HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

RE PACIFIC COAL PTY LIMITED & ORS RESPONDENTS

EX PARTE: CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION & ANOR PROSECUTORS

Re Pacific Coal Pty Limited
Ex parte: Construction, Forestry, Mining and Energy Union
[2000] HCA 34
15 June 2000
S137/1998

ORDER

Order nisi granted 6 November 1998, as amended by orders made 19 May 1999 and 11 November 1999, discharged with costs.

Representation:

No appearance for the first respondent

C N Jessup QC with M P McDonald for the second respondent (instructed by Freehill Hollingdale & Page)

R J Buchanan QC with G C Martin SC for the third to thirty-eighth respondents (instructed by Freehill Hollingdale & Page)

R C Kenzie QC with I Taylor for the prosecutors (instructed by R L Whyburn & Associates)

Interveners:

D M J Bennett QC, Solicitor-General for the Commonwealth with I M Neil and L J Hardiman intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

P A Keane QC, Solicitor-General for the State of Queensland with S J Lee intervening on behalf of the Attorney-General for the State of Queensland (instructed by Crown Solicitor for the State of Queensland)

P A Keane QC, Solicitor-General for the State of Queensland with S G E McLeish intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

N J Williams with P Ginters intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for the State of New South Wales)

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

CONSTRUCTION, FORESTRY,
MINING AND ENERGY UNION & ANOR PLAINTIFFS

AND

THE COMMONWEALTH OF AUSTRALIA DEFENDANT

Construction, Forestry, Mining and Energy Union v The Commonwealth
15 June 2000
S138/1998

ORDER

1. *Amended question reserved for consideration of the Full Court answered as follows:*

   Question: *On the basis of the facts pleaded in the Plaintiffs' Statement of Claim, and admitted in the Defendant's Defence, are any of the following laws invalid:*

   (a) *Section 3 of the* Workplace Relations and Other Legislation Amendment Act *1996 (Cth) to the extent that it purports to give effect to item 50 in Part 2 of Schedule 5 of the* Workplace Relations and Other Legislation Amendment Act *1996 (Cth); or*

   (b) *Section 3 of the* Workplace Relations and Other Legislation Amendment Act *1996 (Cth) to the extent that it purports to give effect to subitems 51(1), (2) and (3) in Part 2 of Schedule 5 of the* Workplace Relations and Other Legislation Amendment Act *1996 (Cth)?*

   Answer: *(a)* *No.*
   (b) *No.*

2. *Plaintiffs to pay defendant's costs of the stated case.*

3. *Action adjourned to a single justice to give directions concerning the disposition of the matter.*

Representation:

R C Kenzie QC with I Taylor for the plaintiffs (instructed by R L Whyburn & Associates)

D M J Bennett QC, Solicitor-General for the Commonwealth with I M Neil and L J Hardiman for the defendant (instructed by Australian Government Solicitor)

Interveners:

P A Keane QC, Solicitor-General for the State of Queensland with S J Lee intervening on behalf of the Attorney-General for the State of Queensland (instructed by Crown Solicitor for the State of Queensland)

P A Keane QC, Solicitor-General for the State of Queensland with S G E McLeish intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

N J Williams with P Ginters intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for the State of New South Wales)

CATCHWORDS

Re Pacific Coal Pty Limited; Ex parte Construction, Forestry, Mining and Energy Union

Construction, Forestry, Mining and Energy Union v The Commonwealth

Industrial Law – Whether s 3 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) is invalid to the extent that it purports to give effect to item 50 and subitems 51(1), (2) and (3) in Pt 2 of Sched 5 to that Act.

Constitutional Law (Cth) – Legislative power of the Commonwealth – Whether s 3 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth), to the extent that it gives effect to item 50 and subitems 51(1), (2) and (3) in Pt 2 of Sched 5 to that Act, is a law with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state under s 51 (xxxv) of the Constitution.

Words and phrases – "conciliation and arbitration" – "industrial dispute" – "implied incidental power" – "award" – "settlement".

Constitution, s 51(xx), (xxxv), (xxxix).
Workplace Relations and Other Legislation Amendment Act 1996 (Cth), s 3.
Workplace Relations Act 1996 (Cth), ss 7A, 89A.

1 GLEESON CJ. In *Federated Saw Mill &c Employés of Australasia v James Moore & Son Proprietary Ltd*[1], O'Connor J traced the history of the growing acceptance, during the latter part of the nineteenth century, of the idea that governments should make provision for what would now be called dispute resolution in relation to industrial differences. Before Federation in Australia, legislation was enacted in England, New Zealand, and two of the Australian colonies, setting up public tribunals for the purpose of settling industrial disputes by conciliation and arbitration. O'Connor J described the power intended to be conferred by s 51(xxxv) of the Constitution as a "power to create tribunals invested with jurisdiction to prevent and settle by conciliation and arbitration industrial disputes" extending beyond the limits of any one State. Similarly, Taylor J, in *The Queen v Kirby; Ex parte Boilermakers' Society of Australia*[2], described the power as one with respect to "the establishment and maintenance of a system, in some form or other, of conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

2 It is for Parliament to determine the structure and incidents of the system of dispute resolution (using that expression to cover prevention as well as settlement) which is appropriate to current circumstances, subject to the limitations imposed by the terms of s 51(xxxv): the available methods of dispute resolution are conciliation and arbitration; and the disputes must be of a certain kind. The Constitution confers the power to establish and maintain, and, where it is considered appropriate, alter, the system. The Parliament, in the exercise of the power, legislates to institute, vary, modify, or abrogate, the system. The nature of a particular legislative scheme set up in the exercise of the power is not to be confused with the scope of the power itself.

3 These proceedings result from a decision by the Parliament to change a system of industrial dispute resolution which operated for many years. The arguments relate to some only of the changes; others are conceded to be legally effective.

4 The two proceedings before the Court challenge the validity of s 3 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) ("the WROLA Act") in so far as it purports to give effect either to item 50 in Pt 2 of Sched 5 to that Act or to subitems 51(1), (2) and (3) in the same Part. The first proceeding is an application for writs of certiorari, mandamus and prohibition against the members of the Australian Industrial Relations Commission

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1 (1909) 8 CLR 465 at 503-504.

2 (1956) 94 CLR 254 at 341-342.

("the Commission"); the second is a question reserved for the opinion of the Full Court in a suit commenced in the original jurisdiction.

5 The WROLA Act was intended to make substantial alterations to the system of industrial dispute resolution in force under the *Industrial Relations Act* 1988 (Cth), which became the *Workplace Relations Act* 1996 (Cth) ("the Act"). Schedules to the WROLA Act set out amendments to the legislation.

6 Before considering the alterations, it is convenient to refer to one feature of the Act which explains the form of some of the amendments. The outcome of a process of arbitration undertaken pursuant to the Act may be the making of an award. The arbitral authority, the Commission, expresses in its awards an opinion as to what the rights and obligations of parties, for the future, should be. What gives legal effect to the award is the statute. It is the Act itself "which gives to an award statutory operation as a prescription of industrial conduct within the area of the dispute which the award settles"[3]. By virtue of s 149 of the Act, awards are binding on parties to the industrial dispute or persons notified thereof, as well as all organisations and persons on whom the award is binding as a common rule and all members of organisations bound by the award. Part VIII of the Act deals with compliance with award provisions. Various provisions of the Act govern the effect of the award, including the period for which it has such effect. (The award the subject of the present case, when it was made, was stated to operate for only six months. It owes its continuing operation to s 148 of the Act.)

7 The main purpose of the alterations to the system of dispute resolution effected by the WROLA Act was to expand the role of conciliation, involving workplace agreements or enterprise bargaining, and to diminish the role of arbitration.

8 Item 11 in Pt 1 of Sched 5 to the WROLA Act inserted into the Act s 89A, which took effect from 1 January 1997. The effect of s 89A is to restrict the scope of industrial disputes and thereby to limit the range of "allowable award matters". Sub-section (1) provides:

> "(1) For the following purposes, an industrial dispute is taken to include only matters covered by subsections (2) and (3):
>
> (a) dealing with an industrial dispute by arbitration;

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3 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 277 per Aickin J. See also *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 463 per Isaacs and Rich JJ.

(b) preventing or settling an industrial dispute by making an award or order;

(c) maintaining the settlement of an industrial dispute by varying an award or order."

9 The matters covered by s 89A(2) include hours of work, rates of pay, annual leave, long service leave, penalty rates, redundancy pay and superannuation. They do not include a variety of matters which have, in the past, commonly been the subject of awards.

10 Section 89A(3) provides that the Commission's power to make an award dealing with matters covered by sub-s (2) is limited to making a minimum rates award.

11 Thus, as from 1 January 1997, the amending legislation restricted the award-making power of the Commission.

12 The validity of s 89A is conceded. It is the provisions dealing with matters that are now not allowable award matters, where such matters were already included in awards previously made by the Commission under the Act, which are challenged.

13 The proceedings were instituted by a union which is a registered organisation of employees, and one of its members, and arise out of proceedings in the Commission, pursuant to the amending legislation, directed (amongst other things) at removing matters which are not allowable award matters from an award concerning the coal mining industry.

14 The way in which the WROLA Act dealt with existing awards, made before 1 January 1997, containing matters that are not allowable award matters, may be summarised as follows. In brief, the object was to limit the effect given by the statute to such awards by confining that effect to allowable award matters.

15 Part 2 of Sched 5 of the WROLA Act established an interim period, ending on 30 June 1998. Item 49 of Pt 2 provided for variation of an award during the interim period. If a party to an award applied to the Commission for variation of an award, the Commission was empowered to vary the award so that it dealt only with allowable award matters. This has been referred to as a process of award simplification. It was possible for a new industrial dispute to arise during this interim period, resulting in a new award. Such a dispute might have been the consequence of the simplification process. The Commission was required, by item 49, to deal with an application for review by arbitration, if satisfied that those applying for variation had made reasonable attempts to reach agreement with the other parties to the award about how the award should be varied and the

treatment of matters that are not allowable award matters. The review was to be conducted by reference to certain criteria.

16 The manner in which parties to awards would conduct themselves during the interim period would, no doubt, be influenced by what they knew was to occur at the end of the interim period.

17 Item 47 of Sched 5 stipulated that in exercising its powers under Pt 2, the Commission must have regard to the desirability of assisting parties to awards to agree on appropriate variations to their awards, rather than have parts of awards cease to have effect under item 50.

18 Subitem 50(1) of Pt 2 of Sched 5 provides:

> "At the end of the interim period, each award ceases to have effect to the extent that it provides for matters other than allowable award matters".

19 It is accepted that, if item 50 had simply provided that, at the end of the interim period, each award ceased to have effect, no problem of legislative power would exist. The problem is said to result from the additional words.

20 Item 51, which appears to be consequential upon item 50, provides:

> "(1) As soon as practicable after the end of the interim period, the Commission must review each award:
>
> (a) that is in force; and
>
> (b) that the Commission is satisfied has been affected by item 50.
>
> (2) The Commission must vary the award to remove provisions that ceased to have effect under item 50.
>
> (3) When varying the award under subitem (2), the Commission may also vary the award so that, in relation to an allowable award matter, the award is expressed in a way that reasonably represents the entitlements of employees in respect of that matter as provided in the award as in force immediately before the end of the interim period.
>
> …"

21 It is argued that s 3 of the WROLA Act, in so far as it purports to give effect to item 50 or subitems (1) (2) and (3) of item 51, is invalid, for the reason that it is not a law with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

22 It is not in dispute that, if such legislation applied only to future awards, it would be valid as a law within s 51(xxxv). It is also accepted that Parliament could, at the same time, legislate to deprive all existing awards of any effect. But, it is said, what Parliament cannot do in relation to past awards is leave them with effect in relation to some of their provisions, and at the same time, deprive other provisions of effect, and require that they be removed. The reason is said to be that legislation of that kind involves the direct legislative imposition of a new and different settlement of the dispute which led to the original award, and this is beyond the power conferred by s 51(xxxv). It amounts to an attempt to legislate directly as to wages or other terms or conditions of employment. In elaboration of the argument, it is contended that such legislation interferes with the settlement effected by the Commission and alters what might well have been a balance struck, involving an element of give and take in relation to various matters covered by the award. The outcome, it is argued, has been altered from one arbitrated by the Commission to one determined, or partly determined, by Parliament. Whilst it is within the power of Parliament to negate the whole settlement, by depriving it of any effect, it cannot alter the settlement by continuing to give effect to only part of it.

23 Such an argument does not do complete justice to the legislative context in which items 50 and 51 take their place. Those items came into effect (assuming the validity of s 3) only after an interim period of eighteen months. During that period, items 47 and 49 applied, and, in addition, the parties to an award were able to make their own assessments of the industrial consequences of the impending ineffectiveness of parts of the award, and to respond accordingly. Even so, the substance of the argument must be addressed. The issue is not about the merits of the legislation. It is about its character.

24 In certain respects, the submissions advanced against validity are similar to those which were unsuccessful in *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association*[4]. They are forcefully expressed in the dissenting judgment of Isaacs and Rich JJ.

25 That case was about s 28(2) of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth). That section had the effect that, when the period of operation of an award specified in the award expired, then, unless the Court of Conciliation and Arbitration otherwise ordered, the award would continue in force until a new award was made. It applied to existing awards. The dissentients, Isaacs and Rich JJ, made the point that the effect of the section was, by direct legislative provision, to impose on the parties an industrial regime which, in relation to the period of its operation, (a matter that, in a given case, could be important to the settlement effected by the award), was different from

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4 (1920) 28 CLR 209.

that formulated by the arbitral authority. The majority upheld the validity of the provision. Knox CJ[5] treated s 28(2) as a limitation imposed by the Parliament upon the power conferred on the Court of Conciliation and Arbitration to settle disputes. It imposed a condition (related to the time of operation of an award) subject to which the arbitral power was to be exercised. He saw in the legislation no attempt to prescribe conditions of employment by legislative enactment. Starke J said[6]:

> "I quite agree that the term of the award is in many cases a most material factor in the dispute, and although the Parliament can, under its constitutional power, allow this phase of the dispute to be settled by the arbitral tribunal if it thinks fit, I cannot follow the reasoning which denies to the prescription by Parliament itself of the duration of an award the character of a law with respect to, or in relation to, or, if you will, upon the subject of arbitration. Provisions setting up the arbitral tribunal are laws with respect to arbitration, and so are provisions limiting the jurisdiction of the Court as to the duration of its awards or giving them force or compelling their performance."

26 If a law giving force to an award, or depriving an award of force, or specifying the period during which an award shall have force, bears the character referred to by Starke J, it is difficult to see why a law depriving part of an award of force does not bear the same character.

27 It has been held that Parliament may widen the effect of the provisions of an award. Section 24 of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) was amended by the *Commonwealth Conciliation and Arbitration Act* 1921 (Cth) to make agreements under that section binding on "any successor, or any assignee or transmittee of the business of a party bound by the agreement". The amendment was held to be valid in *George Hudson Ltd v Australian Timber Workers' Union*[7].

28 The practical result achieved by the legislation the subject of the two cases last mentioned turned upon the consideration that, under the legislative scheme by which Parliament had chosen to exercise the power given by s 51(xxxv), the legal effect of an award depended upon, and was governed by, the provisions of the statute. In each case, when awards were made by the arbitral authority in settlement of a dispute, their legal effect was extended by statute. Legislation

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5 (1920) 28 CLR 209 at 216, 218-219.

6 (1920) 28 CLR 209 at 252-253.

7 (1923) 32 CLR 413.

extending the legal effect of an award made by an arbitrator in settlement of an industrial dispute is a law that bears the character of a law with respect to conciliation and arbitration for the prevention and settlement of industrial disputes. The same is true of legislation restricting the legal effect of such an award.

29 It has often been pointed out that s 51(xxxv) does not empower the Parliament to legislate directly to regulate conditions of employment[8]. An attempt was made in argument to develop that proposition by adding to it what was described as "[t]he principle that Parliament cannot do indirectly what it cannot do directly". Two points need to be made about that. First, it is one thing to say that the nature of the power is such that it deals with instituting and maintaining a system of conciliation and arbitration, and that it is only through such a system that conditions of employment may be regulated under s 51(xxxv); it is another thing to find some negative implication amounting to a prohibition against the Parliament enacting any law which has the effect of altering conditions of employment. That there is no such negative implication, and no such prohibition, must follow from the acceptance that, where Parliament can rely upon some other power conferred by s 51, it can legislate in relation to conditions of employment. Such an implication was rejected, for example, in *Pidoto v Victoria*[9]. In the present case, an attempt was made to rely, if necessary, upon the power conferred by s 51(xx). It is unnecessary to deal with that attempt but if, in a given case, legislation were validly enacted pursuant to that power, then it would not be affected by any negative implication or prohibition of the kind mentioned. Secondly, there is no principle that Parliament can never do indirectly what it cannot do directly. Whether or not Parliament can do something indirectly, which it cannot do directly, may depend upon why it cannot do it directly. In law, as in life, there are many examples of things that can be done indirectly, although not directly. The true principle is that "it is not permissible to do indirectly what is prohibited directly"[10]. If there were a constitutional prohibition of the kind earlier considered, then it could not be circumvented by an attempt to do indirectly that which is prohibited directly. There is, however, no such prohibition.

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8 eg *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association* (1920) 28 CLR 209 at 218 per Knox CJ.

9 (1943) 68 CLR 87.

10 *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 at 522 per Mason CJ, Gaudron and McHugh JJ.

30 Reference was made in argument to *Kartinyeri v Commonwealth*[11], and to the effect of item 50 as a partial repeal of s 149. It was argued that s 149, as affected by such partial repeal, would no longer bear the character of a law with respect to the subject matter described in s 51(xxxv). This contention rests upon an unacceptably narrow reading of the words "with respect to"[12]. It also appears to treat as the subject of s 51(xxxv) the settlement of a particular dispute resulting from an arbitration, rather than a system of dispute resolution. We are not here concerned with a question of the power of the Commission to vary an award[13]. We are concerned with the power of the Parliament to alter the legal effect given to awards.

31 The order nisi should be discharged with costs. The question which asks whether s 3 of the WROLA Act is invalid in so far as it purports to give effect to item 50 or subitems 51(1), (2) and (3) should be answered in the negative. The plaintiffs should pay the defendant's costs of the stated case.

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11 (1998) 195 CLR 337.

12 cf *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ.

13 cf *The King v Commonwealth Court of Conciliation and Arbitration and Australian Railways Union; Ex Parte Victorian Railways Commissioners* (1935) 53 CLR 113.

32 GAUDRON J. These matters were heard together. In the first matter, the Construction, Forestry, Mining and Energy Union ("the Union") and one of its members, Garry William Barnes, seek to have made absolute an order nisi for certiorari, prohibition and mandamus. They seek an order absolute for prohibition to prevent members of the Australian Industrial Relations Commission ("the Commission"), Pacific Coal Pty Limited ("Pacific Coal") and other corporations from giving effect to or relying upon certain decisions and orders of the Commission; for certiorari to quash those decisions and orders; and for mandamus to compel the Commission to hear and determine according to law the applications in respect of which those decisions were given and orders made.

33 As a result of the decisions in question, the Commission ordered the deletion of various provisions from the Coal Mining Industry (Production and Engineering) Consolidated Award 1997 ("the Award"). As amended, the order nisi for prohibition asserts that the decisions and orders of the Commission were beyond jurisdiction by reason that, to the extent that s 3 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) ("the WROLA Act") purports to give effect to item 50 and subitems 51(1), (2) and (3) in Pt 2 of Sched 5 to that Act, it is invalid.

34 In the second matter, the Union and Mr Barnes seek a declaration that the provisions in issue in the first matter are invalid. The second matter came before the Full Court by way of a question reserved pursuant to s 18 of the *Judiciary Act* 1903 (Cth)[14]. As amended, that question asks whether s 3 of the WROLA Act is invalid in so far as it purports to give effect either to item 50 in Pt 2 of Sched 5 to that Act or to subitems 51(1), (2) and (3) in the same Part.

The WROLA Act

35 In general terms, the WROLA Act was designed to substitute conciliation, resulting in either workplace agreements or enterprise bargaining, for compulsory arbitration as the primary means of resolving certain aspects of interstate industrial disputes. No issue arises in these matters as to the validity of the provisions of the WROLA Act as they apply to industrial disputes arising after those provisions came into force. Rather, both matters are concerned solely

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14 Section 18 provides:

> " Any Justice of the High Court sitting alone, whether in Court or in Chambers, may state any case or reserve any question for the consideration of a Full Court, or may direct any case or question to be argued before a Full Court, and a Full Court shall thereupon have power to hear and determine the case or question."

with the effect of certain transitional provisions as they relate to awards made by the Commission in settlement of disputes that arose before then.

36 Section 3 of the WROLA Act provides that, subject to s 2:

> "[E]ach Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms."

Section 2 of the WROLA Act provides as to the commencement of that Act and its Schedules. By s 2(4), Sched 5 commenced on 1 January 1997.

37 Schedule 5 to the WROLA Act, which is headed "Awards", is in two Parts. Part 1 contains various items which amend or repeal provisions of the *Workplace Relations Act* 1996 (Cth) ("the principal Act"). Item 11 in Pt 1 inserted into the principal Act a new section, namely, s 89A. That section is headed "Scope of industrial disputes". Sub-section (1), which is headed "Industrial dispute normally limited to allowable award matters", provides:

> " For the following purposes, an industrial dispute is taken to include only matters covered by subsections (2) and (3):
> (a) dealing with an industrial dispute by arbitration;
> (b) preventing or settling an industrial dispute by making an award or order;
> (c) maintaining the settlement of an industrial dispute by varying an award or order."

Section 89A(2), which is headed "Allowable award matters", lists 20 matters which may be the subject of award. By s 89A(3), "[t]he Commission's power to make an award dealing with matters covered by subsection (2) is limited to making a minimum rates award."

38 It may be taken that s 89A(1) of the principal Act applies only to disputes arising on or after 1 January 1997. Certainly, that is the premise upon which both matters were argued in this Court. And that premise is borne out by Pt 2 of Sched 5 to the WROLA Act which is headed "Transitional provisions".

39 In general terms, the transitional provisions in issue in these proceedings were intended to effect a simplification of existing awards and to bring about a situation in which some matters would cease to be the subject of award coverage. The process by which that was intended to be effected has come to be known as "the award simplification process". That process is the subject of items 49, 50 and 51 in Pt 2.

40 Subitem 49(1) in Pt 2 of Sched 5 allows that, if a party to an award so applies, "the Commission may, during the interim period, vary the award so that

it only deals with allowable award matters". "Interim period" is defined in item 46 as "the period of 18 months beginning on the day on which section 89A of the Principal Act commences". As already noted, Sched 5 commenced on 1 January 1997 and, thus, so, too, did s 89A.

41 Item 50 in Pt 2 provides, in subitem (1):

> " At the end of the interim period, each award ceases to have effect to the extent that it provides for matters other than allowable award matters."

Item 51 then provides, in subitems (1), (2) and (3):

> "(1) As soon as practicable after the end of the interim period, the Commission must review each award:
> (a) that is in force; and
> (b) that the Commission is satisfied has been affected by item 50.
>
> (2) The Commission must vary the award to remove provisions that ceased to have effect under item 50.
>
> (3) When varying the award under subitem (2), the Commission may also vary the award so that, in relation to an allowable award matter, the award is expressed in a way that reasonably represents the entitlements of employees in respect of that matter as provided in the award as in force immediately before the end of the interim period."

42 By item 1 in Pt 1 of Sched 5 to the WROLA Act, a definition of "allowable award matters" was inserted into s 4(1) of the principal Act as follows:

> "***allowable award matters*** means the matters covered by subsection 89A(2)."[15]

It may be taken that that definition applies to items 50 and 51 in Pt 2 notwithstanding that those provisions are not incorporated in the principal Act.

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15 For the purposes of items 49, 50 and 51 the subject of an "exceptional matters order" is also taken to be an allowable award matter. A definition of "exceptional matters order" was inserted into s 4(1) of the principal Act by item 2 in Pt 1 of Sched 5 but nothing presently turns on that definition.

The Award and facts relevant to the first matter

43 On 19 November 1997, Boulton J, a Presidential Member of the Commission, determined to make a new award applying to persons working in the coal mining industry in New South Wales, Queensland and Tasmania. As a result, the Award was made on 10 December 1997 and was expressed to remain in force for a period of six months from 4 December 1997[16]. Although it does not clearly emerge, the first matter was conducted on the basis that the Award was made in settlement or part settlement of a dispute that arose prior to 1 January 1997 when s 89A of the principal Act came into force.

44 Two days before the Award was made, Boulton J, of his own motion, called on various matters, including the dispute in respect of which the Award was later made[17]. It was his Honour's intention to begin the award simplification process, which, in his view, was required by items 50 and 51 in Pt 2 of Sched 5 to the WROLA Act. There were subsequently other proceedings between the parties with the consequence that the process of simplifying the Award did not get underway until 12 March 1998.

45 There was argument before Boulton J as to what were and what were not allowable award matters for the purposes of item 50 in Pt 2 of Sched 5 to the WROLA Act and his decision in that regard was given on 26 May 1998. On 1 July, an order was made varying the Award by deleting those provisions identified as non-allowable award matters. An appeal to a Full Bench of the Commission was dismissed by order dated 22 October 1998. Prohibition and certiorari are sought with respect to the decision and order of Boulton J and, also, the decision and order of the Full Bench.

The Constitutional issues

46 It is not in issue that the provisions deleted from the Award are, in fact, non-allowable award matters. The order deleting those provisions is challenged on the basis that s 3 of the WROLA Act, in so far as it purports to give effect to item 50 and subitems 51(1), (2) and (3), is not a law under s 51(xxxv) of the Constitution[18]. The respondents in the first matter and the defendant in the second matter contend to the contrary. Alternatively, the respondents in the first

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16 Clause 6 of the Award.

17 The matters were called on pursuant to s 33 of the principal Act.

18 An argument that s 3 of the WROLA Act is invalid, to the extent indicated, by reason that it infringes the guarantee of just terms in s 51(xxxi) of the Constitution was not pressed at the hearing.

matter (other than Pacific Coal) argue that, to the extent in issue, s 3, in its application to awards to which corporations are parties, is a valid law under s 51(xx) of the Constitution and so operates by reason of s 7A of the principal Act.

Operation of the WROLA Act and the principal Act: the issues in their statutory context

47 It is important to note that item 51 in Pt 2 of Sched 5 to the WROLA Act is ancillary to or dependent upon item 50. The command in item 51 takes effect only if and when item 50 operates to deprive non-allowable award matters of effect. Thus, for present purposes, the question, so far as concerns s 51(xxxv) of the Constitution, is whether Parliament may legislate to deprive those provisions of effect, not whether Parliament may direct the Commission to delete ineffective provisions from an award.

48 The question whether Parliament may render award provisions ineffective arises in the context of provisions in the principal Act giving effect to an award. In particular, s 148(1) of the principal Act provides that, subject to s 113, which confers power on the Commission to set aside or vary an award and, subject to any order of the Commission:

> "[A]n award dealing with particular matters continues in force until a new award is made dealing with the same matters."

And awards are given binding force by s 149(1) of the principal Act. Moreover, Div 1 of Pt VIII of that Act contains provisions for the imposition of penalties and the granting of other remedies for the contravention of awards[19].

49 The effect of item 50 in Pt 2 of Sched 5 to the WROLA Act is to partially repeal ss 148(1) and 149(1) of the principal Act. Once that is appreciated, the question whether the Parliament may legislate to render certain provisions of an award ineffective takes on another aspect. The question asks whether Parliament may legislate so as to deprive some provisions of an award of effect while continuing the effect of and binding parties to other provisions of the same award.

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19 See ss 177A-180 inclusive. Section 178(1) relevantly provides that:

> "[W]here an organisation or person bound by an award, [or] an order of the Commission ... breaches a term of the award, [or] order ... a penalty may be imposed by the Court or, except in the case of a breach of a bans clause, by a court of competent jurisdiction."

The conciliation and arbitration power: Constitution s 51(xxxv) generally

50 There are three general matters that should be noted at the outset with respect to s 51(xxxv) of the Constitution. First, the power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State" clearly extends to laws dealing with the processes of conciliation and arbitration, including the authorisation of persons or bodies to perform those functions, and the specification of "the manner in which, and the conditions on which, [they are to] carry out [those] functions"[20]. In this regard, Parliament may make it a condition of the discharge of the functions of conciliation and arbitration that certain matters are or are not to be the subject of one or other or both of those processes. Thus, for example, it may legislate so as to limit the matters that may be the subject of arbitration, or of award provision, so long as the resulting law has the character of a law with respect to conciliation and arbitration for the prevention or settlement of interstate industrial disputes.

51 The second matter that should be noted is that s 51(xxxv) is not concerned exclusively with the processes of conciliation and arbitration. Those processes lie at the heart of the legislative power conferred by s 51(xxxv) of the Constitution. But as with every legislative power conferred by the Constitution, s 51(xxxv) carries with it the power to enact legislation which is "appropriate to effectuate the exercise of [that] power"[21] – the "implied incidental power", as it has come to be known[22].

52 The third matter that should be noted with respect to the legislative power conferred by s 51(xxxv) is that, as with other legislative powers, it is not only a power to legislate but, also, a power to repeal or partially repeal earlier laws passed pursuant to that power[23]. However, a question may arise, when an Act

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20 *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association* (1920) 28 CLR 209 at 218 per Knox CJ.

21 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 27 per Mason CJ. See also *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 515 per Stephen J; *Alexandra Private Geriatric Hospital Pty Ltd v The Commonwealth* (1987) 162 CLR 271 at 281.

22 See, for example, *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 508 per Stephen J; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 85 per Dawson J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 296 per Mason CJ.

23 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 355-356 per Brennan CJ and McHugh J, 368-370 per Gaudron J, 376 per Gummow and Hayne JJ,

(Footnote continues on next page)

purports to partially repeal an earlier Act, whether, if amended, that earlier Act would retain the character which gave it its constitutional validity[24]. If it would not, other questions arise. Those questions will be considered later in these reasons.

53 It was argued for the respondents in the first matter and the defendant in the second matter that s 3 of the WROLA Act, to the extent in issue in these proceedings, is valid by reason that it is incidental to the power conferred by s 51(xxxv) of the Constitution. Additionally, it was argued that it is valid because it is simply a law that amends or repeals a law validly enacted under s 51(xxxv).

Section 51(xxxv): incidental power

54 The respondents in the first matter and the defendant in the second matter put two arguments with respect to incidental power. In the first place, they contend that there "is a 'relevant connection' ... between the original settlement of the dispute by conciliation or arbitration and the resulting award as affected [by the deletion of provisions with respect to non-allowable award matters]". In the alternative, they argue that "[t]he award as affected is appropriate and adapted to the prevention of future disputes".

55 As I pointed out in *Nationwide News Pty Ltd v Wills*, "[t]he relationship that is involved when one matter is incidental to another is not one that is always susceptible of precise exposition."[25] In the *Bank Nationalization Case*, Dixon J expressed the view that the question whether a law is on a subject that is incidental to a head of legislative power will often be answered by looking at the purpose of that law[26]. His Honour said:

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cf 421-422 per Kirby J. See also *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 226.

24 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 357 per Brennan CJ and McHugh J, 369 per Gaudron J; *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 472.

25 (1992) 177 CLR 1 at 93.

26 *Bank of NSW v The Commonwealth* ("the *Bank Nationalization Case*") (1948) 76 CLR 1 at 354. See also *The State of Victoria v The Commonwealth* ("the *Second Uniform Tax Case*") (1957) 99 CLR 575 at 614 per Dixon CJ; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 93.

> "[W]here it is sought to connect with a legislative power a measure which lies at the circumference of the subject or can at best be only incidental to it, the end or purpose of the provision, if discernable, will give the key."[27]

56 If the purpose of a legislative measure is to achieve an end within power, then, subject to a qualification shortly to be mentioned, it is within the implied incidental power or, more accurately, it is a law with respect to the subject-matter of the legislative power in question[28]. To ascertain whether a law is within power, it is often necessary to determine whether it has the purpose which is claimed for it. And to ascertain whether it has that purpose, it is sometimes convenient to ask whether it is appropriate and adapted[29] or reasonably capable of being viewed as appropriate and adapted[30] to that purpose. If it is not, it may be taken that it does not have that purpose but has some other and different purpose[31].

57 There are, however, occasions when the apparent purpose of a law can be ascertained from its terms or its operation. If its terms or its operation reveal a purpose within power, it may still be necessary to ask whether the law in question is appropriate and adapted or reasonably capable of being viewed as appropriate and adapted to that purpose. That is because of the qualification earlier referred to. The qualification is this: a law which has as its purpose some

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27 (1948) 76 CLR 1 at 354.

28 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

29 See, for example, *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 358 per O'Connor J; *Airlines of NSW Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54 at 86 per Barwick CJ; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 138 per Mason J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 319 per Brennan J.

30 See, for example, *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 259 per Deane J; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 311-312 per Deane J, 324 per Dawson J; *Davis v The Commonwealth* (1988) 166 CLR 79 at 100 per Mason CJ, Deane and Gaudron JJ; *South Australia v Tanner* (1989) 166 CLR 161 at 165 per Wilson, Dawson, Toohey and Gaudron JJ; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 30 per Mason CJ.

31 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 93-94 per Gaudron J. See also *Richardson v Forestry Commission* (1988) 164 CLR 261 at 311 per Deane J; *South Australia v Tanner* (1989) 166 CLR 161 at 165 per Wilson, Dawson, Toohey and Gaudron JJ.

object that is within power will, nonetheless, not be a law with respect to the subject-matter of that power if it is not appropriate and adapted or reasonably capable of being viewed as appropriate and adapted to that purpose[32]. It may be that the better view is not that there is a qualification of the kind stated but that a law which is apparently directed to achieving an end within power will be shown, if it is not appropriate and adapted to that purpose, to have some other purpose which is beyond power.

58 It is convenient, in light of what has been written, to deal first with the argument that s 3 of the WROLA Act, so far as it purports to give legal effect to item 50 in Pt 2 of Sched 5, is within the implied incidental power because it is appropriate and adapted to the prevention of future disputes. To say that s 3 is, to the extent in issue, appropriate and adapted to the prevention of future disputes is simply to say that it is, to that extent, a law for the prevention of future disputes. But that is not sufficient to bring a law within s 51(xxxv) of the Constitution.

59 Section 51(xxxv) does not authorise laws for the prevention and settlement of interstate industrial disputes. It authorises laws with respect to the means to be employed for their prevention and settlement, namely, conciliation and arbitration[33]. Thus, even if it can be said that s 3, to the extent presently in issue, is a law for the purpose of preventing future industrial disputes extending beyond the limit of any one State, that does not give it the character of a law with respect to conciliation and arbitration. Accordingly, the argument that s 3 is valid to the extent in issue because it is appropriate and adapted to the prevention of future disputes must be rejected.

60 The argument that, to the extent in issue, s 3 is within power because there is a relevant connection between the original settlement of the dispute and the award as varied by operation of item 50 in Pt 2 of Sched 5 to the WROLA Act invites some general, preliminary observations. The first is that Parliament does not have power to legislate with respect to settlements of disputes, as such. And that is so whether or not the settlement is embodied in an award. Parliament may validly legislate with respect to the settlement of disputes, including a settlement embodied in an award, only if the law is, relevantly, a law with respect to conciliation and arbitration.

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32 *Davis v The Commonwealth* (1988) 166 CLR 79. See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1.

33 See *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 401. See also *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 358 per O'Connor J.

61 In essence, the argument that there is a relevant connection between the original settlement of the dispute by the Award and the Award as varied by operation of item 50 in Pt 2 of Sched 5 to the WROLA Act is an argument that Parliament may legislate with respect to an award or with respect to the effect to be given to an award. And that proposition invites analysis of the constitutional underpinning of ss 148(1) and 149(1) of the principal Act which give continuing and binding effect to awards.

62 It is well settled that an industrial dispute is not a dispute as to existing rights and liabilities but a dispute as to what rights and liabilities should exist as between employers and employees[34]. Where the processes of conciliation and arbitration are brought to bear on an industrial dispute, they are brought to bear, in the case of conciliation, for the purpose of reaching agreement or, in the case of arbitration, for determining what those rights and liabilities should be. It may be that, in some cases, the law of contract operates to create binding rights and obligations in the event of a conciliated agreement. That aside, however, the outcome of conciliation and/or arbitration takes effect, not by its own force, but by force of those legislative provisions which give effect to it[35].

63 Since legislation was first enacted pursuant to s 51(xxxv) of the Constitution, the outcome of the arbitral process has been known as "an award"[36]. And for very many years the outcome of the conciliation process has either been given effect as an award or has been incorporated in an award embodying the outcome of arbitration. That position may have changed somewhat since the enactment of s 143(1A) of the principal Act[37]. Whether or not that is so, a law

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34 See *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656. See also *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 463 per Isaacs and Rich JJ.

35 See *Proprietors of the Daily News Ltd v Australian Journalists' Association* (1920) 27 CLR 532 at 537 per Knox CJ, Gavan Duffy and Starke JJ; *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association* (1920) 28 CLR 209 at 228-229 per Isaacs and Rich JJ; *Monard v H M Leggo & Co Ltd* (1923) 33 CLR 155 at 165 per Isaacs J; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 455 per McHugh and Gummow JJ.

36 *Commonwealth Conciliation and Arbitration Act* 1904 (Cth).

37 Section 143(1A) provides that neither a decision to certify an agreement under Pt VIB (Certified Agreements) nor an award under s 170MX (after the Commission terminates a bargaining period) is to be "an award or an order affecting an award" for the purposes of s 143(1), which relates to the making and publication of awards by the Commission.

giving binding effect to the outcome of conciliation and arbitration with respect to an interstate industrial dispute is, clearly, a law with respect to the processes the subject of s 51(xxxv), namely, conciliation and arbitration. A law of that kind is at the heart of the conciliation and arbitration power and raises no question as to the scope of the so-called "implied incidental power".

64 A law gives effect to the outcome of conciliation or arbitration if the agreement which embodies the outcome of conciliation or the award which embodies the outcome of arbitration "applies to the various parties and persons according to its terms and provisions"[38]. On one view, the question whether Parliament may legislate to give effect to an award (using that word to mean the outcome of the processes of conciliation and arbitration) other than in precise accordance with its terms, was considered in *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association* ("the *Waterside Workers' Case*")[39].

65 The *Waterside Workers' Case* concerned the validity of a legislative provision to the same effect as s 148(1) of the principal Act which, subject to any order of the Commission to the contrary, continues an award in effect beyond its term and until a new award is made. The provision in question in the *Waterside Workers' Case* was held valid in its application to an existing award which, in terms, provided for its earlier expiry.

66 In the *Waterside Workers' Case*, Isaacs and Rich JJ, in dissent, noted that the Parliament cannot, itself, legislate to "impose any obligations or alter rights by any provision which dispenses with arbitration" and continued:

> "[I]t cannot go beyond the actual decision of the arbitrator, or alter his decision, or make any provision for settlement of the dispute binding that does not involve his own decision, or that extends beyond his own decision or adoption."[40]

Their Honours added:

> "[I]f Parliament can, irrespective of the merits of the particular case, make a general enactment, operating mechanically and setting aside ordinary legal rights of employers and employees beyond anything awarded, the words

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38 *Monard v H M Leggo & Co Ltd* (1923) 33 CLR 155 at 166 per Isaacs J.

39 (1920) 28 CLR 209.

40 (1920) 28 CLR 209 at 229.

> and the spirit of the constitutional provision are alike broken. And, if Parliament can do it in this case, we can see no limit to its power."[41]

67 Later, Dixon J said of the provision considered in the *Waterside Workers' Case* that it:

> "[W]as upheld as valid ... upon the ground substantially that for the Legislature to keep an industrial regulation, brought into existence by an award, alive until a new regulation was made was incidental to the power of arbitration, at any rate so long as [the arbitrator] was left at liberty to give any contrary direction it saw fit"[42].

Dixon J was speaking of the provision as it related to an existing award which was expressed to expire at an earlier time.

68 So far as concerns future awards and, also, awards which are not expressed to operate for a precise period, there is no difference between a law that makes the outcome of conciliation and/or arbitration binding on the parties and a law that makes that outcome binding for a specified period of time. A law that makes an award binding for a specified period is, simply, a law giving effect to and indicating the period for which effect is given to the outcome of conciliation or arbitration. Subject to a qualification shortly to be mentioned, a law making an award binding for a specified period is a law with respect to conciliation and arbitration and lies at the centre not the circumference of the power conferred by s 51(xxxv) of the Constitution.

69 The qualification to what has been written above is this: although a law providing that an award shall have effect for a specified time is a law with respect to conciliation and arbitration, it is not, in my view, a law with respect to conciliation and arbitration for the prevention and settlement of industrial disputes unless it allows that the processes of conciliation and arbitration may be brought to bear to set aside or to vary the award, including as to its period of operation, or to make a new award in settlement of a further dispute.

70 A law that continued an award in effect but did not permit of the courses outlined above would thwart the very purpose which, by s 51(xxxv), conciliation and arbitration is to serve, namely, the prevention and settlement of interstate industrial disputes. Thus, although a law which continued an award in effect but did not permit of the possibilities indicated would properly be characterised as a

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41 (1920) 28 CLR 209 at 229.

42 *R v Commonwealth Court of Conciliation and Arbitration and Australian Railways Union; Ex parte Victorian Railways Commissioners* (1935) 53 CLR 113 at 140.

law with respect to conciliation and arbitration, it would not be a law with respect to conciliation and arbitration for the prevention or settlement of industrial disputes.

71 A somewhat different analysis is directed in the case of a law which extends the operation of an existing award beyond its expressed term, that being the situation considered in the *Waterside Workers' Case*[43]. A law that extends the duration of an existing award until set aside or varied, or until a new award is made in exercise of the powers of conciliation and/or arbitration, is, in my view, clearly a law that is appropriate and adapted to the main purpose of s 51(xxxv), namely conciliation and arbitration for the prevention and settlement of interstate industrial disputes. And that is so even if the award is expressed to operate for a precise period. That is because a law of that kind preserves the outcome of the processes of conciliation and arbitration until those processes can again be brought to bear for the purpose of preventing or settling interstate industrial disputes.

72 It follows that in their unmodified form, ss 148(1) and 149(1) of the principal Act which, respectively, give effect to awards and extend the operation of awards, are valid. They are valid because they give effect to or continue the effect of the outcome of conciliation and arbitration until set aside or a new award is made. However, if Parliament legislates to give effect to some only of the terms of an award, or, more precisely, to deny effect to some terms whilst continuing the effect of others, it is not legislating with respect to the outcome of the processes of conciliation and arbitration. It is creating a new outcome from the combined processes of legislation and arbitration or, perhaps, the combined processes of conciliation, arbitration and legislation. In substance, the position is the same as if Parliament were to legislate directly to supplement the terms of an award. It follows that s 3 of the WROLA Act, to the extent in issue in these proceedings, cannot be supported on the same constitutional basis as ss 148(1) and 149(1) of the principal Act.

73 As will later appear, Parliament could have amended s 148(1) of the principal Act to withdraw all legislative support from awards containing non-allowable award matters. And it could also have legislated to require the Commission to review awards containing non-allowable award matters to determine whether it was desirable that they should continue to make provision with respect to those matters and directing it, if it found their continued operation undesirable, to vary the awards by deleting those provisions[44]. Of course, the

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43 (1920) 28 CLR 209.

44 See, in this regard, *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416.

award as varied would be a valid exercise of the conciliation and arbitration power only if it retained a requisite connection with the dispute in respect of which it was made. But Parliament has taken neither course.

74 In substance, Parliament has attempted, itself, to review the awards of the Commission and to vary them in the exercise of legislative power. It has substituted its decision for that of the arbitrator. A law which substitutes an outcome that is different from the outcome of the processes of conciliation and arbitration is not a law with respect to conciliation and arbitration. Accordingly, the argument that s 3 of the WROLA Act, to the extent in issue in these proceedings, is valid because there is a relevant connection between the original award and the award as varied by item 50 in Pt 2 of Sched 5 to that Act must also be rejected.

Partial repeal

75 It is not in doubt that a power to enact laws with respect to some specific subject-matter is, also, a power to repeal an earlier law on that subject. In *Kartinyeri v The Commonwealth* Brennan CJ and McHugh J observed that:

> "[T]he power which supports a valid Act supports an Act repealing it. To the extent that a law repeals a valid law, the repealing law is supported by the head of power which supports the law repealed unless there be some constitutional limitation on the power to effect the repeal in question."[45]

76 The present proceedings are concerned with a provision which, if valid, operates to effect a partial repeal of ss 148(1) and 149(1) of the principal Act and, thus, to give effect not to the outcome of conciliation and arbitration but to a different outcome which is the combined result of legislation, conciliation and arbitration. As is apparent from what has been written, s 3 of the WROLA Act, if valid, operates to "so [change] the character of [ss 148(1) and 149(1) of the principal Act] as to deprive [them] of [their] constitutional support"[46].

77 In *Kartinyeri*, Brennan CJ and McHugh J expressly left open the question of the validity of a repealing Act which changes the character of an earlier Act so

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45 (1998) 195 CLR 337 at 356. See also at 368-370 per Gaudron J, 376 per Gummow and Hayne JJ, cf 421-422 per Kirby J; *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 226.

46 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 357 per Brennan CJ and McHugh J.

as to deprive it of its constitutional support, as did I[47]. Logically, there are two possible approaches to an Act of that kind. The first is to hold the repealing Act valid and the amended earlier Act invalid. The second is simply to hold the repealing Act invalid. To determine which is the correct approach, it is necessary to say something about repealing Acts generally.

78 Historically, the power to repeal existing legislation has been seen as an attribute of parliamentary sovereignty. Thus, as was said in Blackstone:

> "[Parliament] hath sovereign and uncontrolable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws"[48].

However, that statement requires some modification in the context of a written Constitution which confers enumerated and specific legislative powers. In that context, Parliament may not enlarge a law so that it extends beyond the subjects with respect to which it has power to legislate. So, too, Parliament may not modify a law so as to give it an operation contrary to a constitutional prohibition[49].

79 A law which repeals a law on a subject with respect to which Parliament has power to legislate is a law with respect to that subject. And in the context of a written constitution, it is valid precisely for that reason. Thus, when considering the validity of a law which partially repeals an earlier valid law but so changes its character as to deprive it of its constitutional support, the question is whether the repealing law is a law with respect to a subject within constitutional power. To put the question that way is, in effect, to answer it.

80 A law which alters or modifies the operation of an earlier law so that it is no longer a law with respect to a subject with respect to which Parliament has power to legislate is not a law on a subject of that kind. More particularly, a law that alters the operation of an earlier law with respect to conciliation and arbitration so that it is no longer a law of that kind is not, itself, a law with respect to conciliation and arbitration.

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47 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 357 per Brennan CJ and McHugh J, 369 per Gaudron J, 422 per Kirby J.

48 Blackstone, *Commentaries on the Laws of England*, 9th ed (1783), bk 1 at 160.

49 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462.

Conclusion with respect to s 51(xxxv) of the Constitution

81 It follows from what has been written that s 3 of the WROLA Act, to the extent that it purports to give effect to item 50 in Pt 2 of Sched 5 to that Act, is not a valid law under s 51(xxxv) of the Constitution. That being so, it is unnecessary to consider subitems (1), (2) and (3) of item 51. They are clearly ancillary to item 50, and, if item 50 is invalid, there is nothing upon which those subitems can operate.

The corporations power: Constitution s 51(xx)

82 The question whether s 3 of the WROLA Act is, to the extent in issue, a valid law under s 51(xx) of the Constitution arises because s 7A(1) of the principal Act relevantly provides that:

> "[I]f a provision of this Act:
> (a) would, apart from this section, have an invalid application; but
> (b) also has at least one valid application;
> it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application."

Relying on that provision, the respondents in the first matter (other than Pacific Coal) argue that item 50 in Pt 2 of Sched 5 to the WROLA Act is a valid law with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth"[50]. The argument fails at the threshold. Item 50 in Pt 2 of Sched 5 is given effect by s 3 of the WROLA Act. It is not incorporated into the principal Act and, thus, s 7A(1) has no application to it.

83 Even if s 7A(1) did apply in this case, item 50 in Pt 2 of Sched 5 could not, in my view, be characterised as a law with respect to constitutional corporations. I have no doubt that the power conferred by s 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business. More relevantly for present purposes, I have no doubt that it extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations.

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50 Constitution, s 51(xx).

84 Whether viewed in isolation or, in the context of the provisions of the principal Act which give awards continuing and binding effect, item 50 in Pt 2 of Sched 5 to the WROLA Act operates neither to prescribe the industrial rights and obligations of corporations and their employees nor to regulate the means by which they are to conduct their industrial relations. All that it purports to do is to prescribe the extent to which awards are binding on those constitutional corporations and their employees who are parties to or bound by awards.

85 The only connection between item 50 in Pt 2 of Sched 5 to the WROLA Act and s 51(xx) of the Constitution is that it may have some effect on the rights and obligations of corporations and their employees. That is not sufficient to give s 3 of the WROLA Act, to the extent that it purports to give effect to item 50, the character of a law with respect to corporations.

Conclusion and Orders

86 So far as it purports to give legal effect to item 50 in Pt 2 of Sched 5 to the WROLA Act, s 3 of that Act is neither a law with respect to conciliation and arbitration for the prevention and settlement of interstate industrial disputes nor a law with respect to corporations of the kind described in s 51(xx) of the Constitution. It is, thus, invalid. That being so, subitems 51(1), (2) and (3) in Pt 2 of Sched 5 have nothing upon which to operate. It is sufficient for present purposes that it be so declared.

87 In the first matter, the amended order nisi should be made absolute. In the second matter, the amended question reserved for the Full Court, namely:

> "On the basis of the facts pleaded in the Plaintiffs' Statement of Claim, and admitted in the Defendant's Defence, are any of the following laws invalid:
>
> (a) Section 3 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) to the extent that it purports to give effect to item 50 in Part 2 of Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth); or
>
> (b) Section 3 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) to the extent that it purports to give effect to subitems 51(1), (2) and (3) in Part 2 of Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth)?"
>
> should be answered:
>
> (a) Yes;
>
> (b) Unnecessary to answer. Section 3 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth), so far as it purports to

give effect to subitems 51(1), (2) and (3) in Part 2 of Schedule 5 to that Act, is inoperative.

88 McHUGH J. The question in these two matters is whether s 3 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) ("the WROLA Act") is invalid to the extent that it gives effect to item 50 and subitems 51(1), 51(2) and 51(3) of Sched 5 to the WROLA Act. The prosecutors'/plaintiffs' claim that it is invalid because the enactment of that item and those subitems is not supported by s 51(xxxv) of the Constitution or any other head of power in s 51 of the Constitution.

89 The first matter before the Court which gives rise to this question, S137 of 1998, is an application in the original jurisdiction of the Court for writs of prohibition, certiorari and mandamus directed to Justice Boulton of the Australian Industrial Relations Commission ("the Commission") and others. The application is brought by the Construction, Forestry, Mining and Energy Union ("the CFMEU") and Mr Barnes, a CFMEU member who was employed by Pacific Coal Pty Limited ("Pacific Coal") as a coal mine production worker at its Blair Athol mine in Queensland from 1983 until 17 August 1998. On 19 May 1999, by the consent of the parties, Kirby J made orders nisi for the relief sought, and those orders nisi are now returned before the Full Court.

90 The prosecutors seek an order that the orders nisi be made absolute on the ground that the variation of the Coal Mining Industry (Production and Engineering) Consolidated Award 1997 ("the award") ordered by Boulton J on 1 July 1998 and other related decisions and orders made by Boulton J were made without jurisdiction. They contend that his Honour had no jurisdiction because the provisions of Sched 5 pursuant to which Boulton J acted (item 50 and subitems 51(1), 51(2) and 51(3)) are invalid. The application seeks relief against members of the Full Bench of the Commission who have heard but not yet determined an appeal from the decision of Boulton J to vary the award. They also seek relief against Pacific Coal and thirty-eight other respondents (who are all employers in the coal industry) to prevent any of them from giving effect to or relying upon the decisions and orders of Boulton J made in connection with the variation of the award.

91 Justice Boulton varied the award made by deleting, inter alia, the following clauses:

(a) cl 10, which provided employees with the right to be consulted over any major changes likely to have significant effects on them;

(b) sub-cl 16.1, which provided employees with the right to discuss with their employer decisions by the employer to make an employee redundant;

(c) cl 39, which provided that union members would have preference of employment in engagement of labour covered by the award;

(d) sub-cl 16.2, which provided for the reduction of hands in accordance with the principle: "the last to come the first to go".

92 The second matter before the Court which gives rise to the question of the validity of s 3 of the WROLA Act, S138 of 1998, is also brought in the original jurisdiction of this Court. In that matter, the CFMEU and Mr Barnes seek declarations against the Commonwealth that item 50 and subitems 51(1), 51(2) and 51(3) are invalid. On 30 April 1999, Kirby J reserved the question of the validity of these provisions for the consideration of the Full Court pursuant to s 18 of the *Judiciary Act* 1903 (Cth). His Honour ordered that the matter be heard together with matter S137 of 1998.

The legislation

93 The *Industrial Relations Act* 1988 (Cth) was amended by the WROLA Act. Schedules to the WROLA Act set out amendments to the *Industrial Relations Act* which commenced at various times in accordance with s 2 of the WROLA Act. Effective from 25 November 1996, pursuant to Sched 19 to the WROLA Act, s 1 of the *Industrial Relations Act* was amended to change its short title to the *Workplace Relations Act* 1996 (Cth) ("the Act").

94 Section 111(1)(b) of the Act confers power upon the Commission to make awards. That section, which was not amended by the WROLA Act, provides:

"Subject to this Act, the Commission may, in relation to an industrial dispute:

…

(b) make an award or order, including one by consent of the parties, in relation to all or any of the matters in dispute, including:

(i) a provisional award or order; or

(ii) an interim award or order."

95 Prior to 1 January 1997, s 111(1)(b) determined the ambit of the Commission's jurisdiction to make awards. The jurisdiction was exercisable "in relation to an industrial dispute". The definition of "industrial dispute" in s 4 of the Act (which was not amended by the WROLA Act) was and is in broad terms:

"'***industrial dispute***' (except in Part XA) means:

(a) an industrial dispute (including a threatened, impending or probable industrial dispute):

(i) extending beyond the limits of any one State; and

(ii) that is about matters pertaining to the relationship between employers and employees; or

(b) a situation that is likely to give rise to an industrial dispute of the kind referred to in paragraph (a);

and includes a demarcation dispute (whether or not, in the case of a demarcation dispute involving an organisation or the members of an organisation in that capacity, the dispute extends beyond the limits of any one State)."

96 Thus, before the enactment of the WROLA Act, the Commission had jurisdiction to make awards in relation to any matter which met the definition of "industrial dispute" as set out in s 4.

97 Section 3 of the WROLA Act provides:

"Subject to section 2, each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms."

98 By operation of s 3 and Item 11 of Sched 5 to the WROLA Act, the WROLA Act inserted s 89A into the Act to be effective from 1 January 1997. Section 89A provides:

"**89A Scope of industrial disputes**

Industrial dispute normally limited to allowable award matters

(1) For the following purposes, an industrial dispute is taken to include only matters covered by subsections (2) and (3):

(a) dealing with an industrial dispute by arbitration;

(b) preventing or settling an industrial dispute by making an award or order;

(c) maintaining the settlement of an industrial dispute by varying an award or order.

Allowable award matters

(2) For the purposes of subsection (1) the matters are as follows:

(a) classifications of employees and skill-based career paths;

(b) ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours;

(c) rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system;

(d) piece rates, tallies and bonuses;

(e) annual leave and leave loadings;

(f) long service leave;

(g) personal/carer's leave, including sick leave, family leave, bereavement leave, compassionate leave, cultural leave and other like forms of leave;

(h) parental leave, including maternity and adoption leave;

(i) public holidays;

(j) allowances;

(k) loadings for working overtime or for casual or shift work;

(l) penalty rates;

(m) redundancy pay;

(n) notice of termination;

(o) stand-down provisions;

(p) dispute settling procedures;

(q) jury service;

(r) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work;

(s) superannuation;

(t) pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.

(3) The Commission's power to make an award dealing with matters covered by subsection (2) is limited to making a minimum rates award.

Limitations on Commission's powers

(4) The Commission's power to make or vary an award in relation to matters covered by paragraph (2)(r) does not include:

(a) the power to limit the number or proportion of employees that an employer may employ in a particular type of employment; or

(b) the power to set maximum or minimum hours of work for regular part-time employees.

(5) Paragraph (4)(b) does not prevent the Commission from including in an award:

(a) provisions setting a minimum number of consecutive hours that an employer may require a regular part-time employee to work; or

(b) provisions facilitating a regular pattern in the hours worked by regular part-time employees.

(6) The Commission may include in an award provisions that are incidental to the matters in subsection (2) and necessary for the effective operation of the award.

Exceptional matters may be included in industrial dispute

(7) Subsection (1) does not exclude a matter (the ***exceptional matter***) from an industrial dispute if the Commission is satisfied of all the following:

(a) a party to the dispute has made a genuine attempt to reach agreement on the exceptional matter;

(b) there is no reasonable prospect of agreement being reached on the exceptional matter by conciliation, or further conciliation, by the Commission;

(c) it is appropriate to settle the exceptional matter by arbitration;

(d) the issues involved in the exceptional matter are exceptional issues;

(e) a harsh or unjust outcome would apply if the industrial dispute were not to include the exceptional matter.

Anti-discrimination clause

(8) Nothing in this section prevents the Commission from including a model anti-discrimination clause in an award .

Interpretation

(9) In this section, ***outworker*** means an employee who, for the purposes of the business of the employer, performs work at private residential premises or at other premises that are not business or commercial premises of the employer."

99 The WROLA Act also amended the Act by adding to the definitions in s 4:

"***allowable award matters*** means the matters covered by subsection 89A(2)".

100 After 1 January 1997, s 89A limited the ambit of an "industrial dispute". Consequently, it limited the ambit of the Commission's jurisdiction to make awards pursuant to s 111(1)(b) of the Act to those matters designated as "allowable award matters". The effect was that, although prior to 1 January 1997 the Commission had frequently made awards which included matters other than allowable matters (as did the award), the Commission no longer had the power to do so.

101 Section 89A only operated prospectively. That is to say, it only affected the Commission's power to make awards in the future. However, Sched 5 to the WROLA Act contained transitional provisions which operated upon awards made by the Commission prior to 1 January 1997. Subitem 49(1) of Sched 5 empowered one or more parties to an award to apply to the Commission for a

variation of the award during the "interim period". If a party did so, the Commission could vary the award so that it only dealt with "allowable award matters". Item 46 of Sched 5 defines the "interim period" to mean the period of 18 months beginning on the day on which s 89A of the Act commenced. The interim period thus began on 1 January 1997 and expired on 30 June 1998.

102 Subitem 49(4) provided that:

> "The Commission may only deal with the application by arbitration if it is satisfied that the applicant or applicants have made reasonable attempts to reach agreement with the other parties to the award about how the award should be varied and the treatment of matters that are not allowable award matters."

The expression "allowable award matters" is not defined in the WROLA Act itself. It is defined in the Act by virtue of an amendment made to it by the WROLA Act. However, s 15 of the *Acts Interpretation Act* 1901 (Cth) provides that every Act amending another Act shall, unless the contrary intention appears, be construed with that other Act and as part thereof. Because that is so, the expression "allowable award matters" has the same meaning in the WROLA Act as in the Act – ie those matters set out in s 89A(2) of the Act.

103 Subitem 49(7) of Sched 5 to the WROLA Act provides that the Commission must, if it considers it appropriate, review the award to determine whether it meets the criteria set out in subitem 49(7)(a)-(c). Subitem 49(8) provides that the Commission must also review the award to determine whether it meets the criteria in subitem 49(8)(a)-(f).

104 Items 50 and 51 deal with the situation where, at the end of the interim period, the Commission has not varied an award under item 49 so that it provides only for allowable award matters. It is the validity of items 50 and 51 which is the issue in these proceedings.

105 Item 50 provides:

> "(1) At the end of the interim period, each award ceases to have effect to the extent that it provides for matters other than allowable award matters.
>
> (2) For the purposes of this item, an exceptional matters order is taken to relate wholly to allowable award matters.
>
> (3) For the purposes of this item, an award that is made under subsection 170MX(3) of the Principal Act is taken to provide wholly for allowable award matters.

(4) If the termination time for special consent provisions is after the end of the interim period, then this item and item 51 apply to the special consent provisions as if a reference to the end of the interim period were instead a reference to the termination time."

106 Item 51 relevantly provides:

"(1) As soon as practicable after the end of the interim period, the Commission must review each award:

(a) that is in force; and

(b) that the Commission is satisfied has been affected by item 50.

(2) The Commission must vary the award to remove provisions that ceased to have effect under item 50.

(3) When varying the award under subitem (2), the Commission may also vary the award so that, in relation to an allowable award matter, the award is expressed in a way that reasonably represents the entitlements of employees in respect of that matter as provided in the award as in force immediately before the end of the interim period."

107 The evident legislative intent of items 49, 50 and 51 is to limit all awards made by the Commission to those matters in respect of which the Commission would have jurisdiction to make awards pursuant to s 89A. In substance, the items sought retrospectively to apply the limitations on the Commission's jurisdiction to make awards on and after 1 January 1997 to the awards made by the Commission prior to that date.

The enforceability of the award provisions

108 Section 149(1) of the Act provides that:

"Subject to any order of the Commission, an award determining an industrial dispute is binding on:

(a) all parties to the industrial dispute who appeared or were represented before the Commission;

(b) all parties to the industrial dispute who were summoned or notified (either personally or as prescribed) to appear as parties to the industrial dispute (whether or not they appeared);

(c) all parties who, having been notified (either personally or as prescribed) of the industrial dispute and of the fact that they were alleged to be parties to the industrial dispute, did not, within the time prescribed, satisfy the Commission that they were not parties to the industrial dispute;

(d) any successor, assignee or transmittee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute, including a corporation that has acquired or taken over the business or part of the business of the employer;

(e) all organisations and persons on whom the award is binding as a common rule; and

(f) all members of organisations bound by the award."

109 Section 178(1) relevantly provides that, where an organisation or person bound by an award breaches a term of the award, a penalty may be imposed by the Federal Court or another court of competent jurisdiction. Pursuant to s 178(5), such a penalty may be sued for, and recovered by, inter alia, a party to the award[51], a person whose employment was, at the time of breach, subject to the award and who is affected by the breach[52], or an organisation that is affected, or whose members are affected, by the breach[53].

The argument as to invalidity

110 Section 51(xxxv) of the Constitution confers power upon the Parliament to make laws with respect to:

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

111 The CFMEU and Mr Barnes contend that s 3 of the WROLA Act is invalid to the extent that it gives effect to item 50 and subitems 51(1), 51(2) and 51(3) of Sched 5 because the settled doctrine of this Court is that s 51(xxxv) of the Constitution does not give the Parliament power to legislate directly for the terms and conditions of employment. They argue that, by selectively denying certain

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51 s 178(5)(b).

52 s 178(5)(ca).

53 s 178(5)(d).

provisions of an award of any effect, the Parliament in substance has legislated for the terms and conditions of employment. That is because the legislation operates on an arbitrated award made in settlement of an interstate industrial dispute and leaves enforceable only those terms and conditions of the award which the Parliament considers desirable. They argue that, while the arbitrated award may remain in form an award, what remains in substance (in the sense of being legally enforceable) is the result of a choice by Parliament as to which terms and conditions of the award accord with its view as to what is the appropriate subject matter of an award. They contend that to do so goes beyond the power given by the Constitution in respect of interstate industrial disputes.

112 On many occasions, this Court has said that, under s 51(xxxv) of the Constitution, Parliament cannot directly legislate for the terms and conditions of employment. In *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association*[54] ("*Waterside Workers*"), Knox CJ said of s 51(xxxv):

> "It is clear that this power does not authorize the Commonwealth Parliament to regulate conditions of employment by direct legislation, eg, to prescribe by Act of Parliament the minimum rate of wage to be paid or the maximum number of hours to be worked. It is, I think, equally clear that the power in question does authorize the Commonwealth Parliament to set up a tribunal with plenary and unrestricted power to prevent or settle two-State industrial disputes by conciliation and arbitration. It follows, in my opinion, that the Commonwealth Parliament has power to prescribe by legislation the manner in which, and the conditions on which, the tribunal so constituted shall carry out its functions and exercise the jurisdiction conferred upon it. The Commonwealth Parliament cannot settle a dispute or make an award by legislative enactment, but it has power, in my opinion, to enact that the tribunal which is set up for the purpose of settling industrial disputes shall, if it makes an award, comply with conditions prescribed by Parliament."

113 In *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd*, the Court said[55]:

> "The laws [made under s 51(xxxv)] cannot be laws simply for the prevention and settlement of such industrial disputes; they must be laws for the prevention and settlement thereof by means of conciliation and arbitration … The court can make orders or awards in relation to particular

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54 (1920) 28 CLR 209 at 218.

55 (1949) 78 CLR 389 at 401.

> disputes, but cannot independently of disputes prescribe a system of industrial regulation. An order or award of the court in its arbitral jurisdiction must be an award or order directed to the prevention or settlement of some particular industrial dispute."

114 In *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)*[56], where one of the issues considered was whether the Parliament had the power to legislate for a particular method of determining wages outcomes, Barwick CJ said[57]:

> "The constitutional power in this area is to make laws with respect to the settlement of industrial disputes extending beyond the limits of one State by a specific means, namely, by conciliation and arbitration. The Parliament is unable itself to legislate the level of wages to be paid. Nor has it power to direct the arbitrator as to the level of wages he shall prescribe in the settlement of a dispute as to wages. The constitutional power requires that settlement of the dispute be left to the arbitrator."

115 The respondents and the defendant ("the respondents") accept the major premise of the prosecutors'/plaintiffs' ("the prosecutors") argument – ie that under s 51(xxxv), Parliament cannot legislate directly as to terms and conditions of employment. However, they argue that items 50 and 51 do not effect an alteration of the settlement reached by the arbitrator – because they merely withdraw the legal effect which ss 149 and 178 of the Act previously provided for the settlement. On this view, the words "ceases to have effect" in item 50 means "ceases to have effect for the purposes of the Act ". The respondents relied on the following passage from the judgment of Isaacs and Rich JJ in *Waterside Workers' Federation of Australia v J W Alexander Ltd*[58]:

> "An industrial dispute is a claim by one of the disputants that existing relations should be altered, and by the other that the claim should not be conceded. It is therefore a claim for new rights. And the duty of the arbitrator is to determine whether the new rights ought to be conceded in whole or in part. His opinion may take any form the law provides; it may be called an order, or an award. But his declaration of opinion does not make it law. He does not legislate. <u>It is always the Statute which gives the arbitrator's opinion efficacy, and stamps his decision with the character of a legal right or obligation. Parliament legislates, but is compelled by the</u>

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56 (1967) 118 CLR 219.

57 (1967) 118 CLR 219 at 242.

58 (1918) 25 CLR 434 at 463.

> Constitution to legislate in that way. It cannot form an *a priori* code, and say that shall be obeyed by disputants. A particular method that other Parliaments *may* adopt, it *must* adopt if it legislates at all." (italics in original, underscoring added)

116 The respondents contend that under the amendments introduced by the WROLA Act the terms and conditions of the settlement are unaltered. That being so, they argue that Parliament has not directly legislated for the terms and conditions of employment by enacting items 50 and 51 because all subitem 50(1) is doing is withdrawing the enforceability of certain provisions of the award and item 51 is merely a consequential provision.

117 The prosecutors, on the other hand, argue that "ceases to have effect" in subitem 50(1) means "ceases to have any legal effect whatsoever". On that construction, to the extent that the award affects any legal rights or obligations other than by force of the Act, those rights and obligations are also deprived of that effect. The prosecutors argue that, if the provisions of an award which were not allowable award matters have been incorporated into a contract of employment, subitem 50(1) would deprive them of their contractual effect as well as their effect under the Act.

118 In my opinion, the contention of neither side of the record correctly describes the effect of items 50 and 51. The two items must be read together. Although subitem 50(1) does not by its terms provide that the award ceases to have effect "for the purposes of the Act" to the extent specified – it simply provides that the award "ceases to have effect" to the extent specified – the respondents' argument would be plausible if subitem 50(1) stood alone. That is particularly so in light of the fact that a construction which leads to validity is to be preferred to one which leads to invalidity[59]. However, subitem 51(2) states that the "Commission must vary the award to remove provisions that ceased to have effect under item 50". That direction makes it clear that the effect of items 50 and 51 is to deprive certain provisions of an award of their legal status *as provisions of an award for all purposes*. If subitem 50(1) were simply intended to deprive certain provisions of an award of their effectiveness for the purposes of the Act, subitem 51(2) would not be required because the provisions would be part of the award for other purposes. That is, to the extent that enforceable rights and obligations derive from a provision's legal status as a provision of an award, those rights and obligations are rendered ineffective by subitems 50(1) and 51(2).

119 Sections 149, 178 and 179 of the Act operate upon an award's status as an award, and the deprivation of certain provisions of the award of their legal status

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59 *Acts Interpretation Act* 1901 (Cth) s 15A.

means that those provisions cannot be enforced pursuant to ss 149, 178 or 179. But this is not the only effect of subitem 50(1). If another Commonwealth Act (or a State Act which was not inconsistent with Commonwealth legislation for the purposes of s 109 of the Constitution) attached legal consequences to an award provision's legal status as an award provision, those consequences would disappear as the underlying effectiveness of the award provision *qua* award provision would have been removed by subitem 50(1).

120 However, the construction that I have adopted does not mean that unallowable award provisions which are "incorporated" into contracts of employment automatically cease to have *contractual* effect. In *Byrne v Australian Airlines Ltd*[60], this Court decided that an award provision does not *ipso facto* become imported into the contract of employment which it regulates. Whether it becomes a term of the contract depends on the intention of the parties. *Byrne* decided that whether an award provision is a term of the contract of employment is to be determined by reference to the usual principles for ascertaining the terms of a contract. At a given point of time, the text of the award (as opposed to its legal effectiveness) may have contained the text of terms which were subsequently adopted by the express or implied agreement of the parties. If so, the agreement will not usually be affected by the repeal of the award. Accordingly, the deprivation of the legal status of an award provision *qua* award provision would ordinarily be irrelevant to the effectiveness of a contractual term which corresponded with that award provision. However, in some cases the removal of the award provision may deprive the corresponding contractual term of effect. But that would be the case only where the contractual term is dependent on the continued existence of the award term.

The consequences of this construction

121 What then is the consequence of the construction that subitem 50(1) and subitem 51(2) together deprive certain provisions of an award of their legal status as provisions of an award for all purposes?

122 In *Fairfax v Federal Commissioner of Taxation*[61], Kitto J said that the question whether a law is a law with respect to a s 51 head of power:

> "is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of

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60 (1995) 185 CLR 410.

61 (1965) 114 CLR 1 at 7.

> the legislation: is it in its real substance a law upon, 'with respect to', one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?"

123 The prosecutors, who bear the onus of demonstrating the invalidity of the legislation in the present case, have identified the "rights, duties, powers and privileges" which items 50 and 51 regulate or abolish as the right to enforce provisions of an award under ss 149, 178 and 179 of the Act. Thus, although on their true construction items 50 and 51 do not simply make certain provisions of an award ineffective for the purposes of the Act, but also deprive them of their legal status as provisions of an award for all other purposes (including other legislation), the character of items 50 and 51 for the purpose of s 51(xxxv) of the Constitution must be determined by reference to the effect they have on the enforceability of the awards pursuant to the Act.

Section 51(xxxv) – a compound conception

124 Section 51(xxxv), like s 51(xxxi) of the Constitution, is what Dixon J has referred to as a "compound conception"[62]. It initially describes a power to legislate with respect to two processes – "conciliation and arbitration", which are disjunctive in the sense that the process can be either conciliation or arbitration. But the width of legislative power that would otherwise flow from a power to legislate with respect to these processes is confined by the conjunctive requirement that the process be directed to achieving an objective. The existence of the objective is indicated by the word "for", and the specified objective is "the prevention and settlement of industrial disputes extending beyond the limits of any one State".

125 In *Applicant A v Minister for Immigration and Ethnic Affairs*[63], I said:

> "The phrase 'a well-founded fear of being persecuted for reasons of ... membership of a particular social group' is a compound conception. It is therefore a mistake to isolate the elements of the definition, interpret them, and then ask whether the facts of the instant case are covered by the sum of those individual interpretations. Indeed, to ignore the totality of the words that define a refugee for the purposes of the Convention and the Act would be an error of law by virtue of a failure to construe the definition as a whole."

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62 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290.

63 (1997) 190 CLR 225 at 256.

126 Similarly, in my view, it is a mistake to isolate the elements of s 51(xxxv) of the Constitution, interpret them, and then ask whether the legislation in question is legislation with respect to the sum of those individual interpretations. It must be always kept in mind that the power in s 51(xxxv) is a power to legislate with respect to a process that is designed to achieve a particular objective.

127 Accordingly, the objective or purpose of "the prevention and settlement of industrial disputes extending beyond the limits of any one State" does not refer to the purpose or objective of the Parliament in enacting the law. It refers to the objective or purpose of the process, as ascertained from its operation. Thus, if Parliament purports to pass a law under s 51(xxxv), then, notwithstanding that in passing that law Parliament may have had the purpose of the "prevention and settlement of industrial disputes extending beyond the limits of any one State" in view, it will not fall within s 51(xxxv) unless the law is also properly characterised as a law with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

128 In my opinion, the diverse and at times seemingly contradictory statements by this Court in relation to how the Parliament can and cannot legislate under s 51(xxxv) are best understood and reconciled with one another by recognising that s 51(xxxv) is a power to legislate with respect to a process designed to achieve a particular objective.

The requirements of the process

129 The "process limb" of the compound conception in s 51(xxxv) has given rise to several requirements which this Court has considered are necessary concomitants of the words used to describe the process. The relevant process in this case is "arbitration" which Isaacs CJ has said[64]:

> "signifies a means of settling a question in dispute by reference to a third party or parties where the contendants themselves have failed to agree".

That third party must be an entity other than a court of law[65]. There can be no arbitration for constitutional purposes unless there is a genuine dispute in

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64 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 355.

65 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 49.

existence between two parties[66] which is determined by the tribunal acting judicially and applying the principles of natural justice[67]. Since, by hypothesis, the parties have been unable to agree, the tribunal must make an agreement for them[68].

130 In *Australian Boot Trade Employés' Federation v Whybrow & Co*[69], Barton J said:

> "'Arbitration' is a term which, taken by itself, connotes a process for the settlement of disputes by submitting them to the decision of a tribunal selected by the parties or accepted by them, and an agreement by both to be bound by the decision, which is commonly called the award."

His Honour went on to say[70]:

> "But, assuming as we may, that the power in [s 51(xxxv)] extends to the establishment of compulsory arbitration, is the judicial character of the tribunal diminished or is any non-judicial or legislative character or function added to it if the compulsory power is given? Clearly, no. The arbitrator's authority is no less purely judicial than it would be if the compulsory power were absent, and nothing was advanced in support of any other conclusion."

131 Similarly, in *R v Kirby; Ex parte Boilermakers' Society of Australia*[71], this Court held that the concept of "arbitration" does not require that the parties to the arbitration agree as to the identity of the arbitrator – the arbitrator may be a "tribunal to which the parties to industrial disputes of the specified character are *compelled* to submit their differences".

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66 *Re State Public Services Federation; Ex parte Attorney-General (WA)* (1993) 178 CLR 249 at 270-271.

67 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Angliss Group* (1969) 122 CLR 546 at 552-554.

68 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 36-37.

69 (1910) 10 CLR 266 at 293-294.

70 (1910) 10 CLR 266 at 295.

71 (1956) 94 CLR 254 at 342-343 (emphasis added).

132 However, it would be pointless to compel parties to submit to an arbitrator if the arbitrator's subsequent decision could be completely ignored by the parties without legal sanction. In the case of parties voluntarily submitting to arbitration, the parties themselves agree to be "bound by the decision". But at least in the case of compulsory arbitration, legislative provisions are needed to make the outcome of the arbitration binding on the parties.

133 The passage in the judgment of Isaacs and Rich JJ in *Waterside Workers' Federation of Australia v J W Alexander Ltd*[72], to which I earlier referred, suggests that Isaacs and Rich JJ did not conceive of an arbitrated award as one which would not be given legal effect by the Parliament. If a statute set up a sophisticated process of non-voluntary *arbitration* but contained a provision that the arbitrator's award would have no legal effect, it is not easy to accept that it would be an arbitration for the purpose of s 51(xxxv) of the Constitution. Depending on all the circumstances, it might be upheld as a law with respect to conciliation but it is hard to accept that the law provided for arbitration for the settlement of an industrial dispute. If the parties can ignore the "arbitrated" result, the process does not bind them and the arbitration has not settled the dispute. At best, it suspends the continuance of the dispute for as long as the parties agree to act in accordance with the "arbitrated" award.

134 The prosecutors conceded that it would be open to the Parliament to legislate so as to make a previously enforceable award completely unenforceable by repealing the provisions which allowed the award to be enforced. In my opinion, that concession was properly made, for reasons which are discussed below. However, there is a constitutional difference between such a repeal and a statute which provides no means of enforcing an arbitrator's award at any time after it is made. That is because in the case of a statute repealing the enforceability of an award, at the time the process of arbitration was engaged, it was an arbitration and was an arbitration directed at the settlement of an industrial dispute. The fact that the enforceability of the award has been subsequently withdrawn does not affect the process or the purpose to which the process was directed at the time that it was engaged. Where the "arbitrated" award is never to have binding effect, however, there is no process which can result in a binding decision determining substantive legal rights and obligations in settlement of an industrial dispute.

135 Because the compound conception of "arbitration for the ... settlement of disputes" in s 51(xxxv) involves some notion of the enforceability of the outcome, I cannot accept the argument of the respondents that the legislation is valid because the impugned provisions do not affect the settlement of the dispute but only its enforceability. That argument seeks to divorce the notion of an

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72 (1918) 25 CLR 434 at 463.

arbitrated settlement from its enforceability. The extent to which notions of enforceability of the outcome are tied up in the compound conception of arbitration directed to the settlement of an industrial dispute in s 51(xxxv) needs to be more closely examined.

The enforceability of the outcome of the process

136 The decided cases in this Court on the conciliation and arbitration power show that, if legislation affecting the enforceability of an award retains the integrity of the award as an outcome of conciliation or arbitration, that legislation will generally be a law with respect to s 51(xxxv). That this result flows from the authorities is not surprising. It is a result dictated by a principled application of the text of the Constitution. The compound conception in s 51(xxxv) includes a process and an objective. Assuming that the process meets its constitutional description, then a law with respect to the outcome *simpliciter* of that process will generally be a law with respect to the compound conception because the outcome is the embodiment of the constitutionally dictated objective.

137 However, a law which operates upon the outcome in such a way so as to not deal with it as an outcome *simpliciter* will not necessarily be a law with respect to the compound conception. If the law deals with only part of the outcome, the outcome will not necessarily retain its status as the end of the constitutionally dictated objective of the process. Part only of the outcome may be something which is not referable to the process directed to that objective.

138 In *Australian Boot Trade Employés' Federation v Whybrow & Co*[73], this Court held that ss 38(f) and 38(g) of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) were invalid. Section 38(f) purported to authorise the Court of Conciliation and Arbitration to "declare by any award or order that any practice, regulation, rule, custom, term of agreement, condition of employment or dealing whatsoever determined by an award in relation to any industrial matter shall be a common rule of any industry in connection with which the dispute (ie the dispute which gives rise to the award) arises"[74]. Section 38(g) purported to provide that the Court of Conciliation and Arbitration had power to direct that the common rule so declared shall be binding upon the persons engaged in that industry[75].

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73 (1910) 11 CLR 311.

74 (1910) 11 CLR 311 at 316.

75 (1910) 11 CLR 311 at 339.

139 The Court held that both ss 38(f) and 38(g) were invalid because there were no ascertainable parties in an ascertainable dispute which were requirements for an "arbitration" within the meaning of s 51(xxxv). The Court held that ss 38(f) and 38(g) fell together. It drew no distinction between the "award or order" made by the Court of Conciliation and Arbitration under s 38(f) and the binding effect given to that "award or order" by s 38(g). That was because the Parliament's power to legislate to give an "award or order" binding effect under s 51(xxxv) was dependent upon the "award or order" being the outcome of the constitutional process of arbitration. The Court's finding that the "award or order" made under s 38(f) was not the outcome of "arbitration" – because there was no identifiable dispute – necessarily resulted in s 38(g) (which dealt with enforceability) also being invalid.

140 In *Waterside Workers*[76], a majority of this Court held that s 28(2) of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) was a valid enactment under s 51(xxxv). That section provided that, in the absence of an order by the Arbitration Court to the contrary, an award shall continue in force from the date of the expiration of the period specified therein until a new award is made. Knox CJ held that the section was valid. His Honour said[77]:

> "It cannot be successfully contended that it was beyond the power of Parliament to enact both a minimum and a maximum period for the continuance in force of any award that might be made under the Act, and in my opinion it is clear that the two sub-sections of sec 28 in effect do no more than this, though a power is reserved to the Court of Arbitration to put an end to an award at any time after the expiration of the 'specified period' referred to in sub-sec 1. Under this provision the continuance in force of an award beyond the specified period is placed absolutely under the control of the tribunal constituted by the Act, and I cannot find in the provisions of this section any attempt on the part of Parliament to prescribe conditions of employment by legislative enactment."

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76 (1920) 28 CLR 209.

77 (1920) 28 CLR 209 at 219.

141 Higgins J also held the section to be valid. His Honour said[78]:

> "It is agreed on all sides that Parliament cannot affirmatively or directly prescribe conditions of employment by its own enactment; but it can make any laws that it thinks fit 'with respect to' conciliation and arbitration, &c (sec 51). Here Parliament does not even say that a certain *minimum rate* shall 'continue in force,' but what it says is that a certain *award* shall continue in force. It is unnecessary in this case to decide how far Parliament can put limitations and conditions on the power of the Court which it creates to prescribe the terms of settlement of the dispute; for in this case all that Parliament has done is to state *the duration of the award*, not any terms of settlement of the dispute. The duration of the award was not one of the industrial matters in dispute." (original emphasis)

142 Gavan Duffy J[79] agreed with Knox CJ that s 28(2) did no more than "delimit the period during which an award may subsist as an instrument binding on the parties whom it affects, and that it is therefore within the competence of the Commonwealth Parliament under the provisions of s 51(xxxv) of the Constitution".

143 Starke J also held the legislation to be valid. His Honour said[80]:

> "Parliament admittedly can take up the award which has been made and give it efficacy and force; but it cannot, so it is contended, fix the period during which it shall have efficacy and force, but must refer that matter to the tribunal which is set up under the law with respect to arbitration. I do not agree with the contention, and, in my opinion, Parliament can, under its constitutional power, prescribe the duration of the awards and orders of the arbitral tribunal, or it can endow the tribunal with jurisdiction to determine the duration, or it can combine both methods."

144 Isaacs and Rich JJ held that the legislation was invalid. Their Honours said[81]:

> "Parliament may give what powers it pleases to the arbitrator; it may limit his powers as it pleases; it may make the exercise of these powers conditional, and may make any determination of the arbitrator law. But it

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78 (1920) 28 CLR 209 at 242.

79 (1920) 28 CLR 209 at 244.

80 (1920) 28 CLR 209 at 253.

81 (1920) 28 CLR 209 at 228-229.

> cannot, consistently with the terms of its legislative power in relation to industrial disputes, impose any obligations or alter rights by any provision which dispenses with arbitration; it cannot go beyond the actual decision of the arbitrator, or alter his decision, or make any provision for settlement of the dispute binding that does not involve his own decision, or that extends beyond his own decision or adoption … But if Parliament can, irrespective of the merits of the particular case, make a general enactment, operating mechanically and setting aside ordinary legal rights of employers and employees beyond anything awarded, the words and the spirit of the constitutional provision are alike broken. And, if Parliament can do it in this case, we can see no limit to its power."

145 Their Honours held "[p]art of the award is the time for which it shall endure"[82], and that Parliament was therefore invalidly legislating for new and independent obligations outside the arbitrator's award.

146 Powers J also dissented. His Honour held that, on the majority's construction of s 28(2) (that it would prevent the Arbitration Court from making an award which would have effect in the time between the expiration of the period specified in the old award and the making of the new award), the provision was *ultra vires* for the reasons given by Isaacs and Rich JJ. Powers J said[83]:

> "The Arbitration Court was only authorized to, and did, settle the dispute for a fixed term, the specified period. It was admitted that Parliament could not by an Act have fixed 1s. a day more than the Arbitration Court fixed by the award for an indefinite period after the expiration of the specified period, or the same rate as the arbitrator fixed. It has in fact done so, if the construction urged by the respondents is accepted as correct, and it cannot do indirectly what it cannot do directly. Parliament by the sub-section, on that construction, purports to fix rates to be paid and conditions to be observed which are to take effect after the expiration of the specified period, however much they are opposed to the rates and conditions the Arbitration Court may think just in settling a new dispute arising after the expiration of the specified period for which the Arbitration Court settled the old dispute. Such a provision by a Parliament having plenary power to legislate in respect of arbitration would be within its powers, but the Commonwealth Parliament has only the power under the Constitution to make laws with respect to the prevention and settlement of industrial

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82 (1920) 28 CLR 209 at 232, citing Heydon J in *In re Saddlers' Award* (1905) NSWAR 329 at 330.

83 (1920) 28 CLR 209 at 251.

disputes extending, &c, by conciliation and arbitration. It has not a general power, as was contended, to make laws with respect to arbitration."

147 In my opinion, the difference between the majority and the minority in *Waterside Workers* can be explained as follows. The majority held that s 28(2) merely operated upon the award, and preserved its status as the arbitrated settlement of a dispute. As Higgins J expressed it: "[h]ere Parliament does not even say that a certain *minimum rate* shall 'continue in force,' but what it says is that a certain *award* shall continue in force"[84]. The minority on the other hand held that the duration of the award was one of its essential terms and that to legislate for the duration of the award was to "alter [the arbitrator's] decision"[85] and to deprive it of its status as an arbitrated outcome.

148 No member of the Court in *Waterside Workers* approached s 28(2) on the basis that there is a dichotomy between the terms of an award and its enforceability. Section 28(2) did not by its terms purport to alter the terms of the award. It merely dealt with its enforceability in a given period. It is clear from the judgments in *Waterside Workers* that it was the legal rights to which s 28(2) gave rise, rather than the award (which remained unchanged) which were examined to determine whether Parliament had directly legislated for the terms and conditions of employment.

149 Similarly, in *George Hudson Ltd v Australian Timber Workers' Union*[86], the issue was whether it was within the power of the Parliament to enact that an agreement made between parties to an industrial dispute should be binding not only on those parties, but also on the successor in business or the assignee of the business of any party to the agreement. The provision in question thus only purported to effect the enforceability of the award, not its content. The Court held that the provision was valid.

150 Knox CJ (with whom Gavan Duffy J agreed) dissented. Knox CJ thought that the decision in *Australian Boot Trade Employés' Federation v Whybrow & Co*[87] dictated the conclusion that the legislation was invalid. As noted earlier, in *Whybrow*, the Court held that it was beyond the power of the Parliament to enact that persons who were not parties to an industrial dispute could, by means of an order of the Court of Arbitration, be bound by an award of the Court duly

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84 (1920) 28 CLR 209 at 242 (original emphasis).

85 (1920) 28 CLR 209 at 229.

86 (1923) 32 CLR 413.

87 (1910) 11 CLR 311.

made for the purpose of preventing or settling that dispute. Knox CJ saw no relevant difference between the legislation in *Whybrow* and that before him.

151 However, Isaacs J said[88]:

> "I am utterly unable to give the words 'industrial dispute' a connotation that would not merely fail to secure the end aimed at, but would even introduce additional evils by discriminating between employees who became such after the dispute and those who were employees before, and would enable employers, by a mere technical transfer of a business or a mine to a different legal entity, to defeat any award whatsoever."

152 It is evident from this passage that Isaacs J considered that the status of the award as an arbitrated settlement was not affected by the legislation; the legislation simply prevented the enforceability of an award being defeated by a technicality.

153 Similarly, Starke J said[89]:

> "As drafted, s 24 bound the parties to the dispute who made an agreement; now, by the amending Act, the successors, &c, of the business of the party who made the agreement are also bound. The constitutional power is not so weak, in my opinion, that it is limited to the settlement of an industrial disturbance between the actual participators therein. If so limited, the power would be practically ineffective: *if industrial disturbances are to be settled or prevented, then the power must extend to the ever changing body of persons within the area of such disturbances*." (emphasis added)

154 This statement recognises that implied in the notion of effective "settlement" of disputes is some ability to enforce that settlement after it is reached. It supports the proposition that in determining whether an outcome of a dispute is an arbitrated "settlement" of the dispute, regard is to be had to the extent to which that settlement is enforceable.

155 Accordingly, I am unable to agree that it is a flaw to attach constitutional (as opposed to legislative) significance to the outcome of a process of conciliation and arbitration. The reason why the outcome of the process does have constitutional significance in my opinion is because the power provided by s 51(xxxv) is not merely a power to legislate with respect to a process. It is a power to legislate with respect to a process directed at a particular objective.

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88 (1923) 32 CLR 413 at 442.

89 (1923) 32 CLR 413 at 454-455.

Legislation which operates upon the outcome *simpliciter* of a valid s 51(xxxv) process (ie a process which properly answers the constitutional description of "conciliation", or "arbitration") or in some other way which preserves its status as the outcome of the constitutional process, is valid legislation. It is valid because it operates upon the embodiment of the constitutionally dictated objective of the process and will therefore usually be legislation with respect to the compound conception in s 51(xxxv).

156 Cases dealing with the power of the Commission to vary awards provide further illustrations of this principle. In *R v Kelly; Ex parte Australian Railways Union*[90], the validity of a provision by which the Arbitration Court was given power to vary an award was examined. Dixon CJ said[91]:

> "It must be incidental to the prevention and settlement of industrial disputes by arbitration to empower the arbitral tribunal to vary any of its awards so long as it is in operation, not only to correct or improve upon the provisions it contains independently of change of circumstances, but also to meet altered conditions. It is true that the power must be exercised in respect of the subject constitutionally described as conciliation and arbitration for the prevention and settlement of industrial disputes. But that subject includes all that is incidental thereto, and to maintain a settlement made by award of an industrial dispute in an expedient and satisfactory form adjusted to changed conditions must be incidental to the subject. Variations cannot go beyond what is appropriate to the general purpose of the settlement of the industrial dispute and continuing the settlement in force. That means that the limits set by the scope and nature of the original dispute cannot be transcended."

157 In *Victoria v The Commonwealth* (*Industrial Relations Act Case*)[92], this Court unanimously upheld the validity of provisions[93] which required the Commission to review its awards to ascertain whether any of them were deficient in that they contained discriminatory provisions, and which directed the Commission to take action (including action to vary the award) in order to remedy any deficiency that it detected in the award. The majority said[94]:

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90 (1953) 89 CLR 461.

91 (1953) 89 CLR 461 at 474.

92 (1996) 187 CLR 416.

93 Section 150A of the *Industrial Relations Act* 1988 (Cth), and reg 26A of the Industrial Relations Regulations.

94 (1996) 187 CLR 416 at 529.

> "It was not argued that it was beyond the power conferred by s 51(xxxv) of the Constitution for the Parliament to legislate to require regular revision and variation of awards to reflect current industrial standards, *so long as the award as varied retains the required connection with an interstate industrial dispute*. Nor, in our view, is such an argument open. A law requiring regular review and variation, within the limits indicated, is clearly a law with respect to conciliation and arbitration. And it makes no difference whether the direction to vary is expressed in terms of industrial standards generally or, as here, is directed to some specific matter which may pertain to the relations of employers and employees." (emphasis added)

158 In relation to provisions requiring the Commission to review and/or vary awards previously made by it, the crucial fact is that it is the Commission which has the ultimate power of variation. The Commission, being the body which made the original award, may be taken to be cognisant of all the various matters which led to the award being promulgated in its original form, and will be in a position to ascertain whether the award as varied maintains a connection with the original industrial dispute. This fact, when coupled with the doctrine that provisions allowing or requiring variation by the Commission have "always been construed, or more accurately, read down by reference to the limits of the power conferred by s 51(xxxv) of the Constitution so as to authorise only those variations which have a relevant connection with the dispute giving rise to the award in question"[95], will generally preserve the validity of legislation requiring or allowing the Commission to vary an award.

159 In cases where the Commission has a discretion as to the variations to be made, the Commission cannot make the variation if the award as varied does not retain its connection with the original industrial dispute. In cases where the Commission is directed to make a particular variation, the legislation will be invalid to the extent that the award as varied would no longer retain a connection with the original industrial dispute.

160 In this case, the impugned provisions do not operate upon the outcome of the process *simpliciter*. They do not, for example, provide that the entire award has legal effect or that the entire award has no legal effect. Given that they only operate selectively upon part of the award, the question which arises is whether they operate so as to deprive the award of its status as the achievement of the constitutionally dictated objective of the process.

161 In my opinion, items 50 and 51 do operate to deprive the award of its status as the achievement of the constitutionally dictated objective of the process. They

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95 *Industrial Relations Act Case* (1996) 187 CLR 416 at 528.

are not laws with respect to the outcome of the constitutional process directed at settling the original dispute. The process of reaching an arbitrated settlement necessarily involves trade-offs being made between the competing claims of the parties. The arbitrator may consider that it is just to impose an obligation on a party ("obligation A") in return for granting that party a compensating right ("right B"). In constructing the award, the arbitrator would have been working on the assumption that the term of the award giving effect to right B would have the same legal status and enforceability as the term of the award giving effect to obligation A, and that no single term of the arbitrated outcome would in the future achieve a preferred legal status over any other term. If it were otherwise, the arbitrator could not confidently impose obligation A as the *quid pro quo* for the granting of right B. The arbitrator would be forced to guess which terms might be unenforceable in the future. In striking of the appropriate balance, the arbitrator would be forced to apply some "discounting factor" to those terms because in the future they may be of no utility to a party – no more substantial in reality than "buildings on a movie set – structures with the appearance of reality but having no substance behind them"[96].

162 By selectively denying the enforceability of some of the provisions of the award, items 50 and 51 have contradicted an inherent element of the constitutional process directed to settling the original dispute. They are therefore not laws with respect to the process directed to the objective of "settlement" of the original "dispute". They render ineffective the non-distributive enforceability of the terms of the award which were a fundamental driver of the "settlement" of that dispute.

163 Moreover, items 50 and 51 differ in a fundamental respect from the provisions considered in *R v Kelly; Ex parte Australian Railways Union*[97] and the *Industrial Relations Act Case*[98]. By selectively depriving provisions of an award of their status as provisions of an award, and hence of their enforceability, items 50 and 51 transcend the "scope and nature of the original dispute"[99].

164 For these reasons, items 50 and 51 are invalid. However, it is necessary to address two further arguments made by the respondents to demonstrate why those arguments cannot succeed.

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96 *Yanner v Eaton* (1999) 73 ALJR 1518 at 1529 [51]; 166 ALR 258 at 272 citing *Planned Parenthood of Southeastern Pennsylvania v Casey, Governor of Pennsylvania* 505 US 833 at 954 (1992) per Rehnquist CJ.

97 (1953) 89 CLR 461.

98 (1996) 187 CLR 416.

99 *R v Kelly; Ex parte Australian Railways Union* (1953) 89 CLR 461 at 474.

The *Kartinyeri* argument

165 The respondents contend that, even if it can be said that items 50 and 51 directly alter the settlements made by the Commission, they are nevertheless valid because they effect a partial repeal of the provisions of the Act which make an award legally enforceable. That is, the impugned provisions merely effect a partial repeal of ss 149, 178 and 179 of the Act. *Kartinyeri v Commonwealth*[100] holds that the head of power in s 51 which authorises an enactment also authorises its repeal. That being so, they argue that the Parliament has the power to repeal or modify the operation of part of the laws that it made in enacting ss 149, 178 and 179 of the Act.

166 In *Kartinyeri*, Brennan CJ and I pointed out that[101]:

> "The power to make laws includes a power to unmake them[102]. Thus the powers conferred on the Parliament under s 51 extend to the repeal, in part or in whole, of what the Parliament has validly enacted[103]. In *Deputy Commissioner of Taxation v Moorebank Pty Ltd*[104], Mason CJ, Brennan, Deane, Dawson and Gaudron JJ said in reference to s 64 of the *Judiciary Act*:

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100 (1998) 195 CLR 337 at 355-357 [13]-[17] per Brennan CJ and McHugh J.

101 (1998) 195 CLR 337 at 355-356.

102 See *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 at 168; [1980] 1 All ER 529 at 551, cited by Dawson J in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 75.

103 *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 623, 636; *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 107; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 74-75 per McHugh J; *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 KB 733 at 743; *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 at 597. Of course, a parliament whose powers of repeal or amendment are restricted by "manner and form" provisions must observe those provisions in order to exercise the power: *McCawley v The King* (1918) 26 CLR 9 at 54, 55; (1920) 28 CLR 106 at 115-116; *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 422, 430 and see *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 618. But the powers conferred by s 51 of the Constitution are not subject to "manner and form" requirements.

104 *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 56 at 63.

'It is neither a constitutional provision nor an entrenched law. Its authority is that of an Act of the Parliament which can be expressly or impliedly amended or repealed, either wholly or in part, by a subsequent Act and whose application or operation to or with respect to cases falling within the provisions of a subsequent Act will be excluded to the extent that such application or operation would be inconsistent with those subsequent statutory provisions: see, eg, *Goodwin v Phillips*[105].'"

167 However, it is important to keep in mind that Brennan CJ and I also said[106]:

"Once the true scope of the legislative powers conferred by s 51 are perceived, it is clear that the power which supports a valid Act supports an Act repealing it. To the extent that a law repeals a valid law, the repealing law is supported by the head of power which supports the law repealed *unless there be some constitutional limitation on the power to effect the repeal in question*. Similarly, a law which amends a valid law by modifying its operation will be supported *unless there be some constitutional limitation on the power to effect the amendment*. Thus in *Air Caledonie International v The Commonwealth*[107], the attempt to amend the *Migration Act* 1958 (Cth) by the *Migration Amendment Act* 1987 (Cth) failed because the amendment purported to insert a taxing provision in the principal Act contrary to s 55 of the Constitution. It is not necessary to consider the hypothetical case postulated by Mr Jackson QC of a repealing or amending Act which so changed the character of an earlier Act as to deprive that Act of its constitutional support[108]."

168 The qualification (which I have italicised) in the statement that "[t]o the extent that a law repeals a valid law, the repealing law is supported by the head of power which supports the law repealed *unless there be some constitutional limitation on the power to effect the repeal in question*"[109] is an important one. In this case, I am of the opinion that there is a constitutional limitation on Parliament's power to repeal a law which operates upon the outcome of the process described in s 51(xxxv). That limitation is that discussed above – ie that the amending law cannot deprive the outcome or award of its status as the

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105 (1908) 7 CLR 1 at 7.

106 (1998) 195 CLR 337 at 356-357.

107 (1988) 165 CLR 462 at 472.

108 cf *Commissioner of Taxation v Clyne* (1958) 100 CLR 246; *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1.

109 (1998) 195 CLR 337 at 356.

"settlement" of the original "dispute" which was arrived at by means of the constitutional process of arbitration. As Mason, Brennan and Deane JJ pointed out in *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union*[110]:

> "[A]n award is the final product of the complex process of conciliation and arbitration set in train by the service of a log of claims and its non-acceptance. It is a settlement, intended to be enduring, of the terms and conditions which are to govern the industrial relations of employers and employees in the industry to which the award relates."

The Parliament cannot constitutionally pick and choose which of the terms and conditions of the settlement are to be enforceable. The choice for the Parliament is to withdraw the enforceability of the whole award or permit it to be enforced according to its terms. In my opinion, items 50 and 51 infringe the limitation discussed above.

169 In determining the constitutional validity of an amending Act, the process of characterising the amending provisions must be determined with reference to their substantive operation. But as amending provisions do not have any substantive operation other than altering the operation of existing provisions, as a practical matter, the character of the amending provisions must be determined by determining the character of the provisions as amended. If those provisions as amended do not have a character within a s 51 head of power, do the provisions as amended fall in their entirety, or do only the amending provisions fall?

170 In my opinion, it is only the amending provisions which fall. Although by necessity they must be characterised by characterising the provisions as amended, if the conclusion is reached that the provisions as amended are not of a character within a s 51 head of power, then it must follow that the substantive effect of the amending provisions is to deprive a previously valid law of its link to a s 51 head of power. That being so, the amending provisions must be characterised as being outside a s 51 head of power, as the Parliament has no power to enact laws which deprive previously valid laws of their constitutionality. As the amending provision is constitutionally invalid, it is void *ab initio*. Although it purports to amend the existing provisions, it is ineffective to do so.

171 Accordingly, in this case, it is only item 50 and subitems 51(1), 51(2) and 51(3) that are invalid or, more correctly, s 3 of the WROLA Act is invalid to the extent to which it gives effect to those provisions.

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110 (1983) 152 CLR 632 at 649.

172 An issue then arises as to the relevant question to ask in determining whether the provisions are severable from the valid provisions. Two questions can be asked:

1. Are the invalid provisions severable from the WROLA Act? or

2. Are the invalid amendments severable from the Act as validly amended?

In my opinion, the answer is the same whichever question is asked. In *R v Poole; Ex parte Henry [No 2]*[111], Dixon J discussed the two types of severance problems:

> "In one type it is found that particular clauses, provisos or qualifications, which are the subject of distinct or separate expression, are beyond the power of the legislature. In the second type, a provision which, in relation to a limited subject matter or territory, or even class of persons, might validly have been enacted, is expressed to apply generally without the appropriate limitation, or to apply to a larger subject matter, territory or class of persons than the power allows."

173 This case has a severance problem of the first type. The amendments simply attempt to make retrospective the limitation on the Commission's jurisdiction which is achieved prospectively by s 89A. Accordingly, in my opinion they are severable from the remainder of the Act as amended.

174 In the above discussion, I should not be taken as suggesting that Parliament could not, at some time after the making of an award, repeal the enforceability of an award *in toto*. Although in my opinion Parliament arguably cannot enact legislation which sets up a process for arbitration but which has no provision, *at the time that the arbitrator's decision is made*, for enforcing that decision, it can subsequently repeal provisions which gave legal effect to the arbitrator's award from the time it is made. That is because a law effecting such a repeal would be a law with respect to the outcome *simpliciter* of the process directed to an objective and hence a law with respect to the compound conception in s 51(xxxv). There would be no violation of the assumptions as to equal enforceability made by an arbitrator in arriving at the award – because each provision would be equally unenforceable.

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111 (1939) 61 CLR 634 at 652.

The "reduction of ambit" argument

175 The final argument of the respondents is that, although Parliament cannot legislate so as to dictate the answer to questions it reserves for the Commission, it can under s 51(xxxv) validly legislate so as to determine questions which the Commission cannot answer. That is, the argument is that it is open to the Parliament to confine the ambit of the Commission's jurisdiction to certain matters only and the impugned provisions do no more than define the ambit of the Commission's jurisdiction.

176 It is beyond question that it is for the Parliament to prospectively determine the ambit of disputes in which the Commission will have jurisdiction. The Parliament can confer a jurisdiction on the Commission to settle industrial disputes that is narrower than that which would be within the legislative competence of the Parliament to confer on the Commission under the full width of s 51(xxxv)[112]. The ambit of industrial disputes which the Commission has jurisdiction to settle has been validly varied by Parliament from time to time[113]. The competency of the Parliament to confer power upon the Commission to make an award and to subsequently vary that award is delineated by the ambit of the initiating dispute[114].

177 Moreover, as an incident of s 51(xxxv), Parliament can legislate so as to confine the scope of the discretion exercised by the Commission in reaching a settlement of an industrial dispute, of whatever ambit, which is properly before it. In *Waterside Workers*, this Court held that the Parliament could "prescribe by legislation the manner in which, and the conditions on which, the tribunal … shall carry out its functions and exercise the jurisdiction conferred upon it"[115]. Similarly, in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)*[116], Barwick CJ said:

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112 See *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 288.

113 See *Re Amalgamated Metal Workers Union; Ex parte Shell Co of Australia Ltd* (1992) 174 CLR 345 at 354.

114 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 37, 61; *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387 at 429; *R v Kelly; Ex parte Australian Railways Union* (1953) 89 CLR 461 at 473-475.

115 (1920) 28 CLR 209 at 218 per Knox CJ. See also 228-229 per Isaacs and Rich JJ, 242 per Higgins J, 244 per Gavan Duffy J, 252 per Starke J.

116 (1967) 118 CLR 219 at 242.

> "[T]he Parliament could not have seized upon one method of determining a wage in settlement of a dispute as to wages and have directed the Commission to follow that method and none other. To have done so would, in my opinion, have transcended the constitutional power.
>
> However, it seems to me that it would be within the power of the Parliament to provide that, if the arbitrator decided to employ such a method of arriving at the wages to be prescribed in settlement of the dispute, it should follow a given procedure or, to be more precise in relation to the present arguments, should compose itself in a particular manner."

178 In the same case, Windeyer J said[117]:

> "I think that it would be beyond the power of the Commonwealth Parliament to insist that the Commission must determine and declare a basic wage. The Commission exercises a far-reaching authority over the national economy. But the Parliament has no power under the Constitution to direct that it go about its task of settling industrial disputes by fixing wages according to some particular principle or formula. It must be given a discretion as to means having regard to the end, the prevention and settlement of industrial disputes by conciliation and arbitration. If the Act commanded that the Commission fix wages by reference to a basic wage it would, I consider, be invalid."

179 Thus, Parliament may confine the Commission's discretion to settle a dispute, but if that discretion is confined too narrowly, it may reach a point where it is proper to say that it is the Parliament, and not the Commission, which is determining the issue which is the subject of the purported discretion.

180 But in a case such as the present, where items 50 and 51 operate *retrospectively* to confine the ambit of the dispute, it cannot be seriously contended that they permissibly confine the scope of the discretion exercised by the Commission. They are a bare command to the Commission to alter the outcome of a discretion previously exercised by it. They do not in terms purport to alter the scope of a discretion. They simply deprive the result of a discretion previously exercised of its legal enforceability. Accordingly, this final argument of the respondents must also fail.

Orders

181 In each of the matters S137 of 1998 and S138 of 1998, I would make orders as proposed by Kirby J.

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117 (1967) 118 CLR 219 at 269.

182 GUMMOW AND HAYNE JJ. The way in which the Commonwealth Parliament has exercised its power under s 51(xxxv) of the Constitution (to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State) has directed the development of industrial law in Australia since 1904[118]. It has meant that the fixing of terms and conditions of employment by arbitrated or conciliated awards of officers of the Commonwealth[119], or State officials having very similar functions, has taken a pre-eminent place in the regulation of industrial relations in Australia. Those awards have then been enforced by the methods given by the Commonwealth conciliation and arbitration legislation or analogous State provisions.

183 The importance of arbitrated or conciliated awards in Australia has been at the expense of some features of other systems of industrial relations. Collective bargaining has a different place in Australia, and takes a very different form, from the bargaining that has taken place in the United States, the United Kingdom, or Germany[120]. The enforcement of arrangements struck between organisations of employees and employers or groups of employers has not depended solely on industrial action as it sometimes has in the United Kingdom[121]. Nor has there been the resort to enforcement in the ordinary courts of collectively negotiated contracts that has been seen in the United States[122]. More importantly, there has seldom been the need to focus, at least until recently,

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118 Higgins, *A New Province for Law and Order*, (1968).

119 First the Commonwealth Court of Conciliation and Arbitration, later the Commonwealth Conciliation and Arbitration Commission and now the Australian Industrial Relations Commission. See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529.

120 Davies and Freedland, *Kahn-Freund's Labour and the Law*, 3rd ed (1983) at 178-180.

121 *Ford Motor Co Ltd v Amalgamated Union of Engineering and Foundry Workers* [1969] 2 QB 303; Great Britain, *Report of the Royal Commission on Trade Unions and Employers' Associations*, (1968) Cmnd 3623.

122 For example, *Schlesinger v Quinto* 192 NYS 564 (1922); affd 194 NYS 401 (1922). See also Rice, "Collective Labor Agreements in American Law", (1931) 44 *Harvard Law Review* 572; Witmer, "Collective Labor Agreements in the Courts", (1938) 48 *Yale Law Journal* 195; Lenhoff, "The Present Status of Collective Contracts in the American Legal System", (1941) 39 *Michigan Law Review* 1109.

upon the terms and conditions of an individual's contract of employment. Identifying the relevant award and its terms has been much more important[123].

184 These features of the history of industrial relations in Australia must not be permitted to obscure two important matters relevant to the present proceedings. First, while the Commonwealth Parliament has power to make laws with respect to conciliation and arbitration, the fact that it has exercised that power in ways that have had profound effects on the ordering of relations between employers and employees does not mean that the Parliament cannot choose to dismantle the structure it has erected. The power to make a law includes a power of repeal. If that were not so, then as Brennan CJ and McHugh J put it in *Kartinyeri v The Commonwealth*[124], "a law once enacted would be entrenched and beyond the power of the Parliament to revoke". Secondly, the focus upon awards and their enforcement does not mean that the individual contract of employment between employer and employee cannot be the primary source of the conditions of employment of a particular employee. An objective of the legislation under consideration here is that wages and conditions of employment be determined as far as possible by the agreement of employers and employees.

185 The changes the Parliament has made by the legislation which gives rise to this litigation involve both the revision of the existing structure and the making of transitional provisions for the passage from the old to the new legal order. The ultimate issue in these matters is the constitutional validity of s 3 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) ("the WROLA Act") in so far as it gives effect to items 50 and 51(1), (2), and (3) of Pt 2 of Sched 5 to the WROLA Act. Items 50 and 51 are two of the provisions made for the transition from the Commonwealth industrial relations regime prescribed by the *Industrial Relations Act* 1988 (Cth) to the new arrangements introduced by the WROLA Act. Under those new arrangements, awards made by the Australian Industrial Relations Commission ("the Commission") deal with a smaller range of subjects than had previously been the case and, in general, provide only for minimum conditions of employment.

186 The issue of validity is raised in two proceedings – one the return of an order nisi for writs of certiorari, prohibition and mandamus against members of the Commission, and the other, an action in the original jurisdiction of the Court in which a question has been reserved for the opinion of the Full Court. The first of those proceedings is brought by the Construction, Forestry, Mining and

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123 But see *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.

124 (1998) 195 CLR 337 at 356.

Energy Union and one of its members who was, until 17 August 1998, employed at a coal mine operated by the second respondent in the proceeding, Pacific Coal Pty Ltd. The second proceeding is brought by the Union and the same member of the Union against the Commonwealth. Before saying anything further about the facts which give rise to the proceedings, it is convenient to deal first with the relevant legislation.

187 The WROLA Act made many amendments to the *Industrial Relations Act*. (Those amendments included changing the short title of the Act to the *Workplace Relations Act* 1996[125] and it is convenient to refer to the Act in its amended form as the "Workplace Relations Act".) Section 3 of the WROLA Act provides that:

> "Subject to section 2, each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms."

Section 4 provides that, in a Schedule to the Act, unless the contrary intention appears, "Workplace Relations Act" means:

> "(a) so far as the context relates to a time before the day on which [the WROLA Act] receives the Royal Assent – the *Industrial Relations Act 1988* as in force at that time; or
>
> (b) otherwise – the Workplace Relations Act 1996."

188 Schedule 5 to the WROLA Act is headed "Awards" and is divided into two parts. Part 1 (items 1-45) is headed "Amendments". Items 8-41 amend provisions of Pt VI of the "Workplace Relations Act 1996" (which in the context means the *Industrial Relations Act* as then in force). Part VI is headed "Dispute Prevention and Settlement" and comprises ss 88A-167[126]. These include many provisions central to the legislative scheme first established by the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth). For example, s 143 requires the Commission, when it makes a decision or determination that, in its opinion, is an award or order affecting an award, promptly to reduce the decision or determination to writing that expresses it to be an award. An award shall specify the period for which it is to continue in force (s 147(1)) and is binding on all parties to the industrial dispute who appeared or were represented before the

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125 WROLA Act, s 3 and Sched 19.

126 Sections 168-170 were repealed by the *Industrial Relations Legislation Amendment Act* 1994 (Cth).

Commission and upon the other parties identified in s 149. An award prevails over State awards to the extent of any inconsistency between them (s 152).

189 For present purposes the most relevant changes made by Pt 1 of Sched 5 to the WROLA Act are those which provide for what are called "allowable award matters". These matters are the 20 subjects set out in s 89A(2) of the Workplace Relations Act and include hours of work[127], pay and allowances[128], superannuation[129], and leave entitlements[130]. Subject to some limitations or exceptions which need not now be noticed, s 89A(1) provides that for the purposes of dealing with an industrial dispute by arbitration, of preventing or settling an industrial dispute by making an award or order, or of maintaining the settlement of an industrial dispute by varying an award or order, an "industrial dispute" is taken to include only allowable award matters. The section further provides that the power of the Commission to make an award dealing with those matters is limited to making "a minimum rates award". There is no attack on the validity of any of the provisions of Pt 1 of Sched 5.

190 The provisions attacked are in Pt 2 of Sched 5. Part 2 (items 46-55), entitled "Transitional provisions", is intended to deal with the way in which the changes made by the WROLA Act would be introduced during the "interim period". That period is defined as "the period of 18 months beginning on the day on which section 89A of the Principal Act commences". The interim period began, therefore, on 1 January 1997[131] and ended on 30 June 1998.

191 On its face, Pt 2 is designed to produce the result that, upon the conclusion of the interim period, existing awards may include only allowable award matters. Existing awards thereby become subject to the same limitations as new awards made after the changes made to the Workplace Relations Act by Pt 1 of Sched 5. The essence of the attack upon the validity of the provisions of Pt 2 is that they lack sufficient connection with the head of power relied upon, that in s 51(xxxv).

192 Although the provisions of Pt 1 of Sched 5 are not challenged, it is as well to say something about the provisions of Pt VI of the *Industrial Relations Act* as amended by items 8-41 of Pt 1 of Sched 5. Those provisions, which relate to

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127 s 89A(2)(b).

128 s 89A(2)(c), (d), (e), (j), (k), (l), (m), (t).

129 s 89A(2)(s).

130 s 89A(2)(e), (f), (g), (h).

131 WROLA Act, s 2(4).

"Dispute Prevention and Settlement", must be understood in the light of the objects of Pt VI. They are stated[132] to be:

> "… to ensure that:
>
> (a) wages and conditions of employment are protected by a system of enforceable awards established and maintained by the Commission; and
>
> (b) awards act as a safety net of fair minimum wages and conditions of employment; and
>
> (c) awards are simplified and suited to the efficient performance of work according to the needs of particular workplaces or enterprises; and
>
> (d) the Commission's functions and powers in relation to making and varying awards are performed and exercised in a way that encourages the making of agreements between employers and employees at the workplace or enterprise level."

Further, they must be read bearing in mind the provision in s 89(a) of the Workplace Relations Act that the functions of the Commission are:

> "to prevent and settle industrial disputes:
>
> (i) so far as possible, by conciliation; and
>
> (ii) as a last resort and within the limits specified in this Act, by arbitration".

Moreover, these, and all other provisions of the Workplace Relations Act, must be understood in the light of the principal object of the Act. That object is stated in s 3 to be "to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia" by (among other things) "ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level".

193 It is clear, then, that the changes introduced by the WROLA Act were intended not only to reduce the subjects with which awards could deal and to

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132 s 88A.

limit the power to make awards about those subjects to minimum rates awards, but also to ensure that "primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level". Thus, the evident intention of the amendments was that awards of the Commission would no longer be the principal repository (let alone the exclusive repository) of the terms and conditions of employment of individual employees.

194 This intention was carried into further effect by changes made by item 41 to s 152 of the Workplace Relations Act, the provision dealing with the interrelation between Commonwealth and State industrial law. If the wages and conditions of employment of an employee are governed by a State employment agreement then a subsequent award under federal law will not become binding on any person in respect of that employee whilst regulation under the State agreement continues (s 152(2)). If such an agreement is made after a federal award binds an employer in respect of an employee, the award will not prevent the agreement from coming into force and, whilst the agreement continues to regulate the wages and conditions of an employee, the award will not be binding on any person in respect of the employee (s 152)(3)).

195 Item 52 of Pt 2 of Sched 5 applies where there has been variation of an award under item 49(1) or the award wholly or partly ceases to have effect by operation of item 50. The result of this contraction in the operation of the federal regime may be to render an employer bound by a State award in respect of an employee. In such circumstances the effect of item 52(1) is that if the employer is a "constitutional corporation"[133], it will only be bound if the employer makes an application to the relevant State industrial authority.

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133 "Constitutional corporation" is defined by s 4 of the Workplace Relations Act to mean:

> "(a) a foreign corporation within the meaning of paragraph 51(xx) of the Constitution; or
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> (b) a body corporate that is, for the purposes of paragraph 51(xx) of the Constitution, a financial corporation formed within the limits of the Commonwealth; or
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> (c) a body corporate that is, for the purposes of paragraph 51(xx) of the Constitution, a trading corporation formed within the limits of the Commonwealth; or
>
> (d) a body corporate that is incorporated in a Territory; or
>
> (e) a Commonwealth authority".

196 Part 2 of Sched 5 comprises items 46 to 55. Item 47 of Sched 5 provides that:

> "In exercising its powers under this Part, the Commission is to have regard to the desirability of assisting parties to awards to agree on appropriate variations to their awards, rather than have parts of awards cease to have effect under item 50 at the end of the interim period."

Item 49 dealt with the variation of awards during the interim period. (There was no suggestion in argument that it was invalid.) Item 49 empowered the Commission, if one or more of the parties to an award applied to it, to "vary the award so that it only deals with allowable award matters"[134]. It stipulated that the Commission could deal with the application by arbitration, only if satisfied that those applying for variation had "made reasonable attempts to reach agreement with the other parties to the award about how the award should be varied and the treatment of matters that are not allowable award matters"[135]. Subitem (8) of item 49 obliged the Commission to review the award to determine whether or not it met certain criteria and subitem (7) obliged the Commission, if it considered it appropriate, to review the award against certain other criteria. If the Commission determined that the award did not meet the relevant criteria, it was given power to take whatever steps it considered appropriate "to facilitate the variation of the award" so that it did meet those criteria[136].

197 Item 49 contemplated that one or other of the parties to an award would move to have the award varied and that this would be done during the interim period. And, of course, there was nothing to prevent a party to an award, which contained provisions dealing with matters that were not allowable award matters, from seeking to engage the ordinary processes of the Commission by creating a new industrial dispute extending beyond the limits of any one State. If that happened, the Commission could make an award that dealt only with allowable award matters and was a minimum rates award[137].

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134 Sched 5, item 49(1).

135 Sched 5, item 49(4).

136 Sched 5, item 49(9).

137 Workplace Relations Act, s 89A.

198 Items 50 and 51(1), (2) and (3) (the provisions alleged to make s 3 partly invalid) provide:

"**50 Parts of awards cease to have effect at the end of the interim period**

(1) At the end of the interim period, each award ceases to have effect to the extent that it provides for matters other than allowable award matters.

(2) For the purposes of this item, an exceptional matters order is taken to relate wholly to allowable award matters.

(3) For the purposes of this item, an award that is made under subsection 170MX(3) of the Principal Act is taken to provide wholly for allowable award matters.

(4) If the termination time for special consent provisions is after the end of the interim period, then this item and item 51 apply to the special consent provisions as if a reference to the end of the interim period were instead a reference to the termination time.

51 Variation of awards after the end of the interim period

(1) As soon as practicable after the end of the interim period, the Commission must review each award:

(a) that is in force; and

(b) that the Commission is satisfied has been affected by item 50.

(2) The Commission must vary the award to remove provisions that ceased to have effect under item 50.

(3) When varying the award under subitem (2), the Commission may also vary the award so that, in relation to an allowable award matter, the award is expressed in a way that reasonably represents the entitlements of employees in respect of that matter as provided in the award as in force immediately before the end of the interim period."

199 Items 50 and 51 must be understood in their context. The parties to the award had had 18 months within which to approach the Commission (pursuant to item 49) to vary the award by removing provisions dealing with matters which were not allowable award matters (and making any necessary consequential changes). If they did not do so, item 50 would produce that result at the end of the interim period. A party to an award who contended that such a variation would, or might, lead to inappropriate consequences in respect of what remained

of the award could have sought, during the interim period, a variation of the award as to those matters under s 113 or, as we have said earlier, could have sought to promote a fresh industrial dispute about those allowable award matters.

200 Something more should be said, at this stage, about the facts which give rise to the present proceedings. Both arise out of the Coal Mining Industry (Production and Engineering) Consolidated Award 1997 ("the Coal Award"), an award of the Commission which contained matters other than allowable award matters. In particular, the Coal Award provided for (among other things) preference to union members in the engagement of labour covered by the award, preference of employment to those retrenched by one employer who was a respondent to the award in seeking employment at the Queensland sites of any of the other respondents, and rights of seniority of employment such that selection of those to be dismissed as part of a reduction of hands would be on the basis of "the last to come the first to go". In addition, the Coal Award provided for authorised union representatives to enter the premises of a respondent to the award. It was accepted that none of these provisions was an allowable award matter and that, therefore, item 50 applied to all of them.

201 It can be seen that item 50 applied to some provisions which operated directly and immediately upon individual employees. (The second prosecutor in the proceedings seeking certiorari, prohibition and mandamus was retrenched in August 1998 by an employer who was a party to the Coal Award. Had the principle of last to come, first to go been applied, he would not have been made redundant. In addition, if the provisions giving preference of employment to retrenched employees of a respondent to the award had applied, he may have obtained other work.) Other provisions to which item 50 applied (such as the right of entry of authorised union representatives) had a less direct and immediate effect upon the terms of employment of individual employees.

202 It is necessary to begin any consideration of validity by construing s 3 and items 50 and 51. As Kitto J said in *Fairfax v Federal Commissioner of Taxation*[138], the question of constitutional validity under s 51 of the Constitution

> "is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, 'with respect to', one or more of the enumerated subjects, or is there no more in it in relation to any

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138 (1965) 114 CLR 1 at 7.

of those subjects than an interference so incidental as not in truth to affect its character?"[139]

203 The criterion of validity of the law in question is the sufficiency of its connection with the head of legislative power[140]. The subject of the power in s 51(xxxv) is described by reference to a class of commercial, economic and social activity, namely, the prevention and settlement by conciliation and arbitration of certain industrial disputes. Against the background of the history of industrial relations in this country, a matter referred to earlier in these reasons, the subject of s 51(xxxv) may also be identified as "a recognised category of legislation"[141]. When the validity of a law enacted under such a head of power is in question, "it is usual", as Dixon J put it in *Stenhouse v Coleman*[142], "to consider whether the legislation operates upon or affects the subject matter … and to disregard purpose or object".

204 There is a qualification, expressed as follows by Brennan CJ in *Leask v The Commonwealth*[143]:

> "If the head of power is itself purposive (eg, the defence power), the existence of a connection may be determined more easily by comparing the purpose of the law and the purpose of the power."

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139 Kitto J referred to *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 185-187 per Latham CJ and *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 409-411 per Higgins J. See also *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 334 per Mason CJ, 336-337 per Brennan J, 351-352 per Toohey J; *Leask v The Commonwealth* (1996) 187 CLR 579 at 590-591 per Brennan CJ, 634 per Kirby J; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 372 per Gummow and Hayne JJ.

140 *Leask v The Commonwealth* (1996) 187 CLR 579 at 591, 605, 616, 623-624.

141 *Stenhouse v Coleman* (1944) 69 CLR 457 at 471.

142 (1944) 69 CLR 457 at 471.

143 (1996) 187 CLR 579 at 591. See also at 605-606 per Dawson J, 624 per Gummow J.

However, Brennan CJ also pointed out[144], with reference to the judgment of Dawson J in *Cunliffe v The Commonwealth*[145]:

> "[T]he purpose of a law is an aspect of 'what the law does in fact'".

In any event, the subject of the power in s 51(xxxv) has not been treated in the decisions of the Court as purposive in the same way as are the defence power and, at least in some aspects, the external affairs power[146]. As Mason CJ observed in *Nationwide News Pty Ltd v Wills*[147], "very few of the Parliament's legislative powers are truly purposive powers …". Section 51(xxxv) is not one of those powers.

205 Nor is this a case where the subject of the law can at best only be incidental to the exercise of the head of power. Where the subject is incidental in this way, the "end or purpose" of the law will "give the key" to the adequacy of the connection with that head of power[148]. Item 50, the primary provision whose validity is attacked, deals only with the effect the pre-existing legislation, itself founded upon s 51(xxxv), gave an award, and item 50 itself is a law at the centre, not the circumference, of the power. Notions of "end or purpose" are inapplicable. Nor is it suggested that this is a case where legislation is invalid because it infringes a limitation upon legislative power which is expressed or implied in the Constitution. In *Nationwide News*[149], s 299(1)(d)(ii) of the *Industrial Relations Act* 1988 (Cth)[150] was held on such a ground to be invalid. In that realm of discourse, questions of proportionality and reasonable adaptation may arise, as is illustrated by several of the judgments in *Nationwide News*[151].

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144 (1996) 187 CLR 579 at 591.

145 (1994) 182 CLR 272 at 352.

146 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 486-489.

147 (1992) 177 CLR 1 at 27.

148 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 354 per Dixon J. See also *Burton v Honan* (1952) 86 CLR 169 at 179 per Dixon CJ.

149 (1992) 177 CLR 1.

150 That provision made it an offence by writing or speech to use words calculated to bring into disrepute a member of the Commission.

151 (1992) 177 CLR 1 at 29-31, 52-53, 75-77, 94-95.

206 Unlike Pt 1, Pt 2 of Sched 5 is not drafted in the form of amending or repealing provisions. Each provision in Pt 1 begins with the word "repeal", "insert", "omit", or "add" and then specifies the provision or expression in respect of which that step is to be taken. By contrast, Pt 2 of Sched 5 is drafted in the same way as substantive provisions of an Act would ordinarily be drawn and is not drafted so as to suggest an intention to change the manner of operation of other particular provisions. On its face then, what might be called the first half of s 3[152] operates to give effect to the items in Pt 1 of Sched 5 and it is the second half of s 3[153] which gives effect to the items in Pt 2 of Sched 5.

207 What, then, does item 50 mean when it says that at the end of the interim period "each award ceases to have effect to the extent that it provides for matters other than allowable award matters"? In particular, what does "ceases to have effect" mean in this context?

208 Two competing constructions of item 50 emerged from the debate in the oral argument of the proceedings. One was that item 50 meant that, at the end of the interim period, provisions of awards which provided for matters other than allowable award matters ceased to have any legal effect whatsoever, whether pursuant to the Workplace Relations Act or contracts of employment between individual employers and employees. The competing construction was that item 50 meant only that whatever effect was given *by the Workplace Relations Act* to those provisions of awards that were not allowable award matters ceased at the end of the interim period. This debate lay behind the competing characterisations of item 50. Those who alleged invalidity sought to characterise it (or, more accurately, s 3 in so far as it gave effect to the item) as a law with respect to the particular terms and conditions of employment of individual employees, rather than a law with respect to conciliation and arbitration for the prevention and settlement of industrial disputes. Those who denied invalidity sought to attribute the latter characterisation to the provisions on the basis that s 3 and item 50 were no more than a repeal or amendment of laws that had previously been passed on that subject.

209 Having regard to the various provisions of the WROLA Act and the Workplace Relations Act that we have mentioned, we do not consider that item 50 should be read as intending to do more than remove any support (that is, any "effect") which the Workplace Relations Act may otherwise have given to those provisions of awards which were not allowable award matters. To

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152 "[E]ach Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned".

153 "[A]ny other item in a Schedule to this Act has effect according to its terms."

understand why that is so, it is necessary to consider what is meant by giving "effect" to an award. First (and obviously) the effect in question is legal effect. That is, when it is said that effect is given to an award, it means that the provisions of the award are of legal significance; legally enforceable rights, duties, powers and privileges are created.

210 Secondly, it is necessary to recall that an award is the arbitrated or conciliated outcome of a process that takes place, usually, between employers, or groups of employers, and one or more registered organisations representing the interests of employees. As is apparent from what we have said about the Coal Award, an award will often contain provisions that would find no place in an individual contract of employment. That may be because one employer cannot bind another (for example, to give preference to retrenched employees) or because the terms are intended to give rights or privileges to organisations rather than individuals. The award is therefore cast in terms of generality rather than in terms of the stipulations which together make up a particular contract of employment between an employer and an employee.

211 Thus, when "effect" is given to an award, it is given legal consequences which attach to individuals, groups or organisations because of the particular status which the award is given by the legislation pursuant to which it was made. When that legislation gives rights to, or imposes obligations on, individuals that are rights or obligations referable to the award, they are rights and obligations conferred by the legislation.

212 That is not to say that the making of an award may not have other important consequences. It is commonplace for persons to be employed pursuant to a contract of employment whose terms incorporate by reference part or all of the identified award, either as it stands at a particular time, or more usually, as it is varied from time to time. Employment on those terms will mean that the content of the obligations and rights of the employer and employee are found in the award (or the award as varied). But again, not all of the terms of an award may be apt to constitute contractual stipulations binding the employer or the employee. For present purposes, what is important is that to the extent that the obligations and rights described in an award are expressly incorporated in a contract of employment, their binding effect as contractual stipulations derives from their incorporation in the contract, not from the award or the legislation which supports the award.

213 To read item 50 as intended to deny any and all legal effect to the award provisions with which it dealt, no matter whether that effect was legislative or contractual, would attribute to it an intention to regulate the terms and conditions of employment of individual employees which would be entirely antithetical to

the stated object of the Workplace Relations Act as being to ensure that primary responsibility for such matters "rests … at the workplace or enterprise level"[154]. In addition, if reading it in that way would lead to invalidity, that would be a further, perhaps even conclusive, reason not to do so if there were some other available construction consistent with validity[155]. But we need not, and do not, base our construction of s 3 and item 50 on those last-mentioned considerations. Rather, we consider that the "effect" with which item 50 was concerned was the legal effect given to awards by the Commonwealth conciliation and arbitration legislation, and not any wider legal effect that would be attributable to the incorporation of particular awards or provisions of awards in individual contracts of employment. Nor is item 50 concerned with the question whether any legal effect may be given, as a contract, to the bargain struck between the parties who negotiated the outcome of the industrial dispute which lies behind the award. It is only the effect given to awards *by the legislation* which can properly be described as the effect of an *award*. The legal consequences of incorporation in contracts of employment and any legal consequences that may attach to a collective bargain are consequences of the contract or bargain, not the award.

214 It follows from the construction of item 50 which we favour, that the answer to the question whether those parts of awards which are not allowable award provisions would have any continued legal effect as terms or conditions of employment after the end of the interim period, would depend upon whether they were terms of the contract of employment of an employee. Further, whether the provisions would, in some way, be enforceable (outside the provisions of the Workplace Relations Act) by the parties to any agreement that gave rise to the making of the award, would depend on other questions. Those questions would include, most importantly, whether the agreement (which would often have one or more industrial organisations as a party) was one intended to create, and was capable of creating, legal relations other than those provided for by the Workplace Relations Act[156].

215 What, historically, has been the pervasive and dominating influence of the award system leads to no different conclusion. No doubt the breadth and significance of that influence underpinned the submissions, put unsuccessfully in *Byrne v Australian Airlines Ltd*[157], that award provisions were imported into individual contracts of employment independently of the intention of the parties,

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154 Workplace Relations Act, s 3(b).

155 *Acts Interpretation Act* 1901 (Cth), s 15A.

156 cf *Ryan v Textile Clothing & Footwear Union* [1996] 2 VR 235.

157 (1995) 185 CLR 410.

or as a matter of custom or usage, or as implied terms. But those submissions were rejected in *Byrne* and the Court held that the obligation to observe the provisions of the award which were in issue in that matter, arose only by force of statute; the award was not incorporated into the contracts of employment. A construction of item 50 which would give it an operation defeating contractually agreed terms would attribute an "effect" to awards which the Court held in *Byrne* that they do not have.

216 Once it is recognised that item 50 deals only with the effect which the legislation has given to an award, it becomes evident that it is not necessary or helpful to the task of constitutional characterisation to consider some of the questions that were raised in argument. In particular, it is not necessary or helpful to consider whether terminating the legislative effect given to awards in respect of some, but not all, of the terms of a consent award will upset the balance at which the parties to a dispute arrived when they struck the bargain reflected in the award. That is, it is not necessary or helpful to consider examples in which statutory effect continues to be given to some of the terms of that bargain (more or less onerous to one side of the bargain) but not other terms which might be said to have been the price exacted for undertaking the burden.

217 Such questions may have significance for other purposes but they do not assist the task of constitutional characterisation. That task requires consideration of "the nature of the rights, duties, powers and privileges which [the legislation] changes, regulates or abolishes"[158]. Here the rights, duties, powers and privileges which are changed, regulated or abolished are some of those which were given by the Parliament in respect of the outcome of the process of conciliation and arbitration carried on under legislation enacted pursuant to s 51(xxxv). The effect of the changes may be very large, and may even be classified by some as unjust. But neither the size of that effect, nor any qualitative description of it, means that some other rights or duties are properly identified as having been the subject of the legislative change.

218 Further, it is not useful to seek to identify a connection between the original settlement of the dispute and the resulting award, as affected by the deletion of certain provisions. Nor is it useful to ask whether the award, as affected, is appropriate or adapted to the prevention of future disputes. These questions appear to proceed from the premise that s 51(xxxv) provides that there *shall* be a system of conciliation and arbitration for the prevention and settlement of interstate industrial disputes and then seek to test the validity of the impugned provisions against that assumed constitutional purpose. But, as noted earlier, s 51(xxxv) is not a purposive power. Item 50 deals with the legal effect given to

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158 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7 per Kitto J.

awards by the Commonwealth conciliation and arbitration legislation. No question arises, then, of whether the law was appropriate and adapted to a purpose of the prevention of future disputes, or the settlement of existing disputes, by conciliation and arbitration.

219 The understanding of the operation of item 50 that we have described is reinforced when item 51 is considered. The duty which item 51(1) (as given effect by s 3) imposes on the Commission is a duty that arises "[a]s soon as practicable after the end of the interim period" and it is a duty to review each award that "the Commission is satisfied has been affected by item 50". What the Commission must then do is "vary the award to remove provisions that ceased to have effect under item 50"[159]. These provisions of item 51 are intended, then, to make the award (in the sense of the written record which the Workplace Relations Act requires the Commission to make[160]) reflect the provisions to which that Act then attributes legal significance. (Item 51(3) does no more than make plain that the task of the Commission in varying an award is not to be confined to applying a "blue pencil" to provisions that ceased to have effect; the task extends to altering the expression of the award in a way that "reasonably represents" the entitlements of employees in relation to allowable award matters.) For present purposes item 51 can be put to one side. To adopt the expression used during oral argument, items 51(1), (2) and (3) are provisions to "tidy up" the award.

220 If the removal of provisions from the award (or the cessation of effect of those provisions) has consequences greater than the removal of the legislative support for those provisions, the reason for those consequences must be sought elsewhere than in the legislation. In particular, if the removal of provisions has consequences for individual contracts of employment, those consequences will arise from the terms of the contract which the parties made. The contract is the relevant source of the rights, duties, powers and privileges of the parties. The award made pursuant to the statute is no more than the articulation of the terms that the contracting parties agreed would be incorporated by reference. It is the agreement which regulates what is, or is not, to be imported as a contractual stipulation.

221 Once the nature of the rights, duties, powers and privileges which the legislation changes, regulates or abolishes are properly identified, it is apparent that s 3 of the WROLA Act (in so far as it gives effect to items 50 and 51(1), (2) and (3)) is a law with respect to conciliation and arbitration within s 51(xxxv). It

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159 Item 51(2).

160 s 143(1).

is a law the subject matter of which is the extent to which legislatively prescribed consequences are to attach to the outcome of conciliation and arbitration processes carried out by persons and bodies established and regulated by legislation enacted within power. That is, it is a law taking away part of what the legislature had validly given, namely, legal effect to awards resulting from processes of conciliation and arbitration that had been legislatively prescribed and regulated within power.

222 It is not necessary to attempt to classify item 50 as a repealing or amending provision to reach the conclusion that s 3 is not beyond power. As is apparent from what we have said earlier, item 50 is a provision to which s 3 "gives effect" and it is not a provision that is cast in the terms of an amendment or repeal of other legislation. It may therefore be very much doubted that it is properly described as a repealing or amending provision. In *Kartinyeri*[161], it was said that to seek to distinguish between amendment and repeal of legislation may suggest or assume a false dichotomy. Similarly, seeking to decide whether the classification "amendment" or "repeal" can properly apply to the legislation now in question may distract attention from the relevant inquiry. As we have said, that inquiry must identify the rights, duties, powers and privileges which, on the true construction of the provisions in question, those provisions are intended to change, regulate or abolish.

223 Counsel for those alleging invalidity all accepted, expressly or implicitly, that there would be no constitutional impediment to the Parliament withdrawing, from all of the awards made under Commonwealth conciliation and arbitration legislation, all of the legal effect which Commonwealth legislation gave to those awards. Counsel contended, however, that it was impermissible to withdraw from only *some* provisions of awards the legal effect given by Commonwealth legislation. This, it was said, constituted the regulation of conditions of employment by direct legislation[162].

224 The contention is flawed in at least two ways. First, it seeks to equate the prescription of terms and conditions of employment (or the prescription of the details of the award which an arbitrator is to make) with the denial of particular statutory legal significance to the terms already prescribed. There is a real and radical difference between the Parliament prescribing what the terms of employment of workers in an industry or in a particular workplace shall be and

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161 (1998) 195 CLR 337 at 375 per Gummow and Hayne JJ.

162 cf *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association* ("the *Waterside Workers' Case*") (1920) 28 CLR 209 at 218 per Knox CJ.

the Parliament declining to give legislative support to some kinds of provisions in an award reached as the result of a process of conciliation or arbitration. That difference lies in the rights and duties which are created in the two cases. In the former case, the rights and duties that are created are not rights that result from, or are in any real way connected with, a process of conciliation or arbitration for the prevention and settlement of industrial disputes. They are rights and duties that stem entirely from the legislative fiat. In the second case, the rights and duties that are regulated are those that are to attach to the result of a process of conciliation or arbitration.

225 The second flaw in the contention is that it seeks to attach constitutional (as opposed to legislative) significance to the outcome of a process of conciliation or arbitration. It is, of course, essential to bear well in mind that the constitutional power in question is a power to make laws with respect to conciliation and arbitration, not a power to make laws with respect to interstate industrial disputes[163]. That is, the constitutionally prescribed process about which the Parliament may legislate is conciliation and arbitration. But that cannot be understood as requiring that, no matter what the outcome a legislatively appointed arbitrator may choose to adopt, that outcome is for all time untouchable by Parliament. Indeed, the *Waterside Workers' Case* and later cases make plain that, within some limits, the Parliament can make laws permitting adjustments to the outcome of the process, whether by extending the term of the award[164], changing the parties to an award[165], or permitting the arbitrator later to vary an award made in settlement of a dispute[166]. The Parliament may provide that if the registration of an industrial organisation is cancelled, its members cease to be entitled to the benefits they otherwise would have had under an award which applied to that organisation and its members[167]. These decisions deny any absolute proposition that an arbitrated award can never be affected by what the Parliament does pursuant to s 51(xxxv).

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163 See, for example, *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 401.

164 *Waterside Workers' Case* (1920) 28 CLR 209.

165 *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413.

166 *R v Commonwealth Court of Conciliation and Arbitration and Australian Railways Union; Ex parte Victorian Railways Commissioners* (1935) 53 CLR 113 at 141-142 per Dixon J.

167 *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636 at 651.

226 A deal of attention was directed in argument to the Court's decision in *Victoria v The Commonwealth* (*Industrial Relations Act Case*)[168] about the then provisions of s 150A of the *Industrial Relations Act*. That section, and regulations made under sub-s (3) of that section, required the Commission to review awards and identify whether they were deficient because they included (among other things) discriminatory provisions. The Commission was then obliged to remedy any deficiency in the award by varying it or taking such other action in relation to the award as it considered appropriate. It was pointed out in the joint judgment[169] that:

> "It is well settled that the terms of an award must be "'relevant" or "reasonably incidental" or "appropriate" to the settlement of the differences constituting the interstate dispute [attracting the Commission's power to arbitrate] or … [have] a "natural or rational tendency to dispose of the question at issue"'[170]. The 'ambit' doctrine[171], which confines the variation of awards within the limits of the dispute upon which the award was based, is an aspect, albeit an important aspect, of that more general rule."

Their Honours concluded[172] that:

> "Given that s 150A(2) is concerned entirely with awards made in settlement or prevention of interstate industrial disputes, s 150A(3) must be read down so as to authorise the variation of awards only to the extent that the variation has a relevant connection with the dispute which attracted the Commission's award-making power. If the removal or variation of an award provision containing the proscribed grounds would deny the

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168 (1996) 187 CLR 416.

169 (1996) 187 CLR 416 at 527-528 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

170 See *Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Vic) Ltd* (1989) 166 CLR 311 at 317 per Mason CJ. See also at 334 per Gaudron J and the cases there cited.

171 As to which, see, eg, *R v Metal Trades Employers Association; Ex parte Amalgamated Engineering Union* (1949) 78 CLR 366 at 372; *R v Kelly; Ex parte Australian Railways Union* (1953) 89 CLR 461 at 473-475, 482; *R v Holmes; Ex parte Victorian Employers' Federation* (1980) 145 CLR 68 at 76 per Mason J; *Re State Public Services Federation; Ex parte Attorney-General (WA)* (1993) 178 CLR 249 at 291-292, 305-307.

172 (1996) 187 CLR 416 at 529.

> connection required between the award and the dispute in settlement of which the award was made, the award could not be considered to be 'deficient' by reason of the provision that contains the proscribed grounds. …
>
> It was not argued that it was beyond the power conferred by s 51(xxxv) of the Constitution for the Parliament to legislate to require regular revision and variation of awards to reflect current industrial standards, so long as the award as varied retains the required connection with an interstate industrial dispute. Nor, in our view, is such an argument open. A law requiring regular review and variation, within the limits indicated, is clearly a law with respect to conciliation and arbitration. And it makes no difference whether the direction to vary is expressed in terms of industrial standards generally or, as here, is directed to some specific matter which may pertain to the relations of employers and employees."

227 Those who challenged validity contended that because item 50 sought to terminate the effect of some, but not all, provisions of the Coal Award, the award as varied (whether by the cessation of effect of provisions under item 50 or the variation contemplated by item 51) would be significantly different from the award as it was originally made. It was contended that the variation could not be characterised as having any relevant connection with the original interstate industrial dispute that gave rise to the award and that, for that reason, the variation fell outside the ambit of s 51(xxxv).

228 As was pointed out in the *Industrial Relations Act Case*, variation of an award could, conceivably, result in the award no longer having the requisite connection with the dispute on which it was founded. The question in the present case is not whether the Commission has power to vary an award by determining that certain provisions are to have no effect. That step is taken by the legislature, not the Commission. It is, therefore, not to the point to ask whether the Commission would have power to do it. The question is one of legislative power. And that directs attention to the issues that have been discussed earlier.

229 If there is any consequence that follows from the cessation of the effect of certain provisions on the question of connection between award and dispute, it is a question that requires consideration of the connections between the remaining, effective provisions of the award and the dispute. It was submitted that the remaining, effective provisions of the award could not be said to be the product of a process of conciliation and arbitration for the prevention and settlement of interstate industrial disputes. It was said that those provisions were not the product of that process because that process had produced an altogether different award from the award to which the Act would give effect after the interim period. Thus, so it was argued, the provisions now in question were not laws with respect to conciliation and arbitration because they produced a "result" different from the

result of conciliation and arbitration. An analogy appears to have been drawn between this and the hypothetical case postulated in argument in *Kartinyeri*[173] but not resolved. This was "of a repealing or amending Act which so changed the character of an earlier Act as to deprive that Act of its constitutional support".

230 This way of putting the argument can be seen to be no more than a restatement, in other words, of arguments with which we have dealt above. Speaking of the "result" of conciliation and arbitration distracts attention from the relevant inquiry: to identify the rights, duties, powers and privileges that have been changed, regulated or abolished. The relevant "result", then, is not just what has previously been published as an arbitrator's award or as a conciliated consent award; the relevant "result" is the rights, duties, powers and privileges to which that process gave rise. And the question that must be asked about the legislation that now is in question is what rights, duties, powers and privileges that legislation changes. The argument about difference in result when examined, can be seen to be one which, directly or indirectly, seeks to attribute relevant legal significance to particular provisions of awards other than the significance that was given to those provisions by the legislation. For the reasons we have given earlier, we do not accept that s 3 and the relevant items of Sched 5 deal with more than that legislative effect. Alternatively it is an argument which seeks to attach constitutional significance to the outcome of a process of conciliation and arbitration. Again, for the reasons given earlier, we do not consider that this is right.

231 We consider that the challenge to the validity of s 3 fails. It is, therefore, not necessary to consider the alternative argument advanced by some respondents to the proceedings for prerogative relief in which it was alleged that constitutional support for some operation of s 3 could be found in s 51(xx), the corporations power.

232 The order nisi for writs of certiorari, prohibition and mandamus should be discharged with costs. The amended question reserved for the consideration of the Full Court, namely,

> "On the basis of the facts pleaded in the Plaintiffs' Statement of Claim, and admitted in the Defendant's Defence, are any of the following laws invalid:
>
> (a) Section 3 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) to the extent that it purports to give effect to item 50 in Part 2 of Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth); or

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173 (1998) 195 CLR 337 at 357.

(b) Section 3 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) to the extent that it purports to give effect to subitems 51(1), (2) and (3) in Part 2 of Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth)?"

should be answered:

(a) No.

(b) No.

The plaintiffs should pay the defendant's costs of the stated case. The action should be adjourned to a single justice to give directions concerning the disposition of the matter.

233 KIRBY J. The law-making power with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State", conferred upon the Federal Parliament by s 51(xxxv) of the Constitution, has given rise to "a Serbonian bog of technicalities"[174]. Yet, despite these technicalities, for almost a century, this Court has insisted that the Parliament cannot legislate to mandate the outcome of conciliation and arbitration[175]. The Parliament can continue in force an award or order validly made which results from that process[176]. It can provide for the variation[177] or wider application of such an award or order[178]. It can require that the statutory tribunal that it has created to perform the functions of conciliation and arbitration review awards by reference to specified considerations[179]. But it is always necessary to relate the Parliament's powers to the constitutional source. This requires a continuing connection with the interstate industrial dispute on which any exercise of the power is ultimately founded[180].

234 The present proceedings demand the application of these established principles to legislation which is challenged as an attempt by the Parliament to regulate, by direct provision, the terms and conditions of employment contained in an award in a way not authorised by s 51(xxxv) of the Constitution. A

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174 Higgins J, President of the Commonwealth Court of Conciliation and Arbitration, so described it during World War I: Garran, *Prosper the Commonwealth* (1958) at 225. The reference is to Milton's description of a lake in which whole armies disappeared in a swamp covered by shifting sands.

175 *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 358; *Australian Boot Trade Employés' Federation v Whybrow & Co* (1910) 11 CLR 311 at 335, 342 ("*Whybrow's Case*"); *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)* (1967) 118 CLR 219 at 242.

176 *Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association* (1920) 28 CLR 209 ("*Waterside Workers' Case*").

177 *R v Blakeley; Ex parte Australian Theatrical and Amusement Employees Association* (1949) 80 CLR 82; *R v Kelly; Ex parte Australian Railways Union* (1953) 89 CLR 461; *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1962) 108 CLR 166.

178 *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413.

179 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1966) 187 CLR 416 at 528.

180 *Industrial Relations Act Case* (1996) 187 CLR 416 at 528.

subsidiary point is whether, if this first challenge fails, another indirect source of constitutional authority for the legislation can be found in the provisions of s 51(xx) of the Constitution with respect to constitutional corporations.

The proceedings

235 Two proceedings are before the Court. The first proceeding is an application in the original jurisdiction of this Court that the order nisi for writs of certiorari, prohibition and mandamus be made absolute. The order nisi, as amended, was issued to members of the Australian Industrial Relations Commission ("the Commission") upon the grounds that they had acted outside their lawful jurisdiction in so far as they had given effect to s 3 of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) ("the WROLA Act") which in turn gave effect to item 50 and subitems 51(1), 51(2) and 51(3) of Pt 2 of Sched 5 to the WROLA Act ("item 50 and subitems 51(1), 51(2) and 51(3)"). In the second proceeding, also in the original jurisdiction of this Court, the plaintiffs sought a declaration that s 3 of the WROLA Act was invalid to the extent that it purported to give effect to item 50 and subitems 51(1), 51(2) and 51(3). Pursuant to s 18 of the *Judiciary Act* 1903 (Cth), this question was reserved for the opinion of the Full Court. As the grounds upon which relief is sought in both proceedings are substantially the same[181], it is convenient to deal with them together.

236 The Construction, Forestry, Mining and Energy Union ("the Union") is the first prosecutor in the proceedings on the order nisi and the first plaintiff in the proceedings giving rise to the question reserved. Mr Garry Barnes is the second prosecutor and second plaintiff respectively. He is a member of the Union and was employed by Pacific Coal Pty Ltd ("Pacific Coal"). That company is the second respondent in the proceedings on the order nisi. The first respondent to the proceedings on the order nisi is Boulton J, a Senior Deputy President of the Commission, together with the members of the Full Bench of the Commission who decided an appeal from Boulton J's orders. The members of the Commission have submitted to the orders of this Court. The Commonwealth has appeared in both matters to support the validity of the legislation. Various States intervened in the proceedings on the order nisi: Western Australia to support the validity of the legislation; and New South Wales and Queensland to support the prosecutors' contentions of invalidity.

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181 The order nisi was returned before the Full Court.

The facts

237 In September 1990, in the exercise of the power of conciliation and arbitration for the prevention and settlement of an industrial dispute extending beyond the limits of a single State, the Commission made the Coal Mining Industry (Production and Engineering) Interim Consent Award ("the interim award"). On 10 December 1997, Boulton J made the Coal Mining Industry (Production and Engineering) Consolidated Award 1997[182] ("the consolidated award") which consolidated the interim award together with variations to that time. Both awards applied to persons engaged in work in the coal mining industry in New South Wales, Queensland and Tasmania. There were approximately 149 employer respondents to the awards, being companies with employees in the coal mining industry in those States. The Union represented the industrial interests of most of the employees employed in those mines. Pacific Coal was a respondent to both awards.

238 On 8 December 1997, the Commission, of its own motion[183], summoned the parties to the awards before it. It did so with a view to considering the requirements of the *Workplace Relations Act* 1996 (Cth) ("the *Workplace Relations Act*"), as amended by the WROLA Act, and having regard to the terms of items 47, 49, 50 and 51 of Pt 2 of Sched 5 to the WROLA Act. On 23 February 1998, application was also made on behalf of the respondents to vary the consolidated award to ensure that it would thereafter contain only "allowable award matters"[184]. The application of the respondents was joined with the award simplification proceedings commenced by the Commission itself[185]. The proceedings were heard together by Boulton J.

239 On 19 March 1998, Boulton J decided to separate consideration of the removal of non-allowable award matters from the award as required by subitem 49(1) of Sched 5 to the WROLA Act and s 89A of the *Workplace Relations Act* from "wider simplification issues" arising under subitems 49(7) and 49(8)[186]. In his decision of 26 May 1998, Boulton J made it clear that his

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182 *Re Coal Mining Industry (Production and Engineering) Consolidated Award 1997*, unreported, Australian Industrial Relations Commission, C2758 A M Print P7386, 10 December 1997.

183 Pursuant to the *Workplace Relations Act* 1996 (Cth), s 33.

184 See the *Workplace Relations Act*, s 4 and s 89A.

185 Pursuant to the *Workplace Relations Act*, s 113.

186 *Re Coal Mining Industry (Production and Engineering) Awards*, unreported, Australian Industrial Relations Commission, Statement of Boulton J, 19 March 1998 at 2.

decision to alter the consolidated award was designed to give effect to item 50 and subitems 51(1), 51(2) and 51(3). It did not necessarily reflect "any conclusion as to the merits of the relevant clauses … in providing rights and obligations in relation to the treatment of retrenched workers in the coal industry"[187]. The variations so ordered were to take effect from 1 July 1998 in relation to both the interim award and the consolidated award[188].

240 Appeals were lodged against the orders of Boulton J both by the Union and by the industrial organisation which represented the respondents. The appeal by the Union was dismissed[189]. The appeal by the respondents succeeded to the extent that the Full Bench of the Commission overturned part of the decision of Boulton J and ordered that cl 9, which related to conditions not dealt with by the award, should be deleted[190]. It was common ground that, in varying the award in the manner stated, the members of the Commission were exercising powers purportedly arising under item 51, and not under s 113 of the *Workplace Relations Act* nor under item 49 of Sched 5 to the WROLA Act[191].

241 Apart from cl 9, the variation of the consolidated award included the deletion of the following clauses: cl 10 (the right to be consulted over major changes affecting employees); cl 16.1 (the right to discussions before termination of employees); cl 16.2 (reduction of employees on the principle "the last to come, the first to go"); cl 39 (preference to unionists); cl 40 (preference to retrenched members of specified unions); cl 41 (right of entry of authorised Union representatives onto the premises of employers); cl 42 (preference of

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187 *Re Coal Mining Industry (Production and Engineering) Awards*, unreported, Australian Industrial Relations Commission, Dec 580/98 M Print Q1205, 26 May 1998 at 11 per Boulton J.

188 *Re Coal Mining Industry (Production and Engineering) Interim Consent Award*, unreported, Australian Industrial Relations Commission, 1 July 1998 per Boulton J; *Re Coal Mining Industry (Production and Engineering) Consolidated Award*, unreported, Australian Industrial Relations Commission, C2758 V002 M Print Q2125, 1 July 1998 per Boulton J.

189 *Re Coal Mining Industry (Production and Engineering) Awards*, unreported, Australian Industrial Relations Commission, Dec 1293/98 S Print Q7842, 22 October 1998 per Senior Deputy President Macbean, Senior Deputy President Polites and Commissioner Harrison.

190 *Re Coal Mining Industry (Production and Engineering) Awards*, unreported, Australian Industrial Relations Commission, Dec 1293/98 S Print Q7842, 22 October 1998 at 6-9.

191 Statement of Agreed Facts, 23 May 1999, pars 20, 30-31.

employment in re-engagement); and cl 44 (the right of a union steward, such as Mr Barnes, to interview employer and employee representatives during working hours)[192]. These variations to the award affected both the Union and Mr Barnes.

242 Matters came to a head in July 1998 when Pacific Coal decided to retrench a number of employees then working at its Blair Athol mine in Queensland with effect from August 1998. Mr Barnes was one of those chosen for redundancy. This would not have happened had "the last to come, the first to go" principle of selection for retrenchment been observed, as was required by the former cl 16.2 of the consolidated award. Upon his retrenchment, Mr Barnes enjoyed no rights to preference of employment at other Queensland mine sites, as was required under the former cl 39 of the award. The Union and Mr Barnes submitted that the Commission, in varying the award, and Pacific Coal, in retrenching Mr Barnes, had acted unlawfully. If s 3 of the WROLA Act, in so far as it purported to give effect to item 50 and subitems 51(1), 51(2) and 51(3), were unconstitutional, the alterations of the consolidated award effected in pursuance of its requirements were invalid. If this were so, the Union and Mr Barnes would continue to be entitled to the benefits of the consolidated award as it stood prior to the invalid alterations.

243 At the commencement of the hearing in this Court, a number of companies sought, and were granted, leave to be joined as parties to the proceedings on the return of the order nisi. Each of them is bound by the awards and each was thus affected by the outcome of the proceedings. They wished to make submissions additional to those advanced by Pacific Coal to support the validity of the impugned section of the WROLA Act by reference to s 51(xxxv) of the Constitution. But they also wished to advance an argument which Pacific Coal, the Commonwealth and Western Australia declined to support. That argument was to the effect that the impugned section of the WROLA Act, and consequently the variations made pursuant to that section, could, if necessary, be supported by reference to the power with respect to constitutional corporations in s 51(xx) of the Constitution. It was argued that this was so by virtue of s 7A of the *Workplace Relations Act*. It will be convenient to deal with this alternative submission after the principal arguments concerning the requirements of s 51(xxxv), together with s 51(xxxix), have been considered.

244 One final point should be noticed in this outline of the facts. Originally, the Union and Mr Barnes relied on another argument to attack the constitutional validity of item 50 and subitems 51(1), 51(2) and 51(3). This was the contention that, if otherwise valid, those items (and, to that extent, s 3 of the WROLA Act

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192 *Re Coal Mining Industry (Production and Engineering) Consolidated Award*, unreported, Australian Industrial Relations Commission, C2758 V002 M Print Q2125, 1 July 1998 per Boulton J.

giving effect to them) would have had the effect of acquiring property otherwise than on just terms contrary to s 51(xxxi) of the Constitution. The order nisi included a question addressed to that ground of objection. It was also one of the suggested grounds of invalidity asserted in the statement of claim upon the basis of which the question of constitutional law was reserved for the opinion of this Court. On the return of the proceedings, the Union and Mr Barnes did not argue this additional suggested basis of invalidity. It can therefore be disregarded.

The relevant legislation

245 The WROLA Act was designed to introduce major changes to federal legislation governing industrial relations. The stated purpose, as set out in the Minister's Second Reading Speech[193], was to alter the system of industrial relations established by the Parliament from one heavily reliant upon awards and orders achieved as the outcome of conciliation and arbitration to one where most industrial disputes would be settled by local agreement either in the form of a certified agreement[194] or an Australian workplace agreement[195]. The recast statement of the principal objects of the *Workplace Relations Act*[196] asserts a deliberate shift of focus away from arbitration to conciliation and a general confinement of the Commission's arbitral functions enjoyed under the previous legislation[197]. The legislation was, once again, renamed to symbolise these further changes of direction[198]. Changes throughout the *Workplace Relations Act* are designed to carry these general objectives into effect.

246 Section 89 of the *Workplace Relations Act* defines the general functions of the Commission as being to "prevent and settle industrial disputes". Following the amendments, a key new section of the *Workplace Relations Act* is s 89A, which is headed "Scope of industrial disputes"[199]. There was no such section in

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193 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 23 May 1996 at 1295.

194 Under Pt V1B of the *Workplace Relations Act*.

195 Under Pt V1D of the *Workplace Relations Act*.

196 *Workplace Relations Act*, ss 3 and 88A.

197 *Conciliation and Arbitration Act* 1904 (Cth) and *Industrial Relations Act* 1988 (Cth).

198 The short title was changed from the *Industrial Relations Act* to the *Workplace Relations Act* by Sched 19 to the WROLA Act, effective from 25 November 1996.

199 The terms of s 89A are set out in the reasons of McHugh J at [98].

the *Industrial Relations Act* 1988 (Cth). Sub-section 1 defines an "industrial dispute" as including only those matters covered by sub-s 2 and sub-s 3, and sub-s 2 limits these matters to 20 "allowable award matters". Although sub-s 7 allows an exemption for an "exceptional matter" and sub-s 8 provides that nothing in the section prevents the Commission from including a model anti-discrimination clause in an award, clearly the basic object of s 89A is to narrow substantially the matters that can be classified as an industrial dispute. It therefore reduces the scope of matters which may be made the subject of an award or order, or the variation of an award or order, by the Commission, under the general powers given to it by the *Workplace Relations Act*. Some of the other items of Sched 5 to the WROLA Act, such as item 35[200], subitem 49(8)(d) and subitem 51(7)(d), are concerned with the removal of obsolete or ineffective provisions from awards. Item 50 and subitems 51(1), 51(2) and 51(3) must be understood in the context of these policy and legislative changes.

247 If s 89A of the *Workplace Relations Act* had been added without more, its sole effect would have been to limit the subject matters with which the Commission might deal in any future award, or variation of an existing award, in the exercise of its powers[201]. Section 89A would not, in its own terms, have affected the provisions of existing awards (such as the interim award or the consolidated award). Such provisions as were not "allowable award matters"[202] would have continued to be effective. By the terms of s 89A, and the conventional principle of prospective operation of legislation, the section would have affected only the making of new awards and variation by the Commission.

248 By subitem 49(1) of Sched 5, it is provided:

> "If one or more of the parties to an award apply to the Commission for a variation of the award under this item, the Commission may, during the interim period, vary the award so that it only deals with allowable award matters."

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200 Now *Workplace Relations Act*, s 143(1C)(d).

201 *Workplace Relations Act*, s 113. The power is now limited by s 89A and by s 170N of the *Workplace Relations Act*.

202 The expression "allowable award matters" appearing in item 50 and subitem 51(3) is not defined in Pt 2 of Sched 5 to the WROLA Act. Pt 1 of Sched 5 to the WROLA Act introduced s 89A into the *Workplace Relations Act* and also amended s 4 ("Interpretation") by adding "allowable award matters", meaning the matters covered by s 89A(2). This definition would apply to the expression "allowable award matters" appearing in Pt 2 of Sched 5 to the WROLA Act pursuant to the *Acts Interpretation Act* 1901 (Cth), s 15.

Then follow item 50 and subitems 51(1), 51(2) and 51(3) which are in contention in these proceedings[203]. Item 50 and subitems 51(1), 51(2) and 51(3) are given effect by s 3 of the WROLA Act which provides that, subject to s 2:

> "each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms".

249 By item 46 of Sched 5 to the WROLA Act, the phrase "interim period" in the above items is defined to mean "the period of 18 months beginning on the day on which section 89A of the Principal Act commences". In the same item, the "Principal Act" is defined to mean the *Workplace Relations Act.* Section 89A was effective from 1 January 1997. Accordingly, the "interim period" began on that day. It extended until 30 June 1998.

250 Neither the Union nor Mr Barnes submitted that s 89A of the *Workplace Relations Act* itself was invalid. In so far as that section controlled the future conduct of the Commission, whether in making or varying awards, the Union and Mr Barnes accepted that this was within the law-making power of the Parliament under s 51(xxxv) of the Constitution. They also acknowledged that, following the amendments to the *Workplace Relations Act* effected by the WROLA Act, various avenues would have been available to Pacific Coal, including to seek the cancellation of the awards, the making of a new award following notification of a new dispute, or the exercise by the Commission of its power of variation which, after the interim period, would have had to conform to s 89A of the *Workplace Relations Act*. None of this, it was said, could have been contested on constitutional grounds. So much is therefore undisputed in these proceedings.

251 However, the Union and Mr Barnes argued that it was not competent for the Parliament to purport to alter by legislative *fiat* (as they described it) the force and effect of an award previously made by the Commission. Nor was it within the power of the Parliament, by legislative prescription, to withdraw the operation and enforceability of particular terms of an existing award that was in force. They submitted that what was thereafter enforceable no longer matched the description of an award of the Commission at all. Most importantly, it was not competent for the Parliament to alter the outcome of conciliation and arbitration in a way that resulted in binding rules on industrial conditions when such rules were not made for the prevention and settlement of an interstate

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203 The relevant terms of item 50 and subitems 51(1), 51(2) and 51(3) are set out in the reasons of Gaudron J at [41].

industrial dispute, as was required both by the *Workplace Relations Act* and by the Constitution[204].

The limitations imposed by s 51(xxxv) of the Constitution

252 The terms in which the law-making power conferred on the Parliament by s 51(xxxv) of the Constitution are expressed impose "profoundly important limitations"[205] on the shape of federal legislation that is reliant on that power. The most important of these is the limitation restricting the power to make laws for the prevention and settlement of interstate industrial disputes to laws involving particular processes, namely "conciliation and arbitration". These words connote the settlement of a question in dispute by reference to a third party or parties when those immediately involved have failed to agree[206]. The process for such settlement must answer to the description of "conciliation" or "arbitration" or both. The opinion which the conciliator or arbitrator reaches "may take any form the law provides; it may be called an order, or an award"[207]. It has no legal force or effect (unless the parties exceptionally contract to give it such). Ordinarily, therefore, an Act of the Parliament is required to attach legal rights and obligations to the award or order of the conciliator or arbitrator which will carry it into effect. This Court has emphasised that, however flexible may be the procedures adopted[208] and however large the ambit of the power once engaged, they do not extend to the regulation of industrial conditions by direct legislation[209]. If the Parliament legislates at all in reliance on s 51(xxxv), it must do so in the particular way that s 51(xxxv) obliges.

253 This point was made both by the majority and the minority in the *Waterside Workers' Case*[210]. In issue in that case was the constitutional validity of a

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204 *Workplace Relations Act*, s 89 and the Constitution, s 51(xxxv), including as read with s 51(xxxix).

205 Creighton, Ford and Mitchell, *Labour Law: Text and Materials*, 2nd ed (1993) at 315.

206 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 355.

207 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 463.

208 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 342.

209 *Waterside Workers' Case* (1920) 28 CLR 209 at 218 per Knox CJ.

210 (1920) 28 CLR 209.

statutory provision which stated that, in the absence of an order of the Court of Conciliation and Arbitration to the contrary, an award should continue in force from the date of the expiration of the period provided in it until a new award was made[211]. This Court divided over whether it was competent for the Parliament to extend the duration of an award in such a way. The dissenting joint reasons of Isaacs and Rich JJ argued forcefully that the Parliament could not, by legislative prescription, so provide[212]. The majority held that Parliament could so legislate[213].

254 Both the majority and the minority in that case found common ground in the limited character of the legislative power conferred by s 51(xxxv) of the Constitution. Thus Knox CJ[214] emphasised the way in which the legislation had constituted the tribunal (then called a court) with plenary power to act according to its unfettered discretion in settling industrial disputes of a given character. His Honour considered that it was open to the Parliament to circumscribe and define the powers which that tribunal might exercise in performing its functions. This included the specification of machinery provisions fixing the duration of any award which the tribunal, in its discretion, had made. Knox CJ went on[215]:

> "It is clear that this power does not authorize the Commonwealth Parliament to regulate conditions of employment by direct legislation, eg, to prescribe by Act of Parliament the minimum rate of wage to be paid or the maximum number of hours to be worked. … The Commonwealth Parliament cannot settle a dispute or make an award by legislative enactment, but it has power, in my opinion, to enact that the tribunal which is set up for the purpose of settling industrial disputes shall, if it makes an award, comply with conditions prescribed by Parliament."

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211 *Commonwealth Conciliation and Arbitration Act*, s 28(2). Section 148(1) of the *Industrial Relations Act* was to the same effect and is unchanged in the *Workplace Relations Act*.

212 (1920) 28 CLR 209 at 232.

213 (1920) 28 CLR 209 at 218-219 per Knox CJ, 242 per Higgins J, 244 per Gavan Duffy J, 253 per Starke J.

214 (1920) 28 CLR 209 at 218.

215 (1920) 28 CLR 209 at 218.

255 Isaacs and Rich JJ had previously expressed their joint opinion on the centrality of conciliation and arbitration in an emphatic way in *Waterside Workers' Federation of Australia v J W Alexander Ltd*[216]:

> "Parliament legislates, but is compelled by the Constitution to legislate in that way. It cannot form an *à priori* code, and say that shall be obeyed by disputants. A particular method that other Parliaments *may* adopt, it *must* adopt if it legislates at all."

Their Honours continued in this vein in the *Waterside Workers' Case*, where they elaborated the inhibition on Parliament which was imposed by the constitutional requirement that legislation resting on s 51(xxxv) of the Constitution answer to the description of a law with respect to conciliation and arbitration[217]:

> "Parliament … may limit [the arbitrator's] powers as it pleases … But it cannot … alter rights by any provision which dispenses with arbitration; it cannot go beyond the actual decision of the arbitrator, or alter his decision, or make any provision for settlement of the dispute binding that does not involve his own decision, or that extends beyond his own decision or adoption. … But if Parliament can, irrespective of the merits of the particular case, make a general enactment, operating mechanically and setting aside ordinary legal rights of employers and employees beyond anything awarded, the words and the spirit of the constitutional provision are alike broken. And, if Parliament can do it in this case, we can see no limit to its power."

256 The large degree of agreement in the *Waterside Workers' Case* was also reflected in the opinion of Higgins J, a member of the majority. He classified the disputed section as nothing more than a continuance of the duration of the award, it being "agreed on all sides that Parliament cannot affirmatively or directly prescribe conditions of employment by its own enactment"[218]. The majority were prepared to regard the continuance of the award beyond its original date by the statutory tribunal, and subject to the tribunal's power to order otherwise, as a law "with respect to" conciliation and arbitration[219]. But none of the participating Justices suggested that legislation which altered an existing award by changing its terms and thereby disturbing its balances and imposing different obligations

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216 (1918) 25 CLR 434 at 463 (original emphasis).

217 (1920) 28 CLR 209 at 228-229.

218 (1920) 28 CLR 209 at 242. See also at 251 per Powers J to like effect.

219 (1920) 28 CLR 209 at 242 per Higgins J, 252-253 per Starke J.

on the parties to it would be permissible. To the contrary, the reasoning of the entire Court suggests the opposite conclusion.

257 Since that decision in 1920, a number of cases have come before this Court in which the power of the Parliament under s 51(xxxv) (together, where necessary, with the incidental powers under s 51(xxxix)) to make laws affecting an award of the statutory tribunal has been explored. I leave aside the exceptional cases in which, during and immediately after wartime, the defence power has been invoked in relation to the powers of the statutory tribunal[220]. The exceptional character of the decision in the *Waterside Workers' Case*, and the fact that s 28(2) of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) had "escaped being held unconstitutional" but "only by the narrowest of margins"[221], encouraged the restatement by this Court that the Parliament could not make "laws simply for the prevention and settlement of such industrial disputes; they must be laws for the prevention and settlement thereof by means of conciliation and arbitration"[222].

258 In every case in which the issue has been revisited, legislation relating to the order or award of the statutory tribunal had to be brought back to the prevention or settlement of some particular interstate industrial dispute in order to maintain its constitutional validity. For example, in *R v Commonwealth Court of Conciliation and Arbitration and Australian Railways Union; Ex parte Victorian Railways Commissioners*[223], Dixon J emphasised the importance for the decision in the *Waterside Workers' Case* of the fact that s 28 of the *Commonwealth Conciliation and Arbitration Act* preserved to the tribunal the power of variation, should that be considered necessary. His Honour said[224]:

> "This provision was upheld as valid by this Court upon the ground substantially that for the Legislature to keep an industrial regulation, brought into existence by an award, alive until a new regulation was made was incidental to the power of arbitration, at any rate so long as the Court of

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220 The enactment of the *Industrial Peace Act* 1920 (Cth) resulted in the resignation of Higgins J as President from the Commonwealth Court of Conciliation and Arbitration: Garran, *Prosper the Commonwealth* (1958) at 225-226.

221 *R v Hamilton Knight; Ex parte The Commonwealth Steamship Owners Association* (1952) 86 CLR 283 at 321 per Fullagar J.

222 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 401.

223 (1935) 53 CLR 113.

224 (1935) 53 CLR 113 at 140.

Conciliation and Arbitration was left at liberty to give any contrary direction it saw fit."

259 A decision in some ways analogous to the *Waterside Workers' Case* was *George Hudson Ltd v Australian Timber Workers' Union*[225]. There the Court, again by majority[226], upheld as valid s 24(1) of the *Commonwealth Conciliation and Arbitration Act* when it was amended to include the words "or any successor, or any assignee or transmittee of the business of a party bound by the agreement, including any corporation which has acquired or taken over the business of such party"[227]. The effect of this change was to increase the parties bound by the agreement settling an interstate dispute. In that case, a fortnight after the original agreement was registered in the tribunal, a party called "George Hudson and Son Limited" changed its name to "George Hudson Limited".

260 The dissentients in *Hudson* argued powerfully[228] that the combined effects of s 51(xxxv) and s 51(xxxix) of the Constitution did not suffice "to impose, either by direct enactment or through the medium of an arbitrator, obligations on persons who are not parties to an existing or probable industrial dispute"[229]. However, Isaacs J, in the majority, pointed out that "the only difference, so far as appears, is a mere change in name"[230]. Were it not possible by legislation to apply the agreement to the renamed company, his Honour considered, "the whole fabric of the constitutional power may be, and in actual practice must be, utterly ineffective and useless"[231]. The agreement duly made could thus be extended to the successors and assignees of those originally bound by it. But this accepted the agreement as it stood in its entirety. True, it enlarged the parties to whom it applied. But it did not purport to alter its contents in any way.

261 In 1953, the question arose as to whether an award might be varied without the necessity of a fresh interstate industrial dispute arising. In an extension of the

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225 (1923) 32 CLR 413.

226 Per Isaacs, Higgins and Starke JJ, Knox CJ and Gavan Duffy J dissenting.

227 The principal Act was amended by the *Commonwealth Conciliation and Arbitration Act* 1921 (Cth), s 3. See now *Workplace Relations Act*, s 149(1).

228 By reference to *Whybrow's Case* (1910) 11 CLR 311.

229 *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413 at 424 per Knox CJ, with whom Gavan Duffy J agreed.

230 (1923) 32 CLR 413 at 438.

231 (1923) 32 CLR 413 at 438.

logic which had sustained the statutory provisions for the continuance of an award in force after its initial term, this Court held in *R v Kelly; Ex parte Australian Railways Union*[232] that it was not necessary that a fresh dispute exist. Awards might be varied by the statutory tribunal to ensure that the original settlement remained appropriate in the light of changed industrial circumstances. However, the power which was upheld[233] was one which authorised the tribunal, of its own motion and without the consent of the parties, to vary the award, so long as the revision or review remained within the limits of the subject matter and the boundaries of the original interstate industrial dispute[234]. This Court read down the power conferred on the tribunal by legislation to vary an award "for any reason", so that the phrase was "restrained by construction to the purpose of preventing or settling industrial disputes"[235]. Dixon CJ[236] was at pains to emphasise the limitation imposed upon the tribunal by the fact that it derived its authority from the exercise of legislative power, which was in turn dependent upon s 51(xxxv) of the Constitution[237]. The reasoning of all members of this Court is therefore consistent only with alteration or adjustment of the detailed provisions of an award by the body which originally made the award, namely the statutory tribunal. It is inconsistent with any direct enactment by the Parliament of a common rule or any other terms of national application which affect particular industrial conditions in an award.

262 The extent to which the Parliament could direct the statutory tribunal as to the level of wages to be prescribed was considered in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)*[238]. In that case, Barwick CJ[239] restated the

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232 (1953) 89 CLR 461.

233 *Conciliation and Arbitration Act* 1904 (Cth), s 49 in conjunction with s 34. The short title of this Act was changed to remove "Commonwealth" from the title by Sched 2 to the *Statute Law Revision Act* 1950 (Cth) as given effect by s 4.

234 (1953) 89 CLR 461 at 474. See also *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1962) 108 CLR 166 at 169.

235 (1953) 89 CLR 461 at 473.

236 With whom Fullagar and Kitto JJ agreed. See (1953) 89 CLR 461 at 479.

237 (1953) 89 CLR 461 at 474-475.

238 (1967) 118 CLR 219.

239 (1967) 118 CLR 219 at 242.

proposition that s 51(xxxv) did not afford the Parliament a general power to legislate the level of wages to be paid under an award. However, his Honour[240] accepted that it was permissible to prescribe a given procedure or manner of dealing with alterations, as the impugned section had done in that case[241]. In the opinion of Windeyer J[242]:

> "the Parliament has no power under the Constitution to direct that it go about its task of settling industrial disputes by fixing wages according to some particular principle or formula. It must be given a discretion as to means having regard to the end, the prevention and settlement of industrial disputes by conciliation and arbitration. If the Act commanded that the Commission fix wages by reference to a basic wage it would, I consider, be invalid."

263 The most recent consideration of the constitutional validity of legislation as it purports to affect awards made by the statutory tribunal is the decision of this Court in *Victoria v The Commonwealth* (*Industrial Relations Act Case*)[243]. In issue in those proceedings was the constitutional validity of s 150A(1) of the *Industrial Relations Act* which required the statutory tribunal (by this time the Commission) to review each award in force and to do so within a specified time. If, after such review, the Commission considered that the award was "deficient" in specified respects, s 150A(2) further required that it "must, in order to remedy the deficiency, take the steps (if any) prescribed by the regulations". Such steps might include variation of the award. Amongst the particular matters by reference to which awards were to be reviewed was whether they included provisions which discriminated on a proscribed ground, being on the basis of "race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin"[244].

264 An issue in the case was whether, so far as the Parliament had purported to oblige the Commission to conduct the review required by s 150A of the

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240 (1967) 118 CLR 219 at 240.

241 *Conciliation and Arbitration Act*, s 33.

242 (1967) 118 CLR 219 at 269.

243 (1996) 187 CLR 416.

244 *Industrial Relations Act*, s 3(g).

Industrial Relations Act, it had ventured beyond the legislative power conferred by the Constitution. In its joint reasons[245], the majority of the Court said:

> "It is conceivable (although hardly likely in practice) that the variation of an award, either by removing or amending a discriminatory term of the kind to which s 150A(2)(b) is directed, could result in the award no longer having the required connection with the dispute on which it was founded. Ordinarily, the question asked with respect to the variation of the award is whether the variation is valid. That is a convenient course if, as is almost always the case, the variation can be severed from the award. But the fundamental question is that of the relationship between the award, as varied, and the dispute. And because that is the question, it is always necessary to relate the Commission's power to vary awards to the conciliation and arbitration power. …
>
> [Section] 150A must be read in the same light as other provisions of the Act which confer power on the Commission to vary awards … [They have] always been construed, or more accurately, read down by reference to the limits of the power conferred by s 51(xxxv) of the Constitution so as to authorise only those variations which have a relevant connection with the dispute giving rise to the award in question or which are made for the purpose of preventing an interstate industrial dispute. …
>
> It was not argued that it was beyond the power conferred by s 51(xxxv) of the Constitution for the Parliament to legislate to require regular revision and variation of awards to reflect current industrial standards, so long as the award as varied retains the required connection with an interstate industrial dispute. Nor, in our view, is such an argument open. A law requiring regular review and variation, within the limits indicated, is clearly a law with respect to conciliation and arbitration. And it makes no difference whether the direction to vary is expressed in terms of industrial standards generally or, as here, is directed to some specific matter which may pertain to the relations of employers and employees.
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> It follows that, when s 150A(3) is read down in the manner indicated, s 150A(2)(b) is valid."

The applicable constitutional requirements

265 What follows from the foregoing history of the authority of this Court? First, and this is common ground between the parties, pursuant to s 51(xxxv) of

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245 *Industrial Relations Act Case* (1996) 187 CLR 416 at 528-529 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ (footnotes omitted).

the Constitution, including as enhanced by s 51(xxxix), it is not competent for the Parliament to enact general laws directly governing the industrial conditions of employers and employees in Australia. Any such laws must, in the terms of s 51(xxxv), be laws with respect to the prevention and settlement of interstate industrial disputes by means of conciliation and arbitration.

266 Secondly, the Parliament cannot itself, under such powers, legislatively mandate the outcome of conciliation or arbitration. It can only legislate to enable such processes, the limits within which the process will be carried out, the incidents of their outcome and the application of the outcome of that process for a longer period or to additional or different parties than originally ordered.

267 Thirdly, after the outcome is concluded by conciliation or arbitration, the Parliament can direct the Commission to conduct reviews and even require it to vary an existing award. But this direction will be valid only if three conditions apply: (1) that any variation of the award preserves an outcome which can still be characterised as connected with the interstate industrial dispute on which the original award was founded; (2) that standards are stated, reflecting current industrial standards by reference to which the Commission is obliged to act; and (3) that the task of variation is reserved to the Commission, which retains a discretion to act or not to act. The task of variation, deprived of any discretion, cannot be imposed on the Commission, for that would be inimical to the essential character of conciliation and arbitration which the Constitution mandates.

268 Fourthly, where legislative provisions operate on the outcome of conciliation or arbitration (such as to continue its operation beyond its original term; to extend its application to the successors and assignees of original parties; to contemplate its variation; or to require review and the consideration of variation by reference to new standards), the outcome so altered must still be capable of characterisation as arising from conciliation or arbitration for the prevention and settlement of an interstate industrial dispute. Its title as an "award" or "order" of the Commission is immaterial. It is its character as the outcome of the process that is essential, for otherwise the necessary connection with the posited constitutional powers will have been lost. If it cannot be so characterised, the Parliament will have attempted to legislate by direct enactment on the subject of industrial conditions. No invocation of the incidental power in s 51(xxxix) could cure such an impermissible attempt to legislate in a way beyond that permitted by s 51(xxxv) of the Constitution.

269 Tested by these standards, s 3 of the WROLA Act to the extent that it purports to give effect to item 50 and subitems 51(1), 51(2) and 51(3), appears to exceed the law-making powers of the Parliament under s 51(xxxv) as supplemented by s 51(xxxix). On the face of it, item 50 appears to be a direct attempt by the Parliament to legislate upon the industrial conditions of persons subject to the awards affected, and specifically in relation to the provisions of such awards that are defined as being outside "allowable award matters". This

has been done in respect of industrial disputes having a definition, scope and content which existed prior to the enactment of the WROLA Act. No attempt has been made in sub-item 50(1) to provide criteria for, or to reserve a discretion to, the Commission as conciliator or arbitrator. Whilst it is true that subitems 51(1), 51(2) and 51(3) confer power on the Commission, and, in the case of subitem 51(3), a discretion, all of these subitems are ancillary to item 50. They are designed to implement the purpose of that item and subitems 51(1) and 51(2) impose duties on the Commission to that end.

270 Therefore, the alteration or deletion of provisions from awards is purportedly performed by force of sub-item 50(1) itself as it is given effect by s 3 of the WROLA Act. No function whatsoever is reserved to the Commission. It is by the operation of sub-item 50(1) that awards cease to have effect to the extent that they provide for matters other than "allowable award matters". On the face of things, this means provisions of the award deemed to be other than "allowable award matters" cease to have effect whether as a provision of the award or otherwise, eg as a condition of the contract of employment imported into the relationship of employer and employee by reason of the award provisions[246].

271 Whilst sub-item 51(1) is expressed in terms of requiring the Commission to review each award, its operation is dependent upon item 50 by reason of par (b) of subitem 51(1). Similarly, subitem 51(2) is posited on the assumption of the operation of item 50. Subitem 51(3) being, in its turn, inextricably linked to the obligation of variation under subitem 51(2), it is also dependent on the operation of item 50. Because, in my view, s 3 of the WROLA Act is invalid to the extent that it purports to give effect to item 50, item 50 is inoperative. Therefore, subitems 51(1), 51(2) and 51(3) are also inoperative. The items fall together.

The arguments for constitutional validity

272 The step involved in the enactment of item 50 is radically different from that taken in previous federal legislation. No prior legislation in the history of the Commonwealth and the long history of industrial relations legislation has attempted, in effect, to alter the content and precise details of an award as s 3 of the WROLA Act and item 50 and subitems 51(1), 51(2) and 51(3) purport to do. In default of powerful arguments to distinguish the long line of authority in this Court, and the principles which that authority has established, the complaint of invalidity against s 3 of the WROLA Act to the extent that it gives effect to item 50 and subitems 51(1), 51(2) and 51(3) would have to be upheld. However, Pacific Coal, the Commonwealth and Western Australia seek to maintain the validity of these items of Sched 5 as they are given effect by s 3 of the WROLA

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246 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.

Act and the alteration of affected awards. They propounded three principal arguments to do so:

(1) that the items were laws "with respect to" the prevention and settlement of interstate industrial disputes by means of "conciliation and arbitration", especially if due regard were given to the words "prevention", "settlement" and "conciliation" and to the ample grant of power conferred on the Parliament inherent in the words "with respect to";

(2) that the items, even if characterised as removing non-allowable award matters from the awards affected, did no more than to withdraw legislative enforcement of such matters, as was open to the Parliament, awards being wholly dependent for their enforceability upon legislation; and

(3) that the items amounted, in substance, to a repeal of so much of the *Workplace Relations Act* as would otherwise give legal effect to the provisions of the awards in question. Just as it was open to the Parliament, by enactment, to give effect to an award, it was open to it, in its entirety or partially, to repeal the legislation giving such effect. Item 50 and subitems 51(1), 51(2) and 51(3), as given effect by s 3 of the WROLA Act, were to be classified as effecting a partial repeal or amendment of the *Workplace Relations Act*.

Extent of the law-making power

273 There is no doubt that the words "with respect to" in s 51 of the Constitution confer a most ample power to make laws. This is so in respect of every head of legislative power, as befits a Constitution[247]. It is so in the particular case of the power to make laws with respect to conciliation and arbitration provided by s 51(xxxv)[248]. It is sufficient that the law in question has an appropriate relevance to, or connection with, the subject specified[249]. Anything reasonably and properly incidental to the effectuation of the purpose embodied in the power is within the legislative grant[250]. The task of this Court, where the constitutionality of a law is challenged, is one commonly described as

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247 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186.

248 *Whybrow's Case* (1910) 11 CLR 311 at 339; *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413 at 450.

249 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

250 *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 262; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 353-354.

characterisation of the law in question[251]. It is not necessary, in order to establish the constitutional validity of a law, that it should be shown to be essential or indispensable to the fulfilment of the power. It is enough that it is appropriate to give effect to the exercise of the power[252]. If this is shown, the law is within the constitutional grant. That is so without invoking the express constitutional provision of s 51(xxxix) in relation to matters incidental to the execution of a power.

274 Pacific Coal submitted that items 50 and 51, as given effect by s 3 of the WROLA Act, were laws with respect to conciliation and arbitration because they operated upon awards made in the past by a process answering that description. The fact that their operation involved the undoing of part of the outcome of that process was, so it was submitted, irrelevant to the impugned law's constitutional validity. Western Australia added to this argument that items 50 and 51 were to be viewed as part of a legislative scheme by which the Parliament was reforming the *Workplace Relations Act* in a manner designed to lay more emphasis upon conciliation rather than arbitration and to prevent interstate industrial disputes by means of workplace and other agreements instead of settling them by means of arbitrated awards. As it was open to the Parliament, in accordance with s 51(xxxv) of the Constitution, to refocus the priorities of federal law in such a way, so it was said, then s 3 of the WROLA Act which was designed to give effect to the changes contained in items 50 and 51 was within power.

275 These submissions are rejected. The power afforded to the Parliament by s 51(xxxv) is not simply one to make laws with respect to conciliation and arbitration. The "conciliation and arbitration" referred to in s 51(xxxv) is qualified by a descriptive limitation requiring that any law reliant on that paragraph be "for the prevention and settlement of industrial disputes extending beyond the limits of any one State". Accordingly, it is not open to the Parliament, by a direct legislative attempt, to impose new and different terms and conditions of employment on those subject to an existing award or order simply because the law in question targets, as its legislative objective, the alteration of an award or order of the Commission. It remains necessary that, for the law to be valid, it should still answer to the description contained in s 51(xxxv) in all of its elements.

276 Were it otherwise, it would necessarily follow that once an award or order was made by a process of conciliation or arbitration to prevent or settle an

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251 *United States v Butler* 297 US 1 at 62 (1936); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 27, 30; *Leask v The Commonwealth* (1996) 187 CLR 579 at 616, 633-637.

252 *Industrial Relations Act Case* (1996) 187 CLR 416 at 549.

interstate dispute, the Parliament would thereafter enjoy the uncontrolled, or virtually uncontrolled, power to legislate to alter some or all of the matters dealt with in the award as it saw fit. By doing so, it could completely change the balance struck by the conditions established by the award or order in question. Thus, it could effectively delete all of the provisions in an award which had been included as the outcome of conciliation or arbitration. An award might contain provisions for higher than standard wages in compensation for obligations to work longer than standard overtime hours. If part of the industrial balance were altered and, say, the provision relating to hours was effectively deleted by legislation, the result would not be the partial enforcement of the award made by the process of conciliation and arbitration. It would be the creation of an entirely new binding rule, made in effect by the Parliament and owing nothing but history to the origins of the original award made as part of an interstate industrial dispute.

277 In the present case, provisions of existing awards have been effectively deleted by the Parliament which might be thought to have been generally favourable to the Union and to workers such as Mr Barnes. But if the deletion of such provisions is constitutionally permissible, it necessarily means that, on a future occasion, the Parliament could delete provisions favourable to, or protective of, employers. This would amount to a most substantial enlargement of the powers of the Parliament under s 51(xxxv) of the Constitution because it would allow the Parliament to make laws directly concerned with industrial conditions in employment throughout Australia. It would permit this in a way contrary to the limited power which the founders included in the constitutional text[253]. It would also do so in the face of the repeated refusal of the electors at referendums to enlarge that power[254]. And it would do so in a way wholly inconsistent with the unbroken line of decisions of this Court from the earliest days of its existence[255].

278 No doubt there is substantial constitutional power for the Parliament to make laws with a greater emphasis on conciliation and on the prevention of

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253 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at §222.

254 Proposed laws for the alteration of the Constitution to enhance federal power over industrial relations were put to the electors in accordance with s 128 of the Constitution but failed to pass on 26 April 1911, 31 May 1913, 13 December 1919 and 28 September 1946: Department of the Parliamentary Library, *Parliamentary Handbook of the Commonwealth of Australia*, 28th ed (1999) at 527-537.

255 *Whybrow's Case* (1910) 11 CLR 311.

interstate industrial disputes[256]. So far as the amendments to the *Workplace Relations Act* introduced by the WROLA Act were said to be for that purpose, neither the Union nor Mr Barnes contested the validity of s 89A of the *Workplace Relations Act*. However, that provision operates prospectively to limit the matters that may constitute an "industrial dispute" for the purposes of the federal legislation. Section 89A does not attempt in any way to interfere with a previous settlement, by conciliation or arbitration, of an interstate industrial dispute, whereas item 50, as given effect by s 3 of the WROLA Act, intrudes directly into such a settlement. It attempts to redraw the terms of such a settlement and thereby necessarily imposes on the parties, as the purported will of the Parliament, something that amounts to a new industrial settlement. The resulting rule is not the outcome of conciliation and arbitration. It is the outcome of direct federal legislation, which is not constitutionally permissible under s 51(xxxv).

Withdrawal of the enforceability of selected award provisions

279 The second argument for the validity of s 3 of the WROLA Act, to the extent that it gives effect to item 50 and subitems 51(1), 51(2) and 51(3), commenced from the undisputed proposition that an award of the statutory tribunal has no binding force in law, as such, except to the extent that the Parliament endows it with legal significance and provides for its enforcement[257]. Based on this proposition, it was open to the Parliament to provide for the enforcement of award provisions, or to provide that either none or only some of the provisions would be enforced. An analogy was drawn with the decision of this Court which held that an award might continue to operate beyond the duration originally fixed for it[258].

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256 *R v Isaac; Ex parte State Electricity Commission (Vict)* (1978) 140 CLR 615 at 631 per Murphy J.

257 *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 463-464; *Ex parte McLean* (1930) 43 CLR 472 at 479; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 547-548; *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 277.

258 *Waterside Workers' Case* (1920) 28 CLR 209; cf *R v Commonwealth Court of Conciliation and Arbitration and Australian Railways Union; Ex parte Victorian Railways Commissioners* (1935) 53 CLR 113 at 141.

280 It was pointed out that the award in question here operated for six months only from 4 December 1997[259]. Thereafter, its effectiveness was continued by s 148(1) of the *Workplace Relations Act*, the successor to s 28(2) of the *Commonwealth Conciliation and Arbitration Act* which was upheld in the *Waterside Workers' Case*[260]. Because the only operation of the award to which items 50 and 51 applied was a legislative extension of what had originally been done by way of conciliation and arbitration, it was submitted that any limitation of such a legislative extension must equally be valid. This included, so the submission ran, a partial confinement in respect of some of the matters covered by the award, being the non-allowable award matters as defined by the Parliament.

281 These arguments are also rejected. So far as the enforceability of awards of the Commission is concerned, it is true that they are reliant upon the *Workplace Relations Act* in several ways[261]. But the *factum* to which the Parliament may attach statutory consequences must remain recognisably the outcome of conciliation and arbitration of the kind described in s 51(xxxv) of the Constitution. To the extent that the Parliament chooses to withdraw selectively enforcement of an award or order of the Commission achieved through these processes, it runs the risk that the result will not truly answer to the description of an outcome of conciliation and arbitration. Thus, to the extent that the Parliament has legislated that identified non-allowable award matters cease to have effect in item 50, as given effect by s 3 of the WROLA Act, it has produced a new outcome of binding provisions not decided by the Commission but selected by the Parliament. At least where the excisions are as substantial as those that have occurred in the present case, affecting as they do the valuable pre-existing rights of the Union, Mr Barnes and other employees, the resulting hybrid is no longer capable of classification as the outcome of conciliation and arbitration of a pre-existing interstate industrial dispute. Indeed, the result is not the product of conciliation and arbitration at all. It is the product of legislation. And, most importantly, it has no connection, as such, with the interstate industrial dispute which first gave rise to conciliation and arbitration.

282 The result must therefore depend entirely on some other source of law-making power for its constitutional validity. The only one of present relevance is s 51(xxxix). But as that head of power is itself limited to "[m]atters incidental to

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259 *Re Coal Mining Industry (Production and Engineering) Consolidated Award 1997*, unreported, Australian Industrial Relations Commission, C2758 A M Print P7386, 10 December 1997, cl 6.

260 (1920) 28 CLR 209 at 218.

261 See eg *Workplace Relations Act*, ss 143, 149 and 178.

the execution of any power vested by this Constitution in the Parliament", items 50 and 51, as given effect by s 3 of the WROLA Act, cannot be made valid by reference to s 51(xxxix). The purpose of these items is to *prevent* execution of the pre-existing outcome of conciliation and arbitration, not to *execute* the award made by that process. It is to do so selectively and by reference to a legislative judgment, rather than by reference to the process outlined in the Constitution and undertaken by a statutory tribunal that is independent of the parties and of the Parliament.

283 There is a world of difference between continuing in operation an entire award after the initial duration fixed in the award (and subject always to the power of the statutory tribunal to order otherwise) and the selective extinguishment of particular provisions of an award as determined by the Parliament. Such partial extinguishment is incompatible with the decision of this Court in the *Industrial Relations Act Case*[262]. It would have been open to the Parliament to have specified an obligation to review awards, criteria for variation, and a time limit for this to be performed by the Commission, all of which would have been permissible under s 51(xxxv) of the Constitution. But this is not what it did.

Suggested repeal or amendment of the *Workplace Relations Act*

284 The third argument to support the validity of s 3 of the WROLA Act to the extent that it gives effect to item 50 and subitems 51(1), 51(2) and 51(3), suggested that a proper classification of the challenged items was that they amounted to a partial repeal of those sections of the *Workplace Relations Act* which otherwise gave legal effect to the award of the Commission. This argument drew on the basic principle that legislation enacted by one Parliament can be repealed or modified by a subsequent Parliament. In *Kartinyeri v The Commonwealth*, Brennan CJ and McHugh J expressed the principle thus[263]:

> "The power to repeal a law may be exercised from time to time as the Parliament chooses. One Parliament cannot deny or qualify the power of itself or of a later Parliament to exercise that power. The Parliament cannot bind itself or its successor Parliaments not to amend the laws it makes."

285 But this principle is, as was there stated, subject to any applicable constitutional limitations[264]. Such a limitation exists in the provisions of

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262 (1996) 187 CLR 416.

263 (1998) 195 CLR 337 at 357; cf Rose, "Constitutional Invalidity and Amendments to Acts", (1979) 10 *Federal Law Review* 93.

264 (1998) 195 CLR 337 at 356.

s 51(xxxv). In the field of industrial relations, this principle has been stated many times. Thus in *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation*[265], it was said:

> "That power, which enables the Parliament to legislate for the registration of organizations as part of the procedure or machinery of conciliation and arbitration for the prevention and settlement of interstate industrial disputes, equally enables the Parliament to cancel the registration of all or any organizations, if that seems to the Parliament to be desirable. The Parliament is not required to preserve or permit continued existence of an organization simply because its legislation has permitted the organization to come into existence."

286 The constitutional foundation for the sections of the *Workplace Relations Act* supporting the legal enforceability of the award as originally made, and as continued after the expiry of its initial term, was not in doubt. What was questioned was whether, by a provision such as item 50, it was open to the Parliament, in the manner there provided, to withdraw legal effectiveness from part only of an award and whether that item was properly described as one repealing or amending the *Workplace Relations Act*. Was it rather, as the Union and Mr Barnes argued, to be classified as a provision with respect to a different subject matter altogether?

287 On its face, item 50, as given effect by s 3 of the WROLA Act, does not appear to be a law to repeal or amend the general sections of the *Workplace Relations Act* governing the enforcement of award provisions. In the language of the item, it is not so expressed. On the contrary, item 50 is addressed to the cessation of the effectiveness of defined award provisions which meet the definition of non-allowable award matters, not the cessation of the operation of statutory provisions giving force and effect to the award. In determining the field of operation of item 50, and whether it is to be classified as a partial amendment to, or repeal of, the sections of the *Workplace Relations Act* providing for the enforcement of awards, two steps must be taken. The first is to determine the true operation and effect of the law in question, as Kitto J explained in *Fairfax v Federal Commissioner of Taxation*[266]:

> "Under [s 51] the question is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes; it is a question as to the

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265 (1985) 159 CLR 636 at 650.

266 (1965) 114 CLR 1 at 7.

true nature and character of the legislation: is it in its real substance a law upon, 'with respect to', one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an inference so incidental as not in truth to affect its character?"

288 The second step, assuming the first to be safely negotiated, is to ask, in the case of a posited amendment or partial repeal, whether, if effected, it would have the consequence of depriving the relevant legislation of some element necessary to its constitutional validity. An obvious example would arise in the case of federal legislation involving acquisition of property on just terms, as required by the Constitution[267], but which amending legislation purported to alter by deleting the essential provisions for compensation. Plainly, there will be borderline cases where an amendment would have a similar invalidating result and others where it would be within the power of the Parliament. The total repeal of an Act is different from amendment or partial repeal. But, to be effective, partial repeal or amendment must leave in place a law which can still answer to all of the applicable constitutional requirements.

289 Item 50 fails on both steps. Properly characterised, in the way Kitto J explained in *Fairfax*, it is not a partial repeal or amendment of the enforcement sections of the *Workplace Relations Act* as to awards generally. It is a particular enactment with respect to itemised subject matters of awards whereby, contrary to authority, the Parliament has purported to make a law directly binding on industrial conditions otherwise than by way of conciliation and arbitration for the prevention and settlement of an interstate industrial dispute. Moreover, were item 50 to be treated as a partial repeal or amendment of the general sections of the *Workplace Relations Act* governing the enforcement of award provisions, it would still be invalid. This is because it would take the *Workplace Relations Act*, as so amended, outside the constitutionally permitted boundaries in at least two respects. It would effectively impose a new settlement on the parties to an award by legislative *fiat*, and not by conciliation or arbitration. It would do so without reference to the interstate industrial dispute which was the foundation of the original award, replacing the settlement of such dispute with a general statutory provision for which no warrant exists in s 51(xxxv) of the Constitution.

290 For these reasons, none of the arguments to sustain the constitutional validity of s 3 of the WROLA Act to the extent that it purports to give effect to item 50 and subitems 51(1), 51(2) and 51(3) succeeds. The section and the items are unsupported either by s 51(xxxv) or s 51(xxxix) of the Constitution. Unless they can be supported in the manner suggested by the added respondents in the

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267 Constitution, s 51(xxxi). This point is made in *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 356-357 per Brennan CJ and McHugh J, 421-422 per Kirby J.

order nisi proceedings, it will be necessary to sever item 50 and subitems 51(1), 51(2) and 51(3) from the rest of the WROLA Act. In my view, that could be done without requiring any substantial rewriting of the WROLA Act. The items in question do not purport to have more than a limited and transitional operation. Other provisions of the *Workplace Relations Act* exist which would permit the Commission to repair the suggested defects in current awards in the exercise of its general power. When the offending items are excised, there is no invalidity in the operation of s 3 of the WROLA Act. At least there is none to which attention was drawn in these proceedings.

Suggested reliance on s 51(xx) of the Constitution

291 The added respondents, all of which are mining corporations who are bound by the subject awards, sought nonetheless to sustain the constitutional validity of item 50 and subitems 51(1), 51(2) and 51(3), as they are given effect by s 3 of the WROLA Act, by invoking s 7A of the *Workplace Relations Act*. That section appears under the heading "Act not to apply so as to exceed Commonwealth power" and provides:

> "(1) Unless the contrary intention appears, if a provision of this Act:
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> (a) would, apart from this section, have an invalid application; but
> (b) also has at least one valid application;
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> it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application.
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> (2) Despite subsection (1), the provision is not to have a particular valid application if:
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> (a) apart from this section, it is clear, taking into account the provision's context and the purpose or object underlying this Act, that the provision was intended to have that valid application only if every invalid application, or a particular invalid application, of the provision had also been within the Commonwealth's legislative power; or
>
> (b) the provision's operation in relation to that valid application would be different in a substantial respect from what would have been its operation in relation to that valid application if every invalid application of the provision had been within the Commonwealth's legislative power."

292 Sub-section 5 defines an "invalid application" in relation to a provision as one which exceeds the Commonwealth's legislative power and a "valid application" in relation to a provision, if it is the only application, as one within

the Commonwealth's legislative power. Pacific Coal did not rely upon s 7A. Nor did the Commonwealth or Western Australia support this argument.

293 The added respondents sought to invoke s 7A of the *Workplace Relations Act* so as to afford a constitutional foundation for so much of s 3 of the WROLA Act and item 50 and subitems 51(1), 51(2) and 51(3) as applied to awards binding upon constitutional corporations such as themselves. It was conceded that such awards, in their terms, made no differentiation between parties which were corporations and parties which were not. On the face of the items (and also the *Workplace Relations Act*, in so far as it deals with the variation, cancellation and enforcement of awards containing provisions dealing with matters other than "allowable award matters"), it is clear that no relevant differentiation is made by the Parliament between treatment of corporations and non-corporations. Yet it was said that s 7A of the *Workplace Relations Act* evinced the intention of the Parliament, in a case such as the present, to sustain the valid application of the impugned items in relation to award parties which were corporations and, by inference, to require severance of the award provisions so far as they would otherwise apply to respondents which were not corporations and for whom s 51(xxxv) afforded no basis for constitutional validity.

294 There are a number of insurmountable difficulties with this argument. In its terms, s 7A of the *Workplace Relations Act* is expressed to apply "unless the contrary intention appears". The principal objects of the *Workplace Relations Act* in s 3 do not suggest a purpose to institute, in effect, a completely different regime of industrial relations in respect of awards covering employees of constitutional corporations formed within the limits of the Commonwealth, on the one hand, and employees of everybody else affected, on the other. Nor is there anything in the terms of s 3 of the WROLA Act or item 50 or subitems 51(1), 51(2) or 51(3) which suggests a legislative purpose to confine the operation of those items to constitutional corporations. Those propounding this argument conceded that the contrary was the case. But they submitted that s 7A nonetheless obliged courts, faced with a challenge to constitutional validity, to perform the task of severance in order to rescue those parts of the *Workplace Relations Act* which might have a valid operation.

295 A more fundamental difficulty encountered in the invocation of s 7A is that, of itself, it has no operative force or effect. It does no more than to state the intention of the Parliament. Whilst that might, in a particular case, be of some relevance to the analysis by a court, it has no relevance to a case such as the present where the operative provisions of s 3 of the WROLA Act and of item 50 and subitems 51(1), 51(2) and 51(3) do not discriminate between corporations and other parties to awards and therefore afford no foothold for a court to give effect to a parliamentary intention, even assuming that it was relevant and appropriate for a court to do so. Having reached this conclusion, it is unnecessary to explore deeper questions such as the constitutional foundation, in the context of the *Workplace Relations Act*, for the enactment of a provision in

the terms in which s 7A appears[268]. Or whether it is competent for the Parliament, when it does not itself identify its reliance on a particular constitutional head of power, to oblige a court such as this Court to search for a relevant head of power for a provision such as s 7A[269].

296 In the circumstances, I do not consider it necessary to explore this question further. The provisions of s 7A of the *Workplace Relations Act* afford no alternative foundation to permit this Court to redraw item 50 or subitems 51(1), 51(2) or 51(3) and s 3 of the WROLA Act so as to confine their operation to constitutional corporations. No other head of constitutional power being relied upon or appearing, those items, and s 3 of the WROLA Act to the extent that it purported to give effect to those items, are of no effect. The offending items should be, and can be, excised, leaving s 3 of the WROLA Act otherwise operative and valid.

Conclusion

297 The decision of this Court, in my opinion, breaks nearly a century of previously unbroken constitutional authority. It upholds, under the conciliation and arbitration power, direct alteration by the Parliament of an existing award made by the process of conciliation and arbitration in the settlement of an interstate industrial dispute. It allows the Parliament to change the internal balances and compromises within an award, which, in this instance, has the effect of benefiting one side in the industrial relationship. Were Parliament allowed to do so, such a change could as easily have the effect of benefiting the other side. The altered award is no longer the outcome of the constitutionally permissible process. It is now simply the product of federal legislation. The size or justice of the change is not the proper concern of this Court. But the novel enhancement of the legislative power of the Parliament is. This decision involves a radical enlargement of the federal legislative power under s 51(xxxv) of the Constitution. That enlargement will not go unnoticed. Respectfully, I dissent.

Orders

298 The following orders should therefore be made:

In matter number S137 of 1998

299 The order nisi, as amended, should be made absolute with costs in favour of the prosecutors against the second to the thirty-eighth respondents.

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268 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.

269 cf *The Queen v Hughes* (2000) 171 ALR 155 at 188.

300 A writ of prohibition should issue directed to the respondents prohibiting them from giving effect to, or relying upon, the decisions of the Commission which are the subject of these proceedings. A writ of certiorari should issue to remove into this Court such decisions for the purpose of quashing them. And a writ of mandamus should issue to command the Commission to determine the applications before it in accordance with law.

In matter number S138 of 1998

301 Answer the question reserved, as amended, as follows:

(a) Yes.

(b) Unnecessary to answer.

The defendant should pay the plaintiffs' costs of the stated case.

302 CALLINAN J. Whilst it may, with respect, be accepted, as McHugh J says in his reasons for judgment in this case[270], that if the Commissioner's discretion is confined too narrowly it may reach a point where it is proper to say that it is the Parliament, and not the Commission, which is determining the issue which is the subject of the purported discretion, whether that was so in this case was not, so far as the operation of s 89A of the *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) ("the Act") is concerned, in contention. All parties argued the case upon the basis that the section was a valid enactment. The only challenge that was mounted by the prosecutors was to s 3 of the Act to the extent that it operated to give effect to item 50 and subitems 51(1), (2) and (3) in Pt 2 of Sched 5 to the Act. It is apparent that the scheme of the legislation is to confine the operation of awards to allowable award matters as defined by s 89A of the Act both past and prospective, by, in effect withdrawing legislative coercive power in respect of the former to the extent that such awards would otherwise extend beyond these matters. That this is the purpose, how it is to be achieved, and that its achievement is within constitutional power are explained in the reasons for judgment of Gummow and Hayne JJ.

303 Against the background of the common assumption of the validity of s 89A of the Act, and having regard to the fact that s 51(xxxv) of the Constitution confers power with respect to the prevention as well as the settlement of industrial disputes, I would regard s 3 and the challenged items as a legitimate exercise of the power which s 51(xxxv) grants to the Commonwealth to do two things: first to withdraw legislative support for parts of awards previously binding the parties under the industrial legislation in force when they were made; and, to redefine the extent to which awards so made will enjoy the support of underpinning legislative effect.

304 There may very well be, as McHugh J points out, elements of compromise in the affected award some of which may not readily be able to be isolated. But it might equally be said that an award such as this one may contain elements repugnant to parties bound by it. It may even be anathematical in whole to some parties, but the industrial regime in this country has nonetheless for a very long time operated to impose awards upon such parties. It does not therefore seem to me to be anomalous that the challenged provisions might in some way affect the balance of compromises (if any) contained in it. However, in any event subitem 51(3) provides that the Commission when varying an award may also vary it, so that in relation to an allowable award matter, the award is expressed in a way that reasonably represents the entitlements of employees in respect of that matter as provided in the award in force immediately before the interim period. In short, it might confidently be expected that any concern about the prospective loss of a benefit achieved by a compromise would usually be the subject of debate and

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270 [2000] HCA 34 at [179].

argument in the Commission. Furthermore, such a matter could also in all probability be the subject of a bona fide interstate industrial dispute.

305 Subject only to the matters which I have mentioned I agree with the reasons for judgment of Gummow and Hayne JJ and would join in the answers and orders their Honours propose.