Duffy* C.J. and *Starke* J. said: "Assuming, however, that the Act does impinge upon the doctrine (that is, of the separation of powers), still such a restriction has never been implied in English law from the division of powers between the several departments of government . . . It does not follow that, because the Constitution does not permit the judicial power of the Commonwealth to be vested in any tribunal other than the High Court and other Federal Courts, therefore the granting or conferring of regulative powers upon bodies other than Parliament itself is prohibited. Legislative power is very different in character from judicial power: the general authority of the Parliament of the Commonwealth to make laws upon specific subjects at discretion bears no resemblance to the judicial power. Indeed, unless this view is correct, and if there has been a delegation of legislative power, the judgments in the *Huddart Parker Case* (9) and in *Dignan's Case* (10) overlooked an obvious point, and the cases were wrongly decided" (11). *Rich* J. said: "*Roche* v. *Kronheimer* (8) is an

(1) (1921) 29 C.L.R., at p. 334.
(2) (1916) 21 C.L.R. 433.
(3) (1917) 24 C.L.R. 120.
(4) (1918) 25 C.L.R. 241.
(5) (1918) 25 C.L.R. 506.
(6) (1921) 29 C.L.R., at p. 337.
(7) (1931) 46 C.L.R. 73.
(8) (1921) 29 C.L.R. 329.
(9) (1931) 44 C.L.R. 392.
(10) (1931) 45 C.L.R. 188.
(11) (1931) 46 C.L.R., at pp. 83-84.

authority for the proposition that an authority of subordinate law-making may be invested in the Executive. Whatever may be said for or against that decision, I think we should not now depart from it" (1). *Dixon* J., as he then was, delivered a long and careful judgment one effect of which, to my mind, is to crystallize the difficulties that flow from the American doctrine. He was inclined to think that the question at issue had not perhaps been decided by *Roche* v. *Kronheimer* (2) because there the delegation to the executive was a delegation to legislate under the defence power. He said: "But the strength in time of war of the defence power, the exceptional nature of which had been much enlarged upon in *Farey* v. *Burvett* (3), might conceivably have enabled the Court to confess and avoid an argument based upon the general doctrine of the separation of powers. For it might be considered that the exigencies which must be dealt with under the defence power are so many, so great and so urgent and are so much the proper concern of the Executive, that from its very nature the power appears by necessary intendment to authorize a delegation otherwise generally forbidden to the Legislature" (4). Nevertheless his Honour came to the conclusion that the delegation under the *Transport Workers Act* was valid. He said: "It may be acknowledged that the manner in which the Constitution accomplished the separation of powers does logically or theoretically make the Parliament the exclusive repository of the legislative power of the Commonwealth. The existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and the usages of British legislation and the theories of English law . . . But, whatever may be its rationale, we should now adhere to the interpretation which results from the decision of *Roche* v. *Kronheimer* (2)" (5). With all respect to his Honour I would not be inclined to distinguish *Roche* v. *Kronheimer* (2) on any ground specially appertaining to the defence power. The decision appears to me to be of general application. But the point need not be pursued because the delegation of legislative power conferred on the Governor-General by s. 3 of the *Transport Workers Act* was made under the Trade and Commerce power and was clearly legislative. It even provided that such regulations should have the force of law notwithstanding anything in any other Act. And that delegation of power was upheld. Since *Dignan's Case* (6) it could not be

(1) (1931) 46 C.L.R., at p. 86.
(2) (1921) 29 C.L.R. 329.
(3) (1916) 21 C.L.R. 433.
(4) (1931) 46 C.L.R., at p. 99.
(5) (1931) 46 C.L.R., at pp. 101-102.
(6) (1931) 46 C.L.R. 73.

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questioned in this Court that the Parliament has power under the Constitution to delegate legislative power to the executive and that the executive has power to receive it. But it does not necessarily follow from *Dignan's Case* (1) that the Parliament in the exercise of its legislative powers can impose functions other than functions of a strictly judicial character on courts. On the question whether Parliament can do this or not the two most important decisions of this Court would appear to be *In re Judiciary and Navigation Acts* (2) and *Ex parte Lowenstein* (3). In the former case it was held by *Knox* C.J., *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting) that Pt. XII of the *Judiciary Act* 1903-1920, which purported by s. 88 to give the High Court jurisdiction to "hear and determine" any question referred to it by the Governor-General as to the validity of any enactment of the Parliament of the Commonwealth and by s. 93 to make the determination "final and conclusive and not subject to any appeal", was not a valid exercise of the legislative power conferred on the Parliament by the Constitution. In the joint judgment *Knox* C.J., *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ. said: "After carefully considering the provisions of Part XII, we have come to the conclusion that Parliament desired to obtain from this Court not merely an opinion but an authoritative declaration of the law. To make such a declaration is clearly a judicial function, and such a function is not competent to this Court unless its exercise is an exercise of part of the judicial power of the Commonwealth. If this be so, it is not within our province in this case to inquire whether Parliament can impose on this Court or on its members any, and if so what, duties other than judicial duties, and we refrain from expressing any opinion on that question. What, then, are the limits of the judicial power of the Commonwealth? The Constitution of the Commonwealth is based upon a separation of the functions of government, and the powers which it confers are divided into three classes—legislative, executive and judicial (*New South Wales* v. *The Commonwealth* (4)). In each case the Constitution first grants the power and then delimits the scope of its operation (*Alexander's Case* (5))" (6). Their Honours then referred to ss. 71 and 73-77 inclusive of Chap. III of the Constitution and proceeded: "This express statement of the matters in respect of which and the Courts by which the judicial power of the Commonwealth may be exercised is, we think, clearly intended as a delimitation of the whole of the original jurisdiction

(1) (1931) 46 C.L.R. 73.
(2) (1921) 29 C.L.R. 257.
(3) (1938) 59 C.L.R. 556.
(4) (1915) 20 C.L.R. 54, at p. 88.
(5) (1918) 25 C.L.R., at p. 441.
(6) (1921) 29 C.L.R., at p. 264.

which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction. The question then is narrowed to this: Is authority to be found under s. 76 of the Constitution for the enactment of Part XII. of the *Judiciary Act*? Section 51 (xxxix.) does not extend the power to confer original jurisdiction on the High Court contained in s. 76. It enables Parliament to provide for the effective exercise by the Legislature, the Executive and the Judiciary, of the powers conferred by the Constitution on those bodies respectively, but does not enable it to extend the ambit of any such power" (1). Their Honours then referred to the word "matter" in s. 76 of the Constitution and proceeded: "In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court" (1). It will be seen that the Court in that case decided that the only judicial power that could be conferred on courts by Chap. III of the Constitution was the power to exercise the judicial power contained in that chapter but did not decide that the Parliament cannot impose on a federal court functions other than strictly judicial functions. That question was expressly reserved. But it arose for decision in *Lowenstein's Case* (2). One of the questions at issue there was whether sub-ss. 1 (*a*), 2 and 3 of s. 217 of the *Bankruptcy Act* 1924-1933, were ultra vires the Parliament of the Commonwealth. Two contentions were raised: (1) that these provisions were an attempt to invest a federal court with non-judicial functions and that such functions cannot be reposed in such a court; and (2) that even if such non-judicial functions can be reposed in a federal court they do not include non-judicial functions which are incompatible with the court functioning as a court and the effect of the legislation under challenge was to require the Bankruptcy Court to be a prosecutor and a judge at the same time. The first of these contentions was rejected. The contention that non-judicial functions cannot be imposed on a court which are incompatible with its strict judicial functions was accepted. But it was held by a majority of the court that the non-judicial functions in question were not at variance with its judicial functions, a conclusion which, if I had been a member of the Court, I might not have reached. In *Sachter* v. *Attorney-General for the Commonwealth* (3) this Court followed *Lowenstein's Case* (2) and declared that it would not reconsider its correctness. The power conferred on the Bankruptcy Court by

(1) (1921) 29 C.L.R., at p. 265.
(2) (1938) 59 C.L.R. 556.
(3) (1954) 94 C.L.R. 86.

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s. 217 was a power which the Parliament could only confer, if at all, by legislation under the bankruptcy power (s. 51 (xvii.) of the Constitution) so that *Lowenstein's Case* (1) is an express decision that non-judicial functions can be conferred on a federal court. *Dignan's Case* (2) and *Lowenstein's Case* (1) are quite antipathic to the idea that the doctrine of the separation of powers, so far as it is implicit in the Australian Constitution, means that there is a rigid demarcation of powers between the legislative, executive and judicial organs of government. As *Isaacs* J. pointed out in *Federal Commissioner of Taxation* v. *Munro* (3) (affirmed in the Privy Council (4)): "The Constitution, it is true, has broadly and, to a certain extent, imperatively separated the three great branches of government, and has assigned to each, by its own authority, the appropriate organ . . . I would say that some matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another. An appropriation of public money, a trial for murder, and the appointment of a Federal Judge are instances. Other matters may be subject to no *a priori* exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government. Rules of evidence, the determination of the validity of parliamentary elections, or claims to register trade marks would be instances of this class. The latter class is capable of being viewed in different aspects, that is, as incidental to legislation, or to administration, or to judicial action, according to circumstances" (5). In relation to Chap. III the doctrine 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. (What *Fry* L.J. in *Royal Aquarium & Summer & Winter Garden Society Ltd.* v. *Parkinson* (6) calls their "fixed and dignified course of procedure".)

There are also the decisions under s. 122 of the Constitution. That section provides that Parliament may make laws for the government of territories. In *Porter* v. *The King*; *Ex parte Yee* (7) it was held by *Isaacs*, *Higgins*, *Rich* and *Starke* JJ. (*Knox* C.J. and

(1) (1938) 59 C.L.R. 556.
(2) (1931) 46 C.L.R. 73.
(3) (1926) 38 C.L.R. 153.
(4) (1931) A.C. 275; (1930) 44 C.L.R. 530.
(5) (1926) 38 C.L.R., at pp. 178-179.
(6) (1892) 1 Q.B. 431, at p. 447.
(7) (1926) 37 C.L.R. 432.

Gavan Duffy J. dissenting) that in exercise of this power the Parliament of the Commonwealth may confer upon the High Court jurisdiction to entertain an appeal from a court established by the Parliament in a territory, notwithstanding that the court so established is not a federal court within the meaning of s. 71 of the Constitution. It was held that this section was an independent grant of power outside and beyond Chap. III which related only to " the judicial power of the Commonwealth consisting of States ", in other words the Commonwealth proper, and had no reference to the Commonwealth in relation to Territories. Presumably, therefore, functions not of a strictly judicial character could be imposed on federal courts by legislation under s. 122 of the Constitution. This being so, it would be irrational to imply a prohibition against the Parliament imposing similar functions on federal courts by legislation under s. 51. In each case the implied limitation must be the same. The functions must not be functions which courts are not capable of performing consistently with the judicial process. Purely administrative discretions governed by nothing but standards of convenience and general fairness could not be imposed upon them. Discretionary judgments are not beyond the pale but there must be some standards applicable to a set of facts not altogether undefined before a court can hear and determine a matter: *Steele* v. *Defence Forces Retirement Benefits Board* (1). If courts cannot be invested with any judicial power not forming part of the judicial power of the Commonwealth it may seem, at first sight, anomalous that non-judicial functions can be imposed upon them by legislation under some of the paragraphs of s. 51 of the Constitution. But it is not really anomalous. The reason why, apart from s. 122 of the Constitution, courts cannot be invested with any form of judicial power outside that created or authorized by Chap. III of the Constitution is because there is no other source of authority in the Constitution. But when the problem whether non-judicial duties can be imposed on federal courts arises, the crucial question is not whether the Constitution authorizes the Parliament to create such duties for some person or body to exercise. The Parliament can create any duties which are authorized by its legislative powers. The crucial question is whether such duties can be imposed on federal courts. The reason why, under Chap. III, courts can only be invested with the judicial power of the Commonwealth may lie 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

(1) (1955) 92 C.L.R. 177.

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have duties imposed on them by federal law. Non-judicial functions cannot be imposed on such courts: *Queen Victoria Memorial Hospital* v. *Thornton* (1). But it does not necessarily follow from this that such functions cannot be imposed on federal courts by legislation under s. 51 of the Constitution. Since 1926 until very recently, when doubts on the subject began to be expressed, the Arbitration Court has always been accepted as a body properly constituted to undertake its dual activities. It has been accepted as a federal court created under Chap. III of the Constitution. It is sufficient to refer to the following cases: *Jacka* v. *Lewis* (2); *Harrison* v. *Goodland* (3); *Barrett* v. *Opitz* (4); *Australian Workers' Union* v. *Bowen* (5); *R.* v. *Taylor*; *Ex parte Federated Ironworkers' Association* (6); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Federated Gas Employees' Industrial Union* (7); *R.* v. *Taylor*; *Ex parte Roach* (8); *Reg.* v. *Kelly*; *Ex parte Waterside Workers' Federation of Australia* (9); *Reg.* v. *Kelly*; *Ex parte Berman* (10); *Reg.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Amalgamated Engineering Union* (*Australian Section*) (11). In one of these cases, *R.* v. *Taylor*; *Ex parte Roach* (8) to take an example, it was held that the Arbitration Court, being constituted by statute a Superior Court of Record, has, by the common law, power to punish summarily for contempt of its judicial authority. In the joint judgment of *Dixon*, *Webb*, *Fullagar* and *Kitto* JJ. it is said: "Section 17 (3) of that Act (the Commonwealth *Conciliation and Arbitration Act*) provides that the Commonwealth Court of Conciliation and Arbitration shall be a Superior Court of Record. It is in virtue of its status as a Superior Court of Record that the Arbitration Court has exercised a summary power to punish for contempt . . . What the Legislature meant to do by s. 17 (3) was simply to establish the Court as a Superior Court of Record. In other words, it is not a question of legislative intention but of the legal consequences of giving a court such a status. The common law gives to a Superior Court of Record power to punish summarily for contempts of its judicial authority" (12).

The important question now at issue was not, of course, raised in any of these cases and it is not the duty or practice of this Court, of its own volition, to raise constitutional issues unless the decision in any case before the Court requires it to do so. But in several of

(1) (1953) 87 C.L.R. 144.
(2) (1944) 68 C.L.R. 455.
(3) (1944) 69 C.L.R. 509, esp. at pp. 515, 521.
(4) (1945) 70 C.L.R. 141.
(5) (1948) 77 C.L.R. 601.
(6) (1949) 79 C.L.R. 333.
(7) (1951) 82 C.L.R. 267.
(8) (1951) 82 C.L.R. 587.
(9) (1952) 85 C.L.R. 601.
(10) (1953) 89 C.L.R. 608.
(11) (1953) 89 C.L.R. 636.
(12) (1951) 82 C.L.R., at pp. 597, 598.

the cases the decision did involve an acceptance of the validity of the dual functions of the Court and it would be a very serious step at this late stage to jettison that acceptance. Naturally, in these circumstances, we were urged in the last resort to apply the principle of *stare decisis*, but I need not consider whether it would be proper to do so because I do not think that there is any constitutional impediment to the Arbitration Court exercising both sets of functions. It is only necessary to read the analysis of the process of obtaining an award made by *Barton* J. in *Alexander's Case* (1) in order to realize the close analogy with ordinary curial proceedings. This analysis led his Honour to conclude that in making an award the Arbitration Court was exercising part of the judicial power of the Commonwealth. This view has not prevailed. The truth is that when an award is made the dispute is settled and the arbitral function is at an end and that the enforcement of the rights thereby created is a separate process from their creation. But the arbitral proceedings are proceedings which should be conducted with that fairness and impartiality which should characterize proceedings in courts of justice. They are proceedings proper to the functions of a judge. In *Frome United Breweries Co. Ltd.* v. *Bath Justices* (2) Lord *Atkinson* cited with approval the following definition of a judicial act by *May* C.J. in the Irish case of *Reg.* v. *Dublin Corporation* (3): "The term 'judicial' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others" (4). The making of an award is at least a judicial act. It requires the same judicial approach as that required when an application is made to the court to enforce it. There is nothing at variance between the arbitral duty to make the award and the curial duty to enforce it.

For these reasons I would discharge the order nisi.

WEBB J. The prosecutor, the Boilermakers' Society of Australia, and the respondent, the Metal Trades Employers' Association, are parties to and are bound by the Metal Trades Award made on 16th January 1952, under the *Conciliation and Arbitration Act* 1904-1951 by Conciliation Commissioner Galvin. Clause 19 (*ba*) (i) of the Award provides, *inter alia*: "No organization party to this award shall in any way, whether directly or indirectly, be a party

(1) (1918) 25 C.L.R., at pp. 452-457.
(2) (1926) A.C. 586, at p. 602.
(3) (1878) 2 L.R. Ir. 371.
(4) (1878) 2 L.R. Ir., at p. 376.

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to or concerned in any ban, limitation or restriction upon the performance of work in accordance with this award".

On 16th May 1955, the respondent association applied to a judge of the Commonwealth Court of Conciliation and Arbitration for a rule to show cause why orders should not be made against the prosecutor union under s. 29 (1) (*b*) and (*c*) of the Act. Section 29 (1) provides, *inter alia* :—"The Court shall have power—(*b*) to order compliance with an order or award proved to the satisfaction of the Court to have been broken or not observed; (*c*) by order, to enjoin an organization or person from committing or continuing a contravention of this Act, or a breach or non-observance of an order or award . . .". This rule was granted, and, on 31st May 1955, was made absolute, by the three judges of the Commonwealth Court of Conciliation and Arbitration who are respondents in these proceedings, and the prosecutor union was ordered to comply with cl. 19 (*ba*) (i) "by ceasing in any way directly or indirectly to be a party to or concerned in a ban, limitation or restriction upon the performance of work in accordance with the award", and were enjoined from continuing the breach or non-observance of cl. 19 (*ba*) (i), at the establishment of Morts Dock & Engineering Co. Ltd. at Balmain. This order was not obeyed, and on the application of the respondent association made under s. 29A of the Act, the prosecutor union was, on 28th June 1955, found by the three respondent judges to have been guilty of contempt of court and was fined £500 and ordered to pay certain costs. Section 29A provides, *inter alia* :—"(1) The Court has the same power to punish contempts of its power and authority, whether in relation to its judicial powers and functions or otherwise, as is possessed by the High Court in respect of contempts of the High Court. (2) The jurisdiction of the Court to punish a contempt of the Court committed in the face or hearing of the Court, when constituted by a single Judge, may be exercised by that Judge; in any other case, the jurisdiction of the Court to punish a contempt of the Court shall (without prejudice to the operation of sub-section (7) of section twentyfour of this Act) be exercised by not less than three judges. (3) The Court has power to punish, as a contempt of the Court, an act or omission although a penalty is provided in respect of that act or omission under some other provision of this Act. (4) The maximum penalty which the Court is empowered to impose in respect of a contempt of the Court consisting of a failure to comply with an order of the Court made under paragraph (*b*) or (*c*) of the last preceding section is :—(a) where the offence was

committed by—(i) an organization (not consisting of a single employer)—Five hundred pounds . . . "

The prosecutor union obtained from the High Court, and now moves to make absolute, an order nisi for a writ of prohibition restraining the respondents from further proceeding on the orders of 31st May and 28th June 1955, on the ground that ss. 29 (1) (*b*), (*c*) and 29A are ultra vires and invalid, in that " the Commonwealth Court of Conciliation and Arbitration is invested by statute with numerous powers, functions and authorities of an administrative, arbitral, executive and legislative character " ; and that the powers which these two sections purport to vest in the court are judicial, and so are conferred contrary and repugnant to Chap. III of the Commonwealth Constitution.

Section 51 of the Constitution provides that :—" The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to :—(xxxv.) Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State ".

Prior to the enactment of the Australian Constitution by the Imperial Parliament in July 1900, the South Australian Parliament had in 1894, by Act No. 598, provided for the compulsory settlement of industrial disputes by award and for the enforcement of the awards by the same tribunal. In the same year the New Zealand Parliament, by Act No. 14, also legislated for the compulsory settlement of industrial disputes and for the making of industrial awards by a special tribunal, but left the enforcement of the awards to the ordinary courts of law until 1898 when the legislation was amended to provide for the making and enforcement of the awards by the same tribunal. Both statutes made strikes punishable. In *Stemp* v. *Australian Glass Manufacturers Co. Ltd.* (1) *Isaacs* J. (as he then was) relied on those two Acts as having attached to the notion of compulsory arbitration in the minds of the Australian people and of the framers of the Constitution the prevention of strikes. That might well have been the case. But it does not follow that the making and enforcing of awards by the same tribunal was also attached by those statutes to that notion in their minds as Mr. *Macfarlan* for the respondent association submitted. That depends on the effect of Chap. III. And here it is noted that all legislation under s. 51 is expressly made " subject to this Constitution ", that is to say, subject to Chap. III among other provisions of the Constitution ; while, on the other hand, no section in Chap. III has

(1) (1917) 23 C.L.R. 226, at p. 238.

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been expressly made "subject to this Constitution". Actually the only reference outside Chap. III to the courts brought into existence by or under Chap. III is in s. 51 (xxxix.) which provides that the Parliament may make laws, *subject to the Constitution*, with respect to:—"Matters incidental to the execution of any power vested by this Constitution in the Parliament . . . or in the Federal Judicature . . .".

It is submitted by Mr. *D. I. Menzies* for the respondent judges and the intervenant Commonwealth that the arbitral powers and the judicial powers in the Commonwealth *Conciliation and Arbitration Act* 1904-1952 are complementary to each other, and that neither is incidental to the other: that the arbitral powers and the judicial powers are equally necessary for the purposes of compulsory arbitration. I agree, unless judicial power is always incidental when conferred by the Commonwealth Parliament, which no counsel contends. As to this see *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1).

Just ten years after the enactment of the South Australian and New Zealand legislation referred to, the Commonwealth Parliament legislated for the first time in exercise of the power conferred by s. 51 (xxxv.) of the Constitution, by enacting the Commonwealth *Conciliation and Arbitration Act* 1904 which by s. 11 provided that "There shall be a Commonwealth Court of Conciliation and Arbitration, which shall be a Court of Record, and shall consist of a President"; by s. 12 (1) that "The President shall be appointed by the Governor-General from among the Justices of the High Court. He shall be entitled to hold office during good behaviour for seven years . . ."; by s. 13 that "The President shall be paid no other salary in respect of his services under this Act than his salary as Justice of the High Court . . ."; by s. 14 that "The President may, by instrument under his hand, appoint any Justice of the High Court or Judge of the Supreme Court of a State to be his deputy in any part of the Commonwealth . . ."; and by s. 15 that "The President or Deputy President shall, before proceeding to discharge the duties of his office, take an oath or affirmation in the form in Schedule A". The Act then proceeded to confer, *inter alia*, power on the court and the president to make awards and orders and to provide for the enforcement of awards and orders by pecuniary penalties imposed by the court and by courts of summary jurisdiction (s. 44), and by the court alone by way of order in the nature of a mandamus or injunction to compel compliance with an award or to restrain its breach under pain of fine or imprisonment

(1) (1938) 59 C.L.R. 556.

(s. 48). The court was also empowered to punish contempt of court in specified cases (s. 83). Chapter III, not s. 51 (xxxix.), of the Constitution confers the power to enact such provisions.

It will be observed that this Act followed the South Australian and New Zealand legislation in providing for the making and enforcement of awards and orders by the same tribunal. Accordingly, awards and orders were made and enforced by the President and Deputy President for fourteen years, until 1918 when in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1) it was held by a majority of the High Court that the enforcement provisions of the Act were invalid, as the President was appointed to this federal Arbitration Court for seven years, and not for life as required by s. 72 in Chap. III of the Constitution in the case of federal courts. However, a majority of the High Court also held that these invalid enforcement provisions were severable and that the rest of the Act was valid. In none of the reasons for judgment was it suggested that arbitral functions could not validly be mixed with judicial functions: it was simply on the ground that the President was not appointed to the Federal Arbitration Court for life that the enforcement provisions were held by the majority to be invalid. No member of the Court suggested that Chap. III prevented the High Court or any federal court from doing anything more than exercising the judicial power of the Commonwealth.

As a result of the decision in *Alexander's Case* (1) the power of enforcing awards and orders was given to the High Court and other courts of law until 1926 when the Commonwealth *Conciliation and Arbitration Act* 1926 was enacted and contained the following provision:—"The Principal Act," (i.e. the 1904 Act and amendments thereof up to 1926), "as amended by this Act, and every provision of that Act as so amended shall be construed as if that Act were, as from the commencement of this Act, confirmed and re-enacted as so amended: to the intent that where any provision of the Commonwealth *Conciliation and Arbitration Act* 1904, or of that Act as amended by any Act or Acts, has before the commencement of this Act been, or would, but for this Act, have been, construed as being in excess of the legislative power of the Parliaments, that provision shall, as from the commencement of this Act, be read with and deemed to have been enacted in relation to the amendments made by this Act."

I take this provision to mean that the 1904 Act was not repealed but only amended.

(1) (1918) 25 C.L.R. 434.

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The 1926 Act then went on to provide by s. 11 that "There shall be a Commonwealth Court of Conciliation and Arbitration, which shall be a court of record, and shall consist of a Chief Judge and such other judges as are appointed in pursuance of this Act"; by s. 12 that "The Chief Judge and the other judges—(*a*) shall be appointed by the Governor-General in Council; and (*b*) shall not be removed except . . . on the ground of proved misbehaviour or incapacity"; and by s. 14 that the Chief Judge and the other judges should receive specified salaries. Section 11 of the 1926 Act really was s. 11 of the 1904 Act amended to provide for a Chief Judge and other judges in the places of the President and Deputy President. So viewed, the 1904 Court continued to exist and a Court was not created by the 1926 Act; and so, if the 1904 court was never a federal Court within Chap. III, then no such court was brought into existence by the 1926 Act. It is seriously arguable that a federal court within Chap. III was not created in 1904. To create such a court, it would appear to be necessary not only to vest in it part of the judicial power of the Commonwealth and to provide for the number of judges, but also to fix the salary of its judges. In fact, Parliament provided in the 1904 Act that there should be no salary. So it is arguable in any event that in the 1904 Act Parliament intended to create a federal court with unpaid judges, and that it did not intend to bring the court into existence otherwise. However, *Starke* J. in *Consolidated Press Ltd.* v. *Australian Journalists' Association* (1) treated the 1926 Act as having *created* a court, whilst *Dixon* J. (as he then was) thought it was *reconstituted*, that is to say, so I understand, that the 1904 court continued but with a Chief Judge and other judges instead of a President and Deputy President: see *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Federated Gas Employees' Industrial Union* (2).

At this stage it is unnecessary and undesirable to decide whether the court was created before 1926, if it was ever validly created. None of the counsel for the parties submitted that the court was never validly created, so we have not had the full argument which would be essential for the proper decision of a question of such great importance. In the absence of such argument I assume that the court was validly created not later than 1926, that is to say, if Chap. III permits of the creation of a court with both arbitral and judicial powers, a question I shall deal with later.

Between 1926 and 1947 there were several amendments of this legislation with which I do not find it necessary to deal. In 1947

(1) (1947) 73 C.L.R. 549, at p. 564. (2) (1951) 82 C.L.R. 267, at p. 272.

the arbitral functions were divided between the Conciliation Commissioners and the court, the judicial functions being discharged by the court alone. Again, between 1947 and 1952 there were further amendments with which also I do not find it necessary to deal. In 1952 provision was made for appeals from the Conciliation Commissioners to the court, which retained all the arbitral and other powers it possessed under the 1947 Act. In the result, the court was left with both arbitral powers and part of the judicial power of the Commonwealth. A question was raised as to the position of the judges of the court as a result of the 1947 and 1952 Acts; but on this point we have heard little argument, and in any event we might well need more facts before coming to a conclusion in particular cases. Mr. *Eggleston* for the prosecutor union made no attack on the constitution of the court, apart from challenging its right to exercise any judicial power of the Commonwealth. The writ of prohibition sought is merely to restrain proceedings on orders made under s. 29 (1) (*b*) and (*c*) and s. 29A. However, if the whole Act is invalid for any reason, then nothing remains for consideration by this Court. If the Act is invalid only in part, the question will arise as to whether that part can be severed so as to leave the rest of the Act operative. It is the submission of the prosecutor union that only the parts of the Act purporting to confer judicial power on the court are invalid, and that the arbitral powers are valid and may be exercised by the court as at present constituted. However, Mr. *Eggleston* also submits that if this Court cannot be satisfied that it was the intention of Parliament that the court should continue to exist without the judicial power purported to be conferred on it, then the whole Act should be declared invalid, despite the drastic consequences attaching to such declaration.

For his submissions, Mr. *Eggleston* relies wholly on Chap. III.

Since 1926 provisions of this legislation and awards and orders made under it have frequently come before this Court for consideration. In *Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1) *Dixon* J. (as he then was) observed, speaking of Chap. III, that it appeared from authorities referred to by his Honour that " because of the distribution of the functions of government and of the manner in which the Constitution describes the tribunals to be invested with the judicial power of the Commonwealth, and defines the judicial power to be invested in them, the Parliament is restrained both from reposing any power essentially judicial in any other organ or body, and from reposing any other than that judicial power in such tribunals " (2). Again in *R.* v.

(1) (1931) 46 C.L.R. 73.

(2) (1931) 46 C.L.R., at pp. 97, 98.

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Foster; *Ex parte Commonwealth Life (Amalgamated) Assurances Ltd.* (1) his Honour in a joint judgment with *Fullagar* J. and *Kitto* J. observed that "whether and how far judicial and arbitral functions may be mixed up is another question, one which fortunately the Court has never been called upon to examine" (2).

Apart from these two observations, in no judgment has it been suggested, so far as I am aware, that the enforcement provisions of this legislation are invalid because of the combination of arbitral and judicial powers in the court. But, to say the least, it has been assumed in many cases that the mere combination of such powers did not give rise to any question of validity or jurisdiction. Among other such cases are *R.* v. *Taylor*; *Ex parte Federated Ironworkers' Association* (3); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Federated Gas Employees' Industrial Union* (4); *R.* v. *Taylor*; *Ex parte Roach* (5); *R.* v. *Kelly*; *Ex parte Waterside Workers' Federation of Australia* (6); and *Reg.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Amalgamated Engineering Union (Australian Section)* (7). Every member of this Court as at present constituted was a party to one or more of these decisions. Here it should be observed, however, that while this Court would, even in the absence of any submission by a party, consider itself bound to satisfy itself as to the existence of its own jurisdiction in any particular matter, as it did in *Watson* v. *Federal Commissioner of Taxation* (8) it would not be likely to question the jurisdiction of another court unless its jurisdiction was challenged by a party on a specific ground. The ground of combination of judicial and arbitral powers is now raised for the first time.

In *Federated Ironworkers' Association of Australia* v. *The Commonwealth* (9) all the members of this Court as at present constituted, except *Taylor* J., referred with approval to a passage in the judgment of *O'Connor* J. in *Jumbunna Coal Mine N.L.* v. *Victorian Coal Miners' Association* (10) that included a suggestion that the making of industrial awards was an exercise of the judicial power of the Commonwealth. But that suggestion was in no way relied upon in the *Federated Ironworkers' Case* (11) although it was not expressly rejected. *O'Connor* J. may have had in mind the setting up of a "court" in the New Zealand legislation already referred to and have taken the view adopted by this Court in *Reg.* v. *Davison* (12)

(1) (1952) 85 C.L.R. 138.
(2) (1952) 85 C.L.R., at p. 155.
(3) (1949) 79 C.L.R. 333.
(4) (1951) 82 C.L.R. 267.
(5) (1951) 82 C.L.R. 587.
(6) (1952) 85 C.L.R. 601.
(7) (1953) 89 C.L.R. 636.
(8) (1953) 87 C.L.R. 353.
(9) (1951) 84 C.L.R. 265, at p. 277.
(10) (1908) 6 C.L.R. 309, at pp. 358-360
(11) (1951) 84 C.L.R. 265.
(12) (1953) 90 C.L.R. 353.

that what constitutes judicial power is to be determined in the light of history, even to the extent of including in the concept findings of constitutive or antecedent facts, to which awards amount, as well as findings of remedial facts, such as are involved in the enforcement of awards.

In the absence of these decisions and of decisions referred to later, I might have taken and acted on the view (1) that, although the Australian Constitution followed the English Constitution as regards the separation of powers, still the Australian Constitution, being written, necessarily substituted laws for conventions, e.g., it would be unconventional under the English unwritten Constitution for the Imperial Parliament to confer executive authority on the judicature, but it would be lawful; whilst under our Constitution such action could be both unconventional and unlawful; and (2) that Chap. III is exhaustive both as to the courts that can be vested with the judicial power of the Commonwealth and as to the powers that can be given to federal courts.

However, statements by the Privy Council in the following well-known passages contain, I think, the solution of the problem now being dealt with:—(1) "The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to enquire further, or to enlarge constructively those conditions or restrictions" (*Reg.* v. *Burah* (1)). (2) "When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to matters enumerated in s. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by s. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament . . . would have had under

(1) (1878) 3 App. Cas. 889, at pp. 904-905.

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like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect" (*Hodge* v. *The Queen* (1)). (3) "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament . . . When acting within those limits it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself". (*Powell* v. *Apollo Candle Co. Ltd.* (2)). (4) "In the interpretation of a completely self-governing Constitution founded upon a written organic instrument . . . if the text is explicit the text is conclusive, alike in what it directs and what it forbids . . . if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself . . . or otherwise is clearly repugnant to its sense" (*Attorney-General for Ontario* v. *Attorney-General for Canada* (3)).

Neither Mr. *Menzies* nor Mr. *Macfarlan* referred to these authorities, and Mr. *Eggleston* submitted that they should not be taken too literally. But they should be taken literally, and moreover have frequently been relied upon by this Court for a liberal interpretation of the Commonwealth Constitution.

Giving full effect to these statements of the Privy Council, it still might seem that Chap. III, which is not expressed to be "subject to this Constitution", as are the legislative powers conferred by ss. 51 and 52, exhaustively deals with the jurisdiction of the High Court which it creates and of the other courts which Parliament creates to exercise the judicial power of the Commonwealth. As already stated, only in one provision of the Constitution outside Chap. III is the "Federal Judicature", referred to, i.e. in s. 51 (xxxix.). But this power to legislate with respect to matters incidental to vesting the judicial power of the Commonwealth in federal courts obviously does not authorize the addition of judicial power other than that of the Commonwealth or of non-judicial power not incidental to the exercise of the judicial power of the Commonwealth.

This view of the exhaustive nature of Chap. III was taken not only by *Dixon* J. (as he then was) in the *Victorian Stevedoring Case* (4) but also by *Knox* C.J. and *Gavan Duffy* J. in *Porter* v. *The*

(1) (1883) 9 App. Cas. 117, at p. 132.
(2) (1885) 10 App. Cas. 282, at p. 289.
(3) (1912) A.C. 571, at pp. 583, 584.
(4) (1931) 46 C.L.R., at p. 98.

King; *Ex parte Yee* (1) where their Honours observed:—"In our opinion, the reasoning of the majority judgment in *In re Judiciary and Navigation Acts* (2) establishes the proposition that the jurisdiction of this Court, whether original or appellate, is to be sought wholly within Chap. III of the Constitution, that the Court exists wholly for the performance of the functions therein described and that the Parliament of the Commonwealth, legislating for the peace, order and good government of the Commonwealth, can no more add to or alter the jurisdiction of the Court than it can add to or alter its own legislative powers . . . The status and duties of this Court are explicitly defined in Chap. III of the Constitution; and an attempt to alter that status or add to those duties is not only an attempt to do that which is not authorized by s. 122 but it is an attempt to do that which is implicitly forbidden by the Constitution" (3).

I take this to be an acknowledgment that the decision of the point expressed to be reserved in the joint judgment to which their Honours were parties in *In re Judiciary and Navigation Acts* (2) was really implicit in the reasoning in that judgment. It was suggested from the Bench during argument that perhaps the point intended to be reserved in that case was whether non-judicial duties, as distinct from powers, could be imposed on the court so as to overburden it. That would, however, have conceded the power of Parliament to add non-judicial duties so long as the court was not called upon to do the extra work to the prejudice of its exercise of the judicial power of the Commonwealth.

It may seem remarkable that the view stated by *Knox* C.J. and *Gavan Duffy* J., and which was shared by *Dixon* J. (as he then was) in the *Victorian Stevedoring Case* (4) was not expressly dealt with in the majority judgments in *Porter's Case* (5). Those judgments rested wholly on s. 122 of the Constitution, which reads:—"The Parliament may make laws for the government of any territory 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, and may allow representation of such territory in either House of Parliament to the extent and on the terms which it thinks fit".

In *Porter's Case* (5) as in *R.* v. *Bernasconi* (6) this Court, relying on s. 122, entertained appeals from territorial courts of New Guinea.

(1) (1926) 37 C.L.R. 432.
(2) (1921) 29 C.L.R. 257.
(3) (1926) 37 C.L.R. 432, at pp. 438, 439.
(4) (1931) 46 C.L.R. 73.
(5) (1926) 37 C.L.R. 432.
(6) (1915) 19 C.L.R. 629.

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In *Bernasconi's Case* (1), *Griffith* C.J. said that Chap. III was limited to the exercise of the judicial power of the Commonwealth in respect of the functions of government as to which it stood in relation to the States; that it had no application to Territories; and that s. 122 was not restricted by Chap. III. No doubt s. 122 is not so restricted, but the question is whether the power conferred by s. 122 is so complete that it extends as far as to require such a qualification of Chap. III itself as to permit this Court or any other federal court brought into existence for the purpose of exercising the judicial power of the Commonwealth to be used as a Court of Appeal for the Territories; in other words, whether s. 122 gives power to treat this Court and other federal courts created by or under Chap. III as though they were individuals whose services could be availed of for general purposes and not legal entities created for the single purpose specified in Chap. III. In the absence of anything to the contrary in the judgments in *Bernasconi's Case* (2) and *Porter's Case* (3) I conclude that their Honours who took the broad view of s. 122 were really giving effect to what the Privy Council said in the passages cited above from the judgments in *Reg.* v. *Burah* (4); *Hodge* v. *The Queen* (5); *Powell* v. *Apollo Candle Co. Ltd.* (6) and *Attorney-General of Ontario* v. *Attorney-General of Canada* (7) and more particularly in the passage quoted from the case last-mentioned, that if the text of the Constitution is explicit in what it forbids then the text is conclusive; but that *if the text says nothing expressly then it is to be taken for granted that the power is bestowed, unless it is clearly repugnant to the sense of the text.* Taking this to be the explanation of the broad view in *Bernasconi's Case* (2) and in *Porter's Case* (3) I do not venture to say that it is a wrong view, although I do not readily conclude that it is not repugnant to the sense of Chap. III to hold that powers other than the judicial power of the Commonwealth can be conferred on this Court or other federal courts. However, to combat the broad view effectively it would, I think, be necessary to fall back on the strict doctrine of the separation of powers. But Mr. *Eggleston* for the prosecutor union does not press for the acceptance of this doctrine, which has never been accepted as applying to the Australian Constitution either by the Privy Council or by this Court. Whatever difference there is between the English and Australian Constitutions is due to the fact that the latter is a written Constitution, that is to say, that the rules of construction of statutes determine its meaning

(1) (1915) 19 C.L.R. 629, at p. 635.
(2) (1915) 19 C.L.R. 629.
(3) (1926) 37 C.L.R. 432.
(4) (1878) 3 App. Cas. 889.
(5) (1883) 9 App. Cas. 117.
(6) (1885) 10 App. Cas. 282.
(7) (1912) A.C. 571.

and effect and the theory of the strict doctrine of separation of powers as applied in the United States of America plays no part.

Mr. *Menzies* for the respondent judges and the intervenant Commonwealth submitted that as s. 61 of the Constitution permitted non-executive power to be given to the executive, so s. 71 in Chap. III permitted non-judicial power to be given to federal courts. The non-executive power to which counsel referred was the power to legislate, which it was held in the *Victorian Stevedoring Case* (1) was validly delegated to the Governor-General in Council, even when the delegated power authorized the repeal of a federal statute. However, it seems that any valid statute of the Commonwealth Parliament falls automatically within s. 61, without adding to the section. It is not necessary to state what is the limit of this power of delegation; but I would find it difficult to supply reasons why any delegation of power to legislate under s. 51 or s. 52 of the Constitution should be held invalid, provided the delegation left the Parliament at liberty to revoke the delegation at any time and to cancel what had been done under it. Such a delegation would seem to be a law with respect to the subject matter delegated and not an attempt to amend the Constitution.

I conclude then that Chap. III permits of the combination of arbitral and judicial powers as in the *Conciliation and Arbitration Act* 1904-1952. But if I had concluded otherwise, still I would have held that the many decisions of this Court based on the assumption that the combination was permissible should be allowed to stand. This would be because if they were set aside it would still be possible to legislate validly, and indeed very briefly, to continue the present system with or without the co-operation of the executive. Under such legislation, and with or without such co-operation, the same officers of the Commonwealth could continue to perform the same acts in the same way, except that the arbitral powers now exercised by the judges would have to be exercised by them as *personae designatae*, but for all practical purposes with the same consequences. The judges as individuals are subject to both State and Commonwealth laws and may be required to perform duties other than judicial duties; and may even be required to perform additional duties simply because, having become judges, they are believed to have special personal qualifications to discharge them. The judges as individuals must be distinguished from the courts which they constitute. If all the judges of a court resigned to-day their places on the court could be filled tomorrow: the legal entity, the court, would continue without further legislative

(1) (1931) 46 C.L.R. 73.

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enactment. Even if then additional powers might not validly be given to a court under Chap. III, still extra duties involving the exercise of these same powers might validly be imposed on the judges of the court as *personae designatae*. In view of the long experience of the working of this industrial legislation it could not be established that this would place an undue burden on the judges. However, it is not within my province to suggest what Parliament should do in view of any decision of this Court or of anything in any reasons for judgment; that is to say, whether Parliament should leave things as they are, or separate the arbitral powers from the judicial and provide for their discharge by the same or by different officers of the Commonwealth. In saying this I am not making gratuitous observations because Mr. *Menzies* for the respondent judges naturally enough stressed as a matter calling for careful consideration in coming to our decision the situation of the Arbitration Court judges if the legislation were declared invalid wholly or in part. But whatever happens, Parliament can adequately cope with any situation that arises. At all events nothing in the Constitution stands in the way, as far as I am aware.

It will be observed that in taking the view that, whatever the effect of Chap. III, the principle of *stare decisis* should apply in any event, I am influenced by the limited consequences that would necessarily follow if it were not applied, namely nothing more than the need for a short amendment of the legislation by a few more or less formal changes that would preserve the *status quo* for all practical purposes. The application of the principle would not be warranted if the necessary consequences were considerable, e.g., if the view that arbitral powers were judicial powers of the Commonwealth within Chap. III had prevailed so that industrial awards could validly be made only by judges appointed for life, and that view were now successfully challenged. Of course, Parliament might not care to resort to the *personae designatae* method although it has been resorted to frequently enough; as that might seem to circumvent the Constitution by observing its letter whilst violating its spirit. But it is sufficient for my purposes that Parliament could resort to it.

It might appear that the making and enforcing of awards by the same persons involves the discharge of conflicting duties. However, that objection is not raised here. It is no answer to say that the making and enforcing of rules of court by the same judges is objectionable for the same reason: there is a difference in principle between awards which are the subject matter of the jurisdiction and the rules of court and contempt proceedings which are essential

to its exercise. I think that the only answer is that awards were made and enforced by the same tribunals in New Zealand and South Australia before Federation and that several States as well as the Commonwealth have for many years followed this lead. This answer may not seem very persuasive; but it is supported by *Stemp's Case* (1), and to some extent by *Lowenstein's Case* (2).

Before concluding, I think I should refer to the decision of this Court in *Mainka* v. *Custodian of Expropriated Property* (3) in which it was held that the High Court was validly given jurisdiction to hear an appeal from the Central Court of the Mandated Territory of New Guinea. The decision was based on the fact that the Mandate provided that the Mandatory should have full power of administration and legislation over the Territory "as an integral portion of the Commonwealth of Australia". The acceptance of the Mandate was authorized by the King by Imperial Act 9 & 10 Geo. V. c. 33 called "*The Treaty of Peace Act* 1919". It was held by a majority that the central court was a federal court within s. 73 in Chap. III of the Constitution. However, the Imperial legislation operating on the terms of the Mandate accounts for this decision which then is of no assistance here.

I would discharge the order nisi for prohibition.

TAYLOR J. In this matter the prosecutor seeks an order making absolute an order nisi calling upon three members of the Commonwealth Court of Conciliation and Arbitration and the Metal Trades Employers' Association to show cause why a writ of prohibition should not issue prohibiting any further proceedings upon two orders made by the court, as constituted by those members, on 31st May 1955 and 28th June 1955 respectively. The orders were made pursuant to ss. 29 (1) (*b*), 29 (1) (*c*) and 29A of the *Conciliation and Arbitration Act* 1904-1952. These provisions are in the following terms:—"29.—(1) The Court shall have power—(*b*) to order compliance with an order or award proved to the satisfaction of the Court to have been broken or not observed; (*c*) by order, to enjoin an organization or person from committing or continuing a contravention of this Act or a breach or non-observance of an order or award;

29A.—(1) The Court has the same power to punish contempts of its power and authority, whether in relation to its judicial powers and functions or otherwise, as is possessed by the High Court in respect of contempts of the High Court. (2) The jurisdiction of

(1) (1917) 23 C.L.R. 226.
(2) (1938) 59 C.L.R., at p. 572.
(3) (1924) 34 C.L.R. 297.

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the Court to punish a contempt of the Court committed in the face or hearing of the Court, when constituted by a single Judge, may be exercised by that Judge; in any other case, the jurisdiction of the Court to punish a contempt of the Court shall (without prejudice to the operation of sub-section (7) of section twenty-four of this Act) be exercised by not less than three Judges. (3) The Court has power to punish, as a contempt of the Court, an act or omission although a penalty is provided in respect of that act or omission under some other provision of this Act. (4) The maximum penalty which the Court is empowered to impose in respect of a contempt of the Court consisting of a failure to comply with an order of the Court made under paragraph (*b*) or (*c*) of the last preceding section is :—(*a*) where the contempt was committed by—(i) an organization (not consisting of a single employer)—Five hundred pounds; or (ii) an employer, or the holder of an office in an organization, being an office specified in paragraph (*a*), (*aa*), or (*b*) of the definition of 'Office' in section four of this Act—Two hundred pounds or imprisonment for twelve months; or (b) in any other case—Fifty pounds."

Both the prosecutor in this matter and the Metal Trades Employers' Association are organizations registered under the Act and the orders which are called in question were made by the court upon the application of the latter. The first of the orders directed the prosecutor to comply with specified provisions of the Metal Trades Award and enjoined it from continuing specified breaches thereof, whilst the second, after reciting a finding by the court that the prosecutor had been guilty of contempt constituted by its wilful disobedience of the earlier order, imposed a fine upon it of £500. It is unnecessary to set out the precise terms of the orders, for their form is not in question, but it is of importance to observe that it was common ground between the parties that both orders were essentially judicial in character and that they can have no legal foundation unless they were made in the exercise of the judicial power of the Commonwealth. It is this circumstance which has given rise to the constitutional arguments submitted to us in this matter, it being asserted by the prosecutor that it is not competent for the legislature to confer any part of the judicial power of the Commonwealth upon any federal body unless it is a court constituted in accordance with Chap. III of the Constitution. This is, of course, beyond question and is not denied by the respondents, who maintain that the Commonwealth Court of Conciliation and Arbitration is such a court. But the prosecutor relies upon the circumstance that the Act purports to confer what have been described as mixed

functions upon that court, some judicial in their nature and others described as "arbitral", and this, it is contended, is not permissible under the Constitution of the Commonwealth.

The arguments of the prosecutor are twofold. In the first place, it is said, the political theory of the separation of the three functions of government—legislative, executive and judicial—is to be found incorporated as a fundamental part of the structure of the Constitution and, accordingly, it is not permissible for any one organ of government to exercise any of the powers or functions which belong to or are appropriate to either of the other two. Strict adherence to this doctrine or theory must necessarily mean that legislation which purports to authorize any one organ of government to exercise functions which appertain to either of the others is invalid.

The prosecutor's second submission asserts that Chap. III is the exclusive measure of Parliament's legislative authority to confer power upon federal courts and that, since the "arbitral" powers and functions with which the *Conciliation and Arbitration Act* purports to invest the Arbitration Court are not part of the judicial power of the Commonwealth, the Act is, or at least many of its provisions are, invalid. This result is said to flow from a consideration of the provisions of the Constitution itself, and in particular those of Chap. III, and quite independently of the political theory of the separation of powers.

As a political theory the doctrine of the separation of powers has had a marked influence in the United States and to some extent, at least, ss. 1, 61 and 71 of the Commonwealth Constitution represent an attempt to commit to the three organs of government those powers and functions appropriate to their respective departments. But it is apparent 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: (see per *Isaacs* J. in *Le Mesurier* v. *Connor* (1). Some of such matters, as the same learned justice said in *Federal Commissioner of Taxation* v. *Munro* (2) "so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another" (3) and he gave as obvious examples the appropriation of public money, a trial for murder and the appointment of a federal judge. But he then went on to say

(1) (1929) 42 C.L.R. 481, at p. 519.
(2) (1926) 38 C.L.R. 153.
(3) (1926) 38 C.L.R., at p. 178.

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that " other matters may be subject to no *a priori* exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government. Rules of evidence, the determination of the validity of parliamentary elections, or claims to register trade marks would be instances of this class. The latter class is capable of being viewed in different aspects, that is, as incidental to legislation, or to administration, or to judicial action, according to circumstances " (1). Examples of the latter kind are numerous and though his Honour mentioned some it is, perhaps, not out of place to supplement the list by some particular references. The *Patents Act* 1952, s. 95, authorizes a patentee, who has suffered loss or damage of the nature referred to in that section, to apply to the High Court *or* to the Commissioner of Patents for an extension of the term of his patent. In any application made to the Court it may, if it finds that the patentee " has suffered loss or damage by reason of hostilities between Her Majesty and the foreign state ", order the extension of the term of the patent for such further term as the Court thinks fit, whilst in any application made to the commissioner he may, if he makes a similar finding, extend the term of the patent in the same way. Again by Pt. XVII of the Act the High Court is constituted the Appeal Tribunal for the purposes of the Act and a right of appeal from the commissioner is given in many matters which, in the first instance, are dealt with by him pursuant to powers and authorities vested in him by the Act. The " appeal " is of course not a true appeal for it is not brought from a court and it is disposed of by the Court as a matter within its original jurisdiction and in the exercise of powers and authorities of the same apparent character as those which are vested in the commissioner. But in the former case the court, in some cases at least, may be said to exercise judicial power whilst, in the latter, the commissioner exercises administrative authority. Similar comments may be made with respect to the right of appeal from the decisions of the commissioner under the earlier *Patents Act* and from decisions of the Law Officer pursuant to s. 34 of the *Trade Marks Act* 1905-1948. Again many of the powers exercisable under the *Bankruptcy Act* 1924-1954 may be thought to present this double aspect, but that it was the legislative intention that the federal Court of Bankruptcy should be invested with powers, duties and functions of an administrative character, is apparent from the plain terms of s. 23. Striking examples are the powers given to the court, by s. 68, to hold a sitting for the examination of any bankrupt as to his conduct and affairs and, by s. 80, to require

(1) (1926) 38 C.L.R., at pp. 178-179.

the bankrupt or his wife or any person known or suspected to have in his possession any of the estate or effects belonging to the bankrupt to attend before the court and to give evidence relating to the bankrupt, his trade dealings, property, or affairs. The examination in either case may be conducted before the court or, pursuant to s. 24 of the Act, before the registrar. Whichever course is adopted it is in aid of the official receiver's duty of investigation and administration: (see s. 15). No less striking are the powers conferred upon the court by Pt. VIII with respect to trustees. The provisions in this Part authorize the court to direct that any person may be registered as a trustee, to cancel any such registration, to confirm, reverse or modify any action or decision of a committee upon the application of the bankrupt or any of his creditors, to inquire into the question whether a trustee is faithfully performing his duties and to take such action and make such order as may be deemed expedient. Many of these powers are by no means essentially judicial in their nature and might well be vested in an administrative officer. Indeed they are so exercisable either under s. 24 or pursuant to a direction of the court (s. 23). The authority of a Court of Marine Inquiry to make inquiries concerning marine casualties or in any matter of the character specified in s. 354 of the *Navigation Act* is another instance of an authority which might be exercised administratively. Indeed, s. 377 which authorizes a Court of Marine Inquiry to hear and determine in open court any appeal or reference in pursuance of the Act in respect of the detention of a ship alleged to be unseaworthy or any other prescribed matter, expressly empowers the court "in relation to the hearing and determination of the appeal or reference" to exercise "all the powers of the Minister". The powers given to the High Court by the *Life Insurance Act* 1945-1950 are a further example of powers which might be exercised administratively. I refer particularly to s. 39 which requires the sanction of the court to investments of a specified character, to s. 40 which authorizes appeals to the court against directions given by the commissioner with respect to the allocation of further assets to a company's statutory fund, to s. 47 which authorizes an appeal against the refusal of the commissioner to approve of any person performing the functions of an auditor under Div. 4 of Pt. III of the Act, to s. 52 which gives a right of appeal to the High Court against the rejection of any account or balance sheet of a company, to s. 58 which gives a right of appeal against the directions concerning the conduct of a company's business which may be given under that section, to s. 75 which

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authorizes the court to confirm a scheme for transfer or amalgamation and s. 119 which authorizes the court to direct the issue of special policies in lieu of policies which have been lost or destroyed. These powers are not dissimilar to the supervisory powers conferred upon the High Court by the *Trading with the Enemy Act* 1939-1952 and which have so often been exercised by this Court without question. Many other examples might be given but I conclude the list by referring to two of the many cases in which it became necessary to determine whether powers which had been conferred were not only judicial or quasi-judicial but were part of the judicial power of the Commonwealth. The first of these (*Peacock* v. *Newtown Marrickville & General Co-operative Building Society No.* 4 *Ltd.* (1) was concerned with the *National Security* (*Contracts Adjustment*) *Regulations*, which purported to authorize, *inter alia*, a district court of the State of New South Wales, upon the application of any party, to cancel or vary any agreement where it was satisfied that "by reason of circumstances attributable to the war or the operation of any regulation made under the *National Security Act* 1939 . . . the performance, or further performance" of the agreement had become or was likely to become impossible or, so far as the applicant was concerned, had become or was likely to become inequitable or unduly onerous. The power so conferred was held to constitute a part of the judicial power of the Commonwealth notwithstanding the fact that the power was not concerned with the declaration or enforcement of existing rights but extended to the variation or total destruction of the existing legal rights and obligations of the parties. On the other hand the powers conferred upon committees of reference by the *Women's Employment Regulations* were held not to constitute part of the judicial power of the Commonwealth (*Rola Co.* (*Australia*) *Pty. Ltd.* v. *The Commonwealth* (2)). These regulations authorized such committees to decide authoritatively questions of fact upon which the rights and liabilities of particular employers with respect to their female employees depended. A majority of the Court held that this function was not essentially judicial though there can be little doubt that the power might validly have been conferred upon a court. Considerations which become evident from illustrations such as have been given lead inevitably to the conclusion that, though the Constitution effects a broad and fundamental distribution of powers among the organs of government, it is not such a distribution as precludes overlapping in the case of powers or functions the inherent features of which are not such as to enable them to be assigned, *a priori*, to

(1) (1943) 67 C.L.R. 25.

(2) (1944) 69 C.L.R. 185.

one organ rather than to another. Moreover as the Judicial Committee of the Privy Council said in *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (1): "The borderland in which judicial and administrative functions overlap is a wide one" (2).

Chapter III of the Constitution deals specifically with the judicature. Section 71 provides that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction. By s. 73 the High Court is given an extensive appellate jurisdiction and by s. 75 it is invested with original jurisdiction in matters of a specified character. In addition Parliament is authorized to make laws conferring original jurisdiction upon the High Court in a number of other matters. The legislative power to create other federal courts and to define their respective jurisdictions is to be found in ss. 71 and 77 (i.). There is no power to confer judicial power generally upon any new federal court, for jurisdiction may only be conferred with respect to any of the *matters* specified in ss. 75 and 76. These latter sections mark the limits of judicial power which may be conferred upon any new federal court created by Parliament and also, it is said, the limits of legislative authority to confer powers of any kind upon a court. It should, perhaps, be observed, in passing, that the legislative authority to confer judicial power upon courts created by Parliament, though defined by reference to a number of so called subject matters, extends to *any matter arising under any laws made by Parliament* and *in addition* to a number of other matters. But on the assumption that the "arbitral" powers of the Arbitration Court are not judicial in their essential character the argument of the prosecutor means that legislation which purports to vest such powers in a federal court must be invalid.

In argument however it was said by the prosecutor, on the authority of *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (3) that it is constitutionally permissible to invest a court with limited legislative powers where the existence and exercise of such a power may be considered as reasonably incidental to the performance of their judicial functions. There is, of course, no express provision in Chap. III to justify legislation investing courts with subordinate legislative authority and to suggest, as was done during the course of argument, that such legislation may be justified under

(1) (1949) A.C. 134.
(2) (1949) A.C., at p. 148.
(3) (1938) 59 C.L.R. 556.

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s. 51 (xxxix.) is immediately to depart, to this extent at least, from the notion that the legislative authority to confer powers upon courts is to be sought exclusively in Chap. III. And if the prosecutor's main contention is correct there is nothing in s. 51 (xxxix.) to authorize any exception from it. That paragraph, so far as is relevant to this inquiry, merely authorizes legislation with respect to matters incidental to the execution of any power vested by the Constitution in the Parliament or in the Federal judicature and effective laws may well be made under this head of power without investing the courts with subordinate legislative authority. Indeed it was not thought necessary to invest the Federal Court of Bankruptcy with power to make rules for regulating its practice and procedure in the many types of matters which may come before it; it was sufficient to leave the making of such rules to the executive. Moreover, it should be observed, the express power given by par. (xxxix.) would seem to be quite inconsistent with the notion, suggested in argument at one stage, that Chap. III impliedly authorizes legislation investing courts with non-judicial powers, including *subordinate legislative power*, which are incidental to the exercise of the judicial powers with which they have been invested. These observations may, of course, be said to constitute but a minor criticism of the prosecutor's contentions, but if s. 51 (xxxix.) may be relied upon to enable the legislature to confer upon courts authorities incidental to the performance of their strictly judicial functions it constitutes a real and not merely an apparent exception to the proposition that Chap. III is the exclusive measure of legislative authority to invest courts with powers and functions.

It cannot, of course, be doubted that no part of the judicial power of the Commonwealth can be vested in a body which is not a court constituted in accordance with Chap. III. Nor, except to the extent indicated, is 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". But what is the position with respect to those other powers which are "subject to no *a priori* exclusive delimitation"? In relation to this problem the question also arises whether the "arbitral" powers of the Arbitration Court fall into this category of powers or whether they may, *a priori*, be assigned exclusively to one branch of government or another.

In his work on the *Constitution of the United States*, *Willoughby* has sought to deduce some general principles from the cases decided in that country in relation to these matters. He points out (2nd ed.

(1929), pp. 1619, 1620) that " 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." Thereupon he proceeds : " 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 ". But speaking of those powers the character of which does not admit of any *a priori* assignment he continues : " Generally speaking, it may be said that when a power is not peculiarly and distinctly legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested ". I should have thought that a particular application of the latter proposition is to be found in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1) for if it be not permissible to entrust to courts functions which cannot be said to be judicial in character it mattered little whether the President of the Arbitration Court, as it was then constituted, had been appointed in accordance with constitutional requirements or not. It is true, of course, that the question whether such a course was permissible was not directly decided by the Court but the circumstance that the Act then under challenge purported to invest the court with " mixed " powers and functions and the possible consequences of this were not overlooked. Counsel for the respondent, upon the authority of *United States* v. *Ferreira* (2) stated in argument that " Under sec. 51 (xxxv.) of the Constitution the power to settle disputes by means of arbitration might be conferred upon a Court exercising the judicial power of the Commonwealth. There is no reason why the Commonwealth Parliament should not have authority to impose upon a Court exercising judicial power the performance of other duties " (3). Counsel for the applicants asserted

(1) (1918) 25 C.L.R. 434.
(2) (1852) 13 How. 40 [14 Law. Ed. 42].
(3) (1918) 25 C.L.R., at p. 437.

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that " Under sec. 51 (xxxv.), which may be used in conjunction with sec. 71 of the Constitution, it is perfectly proper to create a Court, and to arm that Court with the powers incidental to the performance of its purpose of settling disputes " (1). It is clear that no argument to the contrary was addressed to the court but the heresy involved in the propositions as stated—if there was one—was so fundamental and, I venture to add, must then have been so palpable, that it could not have escaped detection and exposure. There was however no such exposure. On the contrary three justices of the Court (*Griffith* C.J. and *Higgins* and *Gavan Duffy* JJ.) upheld the impugned provisions in their entirety whilst a fourth (*Powers* J.) expressly stated that he did not think that " any member of the Court considers that the constitution of a Commonwealth Court of Conciliation and Arbitration, to be presided over by a Judge or Justice duly appointed as Judge of that Court in accordance with s. 72 of the Constitution, to exercise all the powers given by the present *Commonwealth Conciliation and Arbitration Act*, is beyond the powers of the Parliament of the Commonwealth " (2). Though it is not the practice of this Court to pronounce upon questions which are not directly raised in proceedings before it, it is clear that this matter was before the Court, that it was of transcendent constitutional importance, that the views of a number of the Justices were opposed to the argument now advanced in this case and that there is nothing in the reasons of the remaining Justices to support that argument. On the contrary it is perhaps reasonable to say that the only vice which their Honours saw in the legislation was the tenure of office provided by the Act for the appointment of the President. Moreover, this view of *Alexander's Case* (3) was the one which was acted upon when the court was reconstituted in 1926 and it is a view which has remained unchallenged until now. Lapse of time is of course no answer to a valid constitutional argument but before acting upon a submission which appears to me to be contrary to all the implications of *Alexander's Case* (3) I should be required to be convinced of the validity of the submission.

The submission does not, however, carry conviction to my mind. On the contrary, whilst I see in Chap. III of the Constitution an exhaustive declaration of the judicial power with which Federal courts may be invested, I see nothing to prohibit Parliament absolutely from conferring other powers or imposing other duties upon them under s. 51. But this does not mean that Parliament may confer upon courts powers and functions which are essentially

(1) (1918) 25 C.L.R., at p. 438.
(2) (1918) 25 C.L.R., at p. 479.
(3) (1918) 25 C.L.R. 434.

legislative or executive in character except in so far as they are strictly incidental to the performance of their judicial functions. The investing of courts with such powers would clearly be in conflict with constitutional principles and, in turn, judicial authority. But "arbitral" functions are not, in my opinion, essentially legislative or executive in character. Indeed, *Barton* J. in *Alexander's Case* (1) considered that the "arbitral" functions of the Arbitration Court constituted part of the judicial power of the Commonwealth whilst *Griffith* C.J. (2) found himself unable to make any intelligent distinction between the "arbitral" and "judicial" provisions of the Act and pointed out, in effect, that "arbitral" is not synonymous with "non-judicial". It is, of course, much too late in the day to contend that "arbitral" functions of the nature created by the *Conciliation and Arbitration Act* can ever constitute any part of the judicial power of the Commonwealth, but I mention in passing that the Court in *Alexander's Case* (3) was not so much concerned with the question whether such functions could be classified as judicial if committed to a properly constituted court; it was sufficient if they could be made exercisable by a tribunal which was not a court. The notion that powers of an indeterminate character may "achieve ultimate recognition as aspects of the judicial power, not so much because of their inherent nature or characteristics, but because their performance has been committed to a court in the strict sense" (*Reg.* v. *Davison* (4)) appears to be a subsequent development. It is, however, sufficient to say that "arbitral" functions of the kind in question do not bear the indelible imprint of legislative or executive character; on the contrary an examination of the provisions of s. 51 (xxxv.) may lead to the conclusion that they are of a special character.

The authority conferred upon the Commonwealth Parliament by s. 51 (xxxv.) of the Constitution is expressed as a power to make laws for the peace, order and good government of the Commonwealth with respect to "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". It is not, as has been frequently observed, a power to legislate with respect to industrial matters or, even, with respect to industrial disputes; the subject matter of the power is conciliation and arbitration for the declared purpose. Accordingly Parliament has no power to make laws directly regulating industrial conditions; its authority is limited to the establishment and maintenance of a system, in some form or other, of conciliation and

(1) (1918) 25 C.L.R., at p. 456.
(2) (1918) 25 C.L.R., at p. 449.
(3) (1918) 25 C.L.R. 434.
(4) (1954) 90 C.L.R. 353, at p. 388.

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arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

It has been argued, without success, that "arbitration," as used in s. 51 (xxxv.) does not authorize legislation under which the parties to an industrial dispute are *required* to submit to the determination of a dispute by an arbitrator not appointed either directly or indirectly by the parties (*R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1)). The position is therefore that this head of power authorizes legislation for the establishment of a system of arbitration which, at the option of the legislature, may be available to the parties if they wish to avail themselves of it or which, on the other hand, will begin to function upon the occurrence of an industrial dispute irrespective of the wishes of either party or, indeed, in spite of their desire to settle their differences otherwise. Likewise, the legislature may, at its option, provide for arbitrators who will represent the parties in dispute or provide an arbitrator who is an entire stranger to the dispute and to the parties. But whatever the composition of the body charged with the function of arbitrating between parties in dispute, "arbitration" requires that it must "act on the ordinary principles of justice involved in the necessity of allowing a hearing to all parties to the difference on which it must decide, and of abstaining from involving in its decision interests of others than the parties to the difference. It is not absolved from this duty by the fact that a Statute has imposed it on the parties as their tribunal, or has compelled them to submit their differences to it": (per *Barton* J. in *Whybrow's Case* (2)). Accordingly, arbitration presents some features which are characteristic of the exercise of judicial power. It is concerned with a dispute or disputes between parties and it involves a hearing and determination of the matters in dispute. Indeed, "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 for the prevention and settlement of industrial disputes and is not authorized by sec. 51 (xxxv.) of the Constitution". (*Australian Railways Union* v. *Victorian Railways Commissioners* (3)).

The Constitution therefore authorizes Parliament to legislate for the establishment of a tribunal to which the parties to industrial disputes of the specified character are compelled to submit their

(1) (1910) 11 C.L.R. 1.
(2) (1910) 11 C.L.R., at pp. 36, 37.
(3) (1930) 44 C.L.R. 319, at pp. 384, 385.

differences and which, in the exercise of its arbitral functions, is bound to proceed, according to the ordinary principles of justice, to hear the parties and to determine the matters in dispute. But, it should be observed, the competence of Parliament does not extend beyond making such provision with respect to industrial disputes "*extending beyond the limits of any one State*". The italicized words immediately suggest the reason for the vesting of this power in the Commonwealth Parliament. According to *Griffith* C.J. (*Federated Saw Mill, Timber Yard, & General Woodworkers Employes' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (1):—"Before the establishment of the Commonwealth 'industrial disputes' (as to the meaning of which term I shall have more to say) had occasionally arisen in the different Colonies, and in two of them (New South Wales and South Australia) tentative legislation had been passed for the purpose of dealing with them by conciliation and arbitration. A similar law had been passed in the neighbouring Colony of New Zealand. Tentative efforts had been also made in the United Kingdom to deal with the same subject. Each Colony had absolute power to deal with the matter within its own limits, but in the event of a single dispute covering an area not within the bounds of any one Colony, there was no legislative authority (except the Parliament of the United Kingdom) which could have dealt with it. This was the state of the law, and this was the defect. The remedy was to authorize the Commonwealth Parliament to make laws for dealing with such disputes, not in any way they might think desirable, but by conciliation and arbitration for their prevention and settlement" (2). Many other observations to the same effect may be quoted and they reveal the true character of the power. It is a power which is not concerned with and which cannot be exercised with respect to industrial disputes which are confined within the limits of any one State; it is a power which was designed to deal with the situation which arises when, an industrial dispute having spread across State borders, the machinery of any one State is unable to deal effectively with the whole matter.

Nothing of what I have so far said on this point would, I think, be denied by the prosecutor but from it emerges the notion that the legislative power was intended to authorize Parliament, at least, to employ, in its exercise, instruments of the same character as those then recognized as a usual or commonly accepted instrument of compulsory arbitration in such matters. Indeed to deny to the

(1) (1909) 8 C.L.R. 465.

(2) (1909) 8 C.L.R. 465, at p. 487.

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Commonwealth Parliament the authority to use instruments of the character or characters then in use in the various States would have been to deprive the power of a great deal of its significance.

The history of arbitration as a means of regulating industrial relations has been the subject of considerable discussion: (see *Federated Saw Mill, &c. Employes' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (1)—per *O'Connor* J. (2) and per *Isaacs* J. (3)—and *Australian Railways Union* v. *Victorian Railways Commissioners* (4)—per *Isaacs* J. (5) but for the purposes of the present case it is unnecessary to make any extended survey. *Griffith* C.J. in the former case (6) referred to the fact that tentative legislation had been passed in New South Wales and South Australia—and also "in the neighbouring colony of New Zealand"—for the purpose of dealing with industrial disputes. In the last-mentioned colony the *Industrial Conciliation and Arbitration Act* became law in 1894. This statute made provision for the registration of societies lawfully associated for the purpose of protecting or furthering the interests of employers or workmen in or in connection with any industry in the colony and set up Boards of Conciliation and a Court of Arbitration. The various boards, within their respective districts, were charged with the settlement of industrial disputes and the court, presided over by a judge of the Supreme Court, was given jurisdiction to determine any dispute referred to it by a board. The court was not given power by this enactment to enforce its own awards, provision being made for their enforcement in the same manner as a judgment of the Supreme Court after the filing in that court of a duplicate of any award. But by the *Industrial Conciliation and Arbitration Act Amendment Act* 1898 the Court of Arbitration was given power to fix (s. 3) and impose (s. 83) penalties for the breach of any award and it was further given full and exclusive jurisdiction to deal with all offences against the Act. The system erected by the New Zealand Statutes of 1894 and 1898 was adopted in Western Australia by the *Industrial Conciliation and Arbitration Act* 1900. The provisions of the New Zealand legislation were adopted almost literally and, as in the latter colony, a court was created for the purpose of exercising arbitral and judicial functions side by side. In addition to having authority to fix and impose penalties for breaches of awards and full and exclusive jurisdiction to deal with all offences against the Act it was invested with power to grant injunctions and prohibitions

(1) (1909) 8 C.L.R. 465.
(2) (1909) 8 C.L.R., at pp. 502 et seq.
(3) (1909) 8 C.L.R., at pp. 522 et seq.
(4) (1930) 44 C.L.R. 319.
(5) (1930) 44 C.L.R., at pp. 354 et seq.
(6) (1909) 8 C.L.R., at p. 487.

and to issue writs of mandamus and generally to exercise the powers of the Supreme Court in the administration of the Act. The "tentative" legislation in New South Wales (the *Arbitration Act* 1892 and the *Conciliation and Arbitration Act* 1899) were followed by the *Industrial Arbitration Act* 1901 which set up a Court of Arbitration, presided over by a judge of the Supreme Court, for the hearing and determination of industrial disputes. In addition to its arbitral functions it was given power "to deal with all offences and enforce all orders under" the Act (s. 26 (*n*)), to grant injunctions restraining the breach or non-observance of any award (s. 37 (4)) and to impose fines for any such breach or non-observance (s. 37 (8)). The industrial legislation of the other States does not appear to have embodied those features. According to *Isaacs* J. (*Federated Saw Mill &c. Employes' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (1)):—"Some States were without any legislation whatever on the subject; no two States were uniform; all of the Acts were inadequate to cope with admitted evils, even domestic; and with the advent of intercolonial free trade and the enlargement of intercourse the mischief manifestly might be more extensive and more destructive in the Commonwealth about to be created" (2). The New South Wales Act of 1901 became law after Federation but sufficient has been said to indicate that the concept of a court having cognizance of industrial disputes and possessing full power to enforce its own awards was by no means unknown before that time. On the contrary it was a well-recognized concept and, though differing views may have been entertained concerning the wisdom of creating tribunals possessing both arbitral and judicial powers, it was a concept which, if the matter fell to be determined by consideration of the language of par. (xxxv.) alone, was clearly embraced by the terms in which the power was defined. I find myself in agreement with *Isaacs* J. (*Federated Saw Mill &c. Employes' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (1)) when, after discussing the meaning of "arbitration" and referring to pre-Federation legislation, he said: "When therefore there was entrusted to the Commonwealth Parliament the plenary power of legislating upon the familiar subjects of conciliation and arbitration for the settlement of industrial disputes extending beyond the limits of any one State, it appears to me an irresistible inference that the grant with respect to such disputes was as full and unrestricted as a State already

(1) (1909) 8 C.L.R. 465.

(2) (1909) 8 C.L.R., at p. 526.