HIGH COURT OF AUSTRALIA.

THE QUEEN AGAINST

COLDHAM AND OTHERS; EX PARTE THE AUSTRALIAN SOCIAL WELFARE UNION.

Gibbs C.J., Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ.

1983: *March* 8, 9; *June* 9.

153 CLR 297

Industrial Law (Cth) — Conciliation and Arbitration — Industrial dispute — Scope — Whether any dispute between employees and employers about terms of employment and conditions of work included — Demand on behalf of employed social workers — The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*xxxv*) *— Conciliation and Arbitration Act* 1904 (*Cth*), *s.* 4(1) *"employee", "employer", "industrial dispute", "industrial matters", "industry".*

The phrase "industrial disputes" in s. 51(xxxv) of the Constitution includes all disputes between employees and employers about terms of employment and conditions of work, and is not confined to disputes in productive industry and organized business carried on for the purpose of profit.

Federated State School Teachers' Association of Australia v. Victoria (1929), 41 C.L.R. 569, *overruled*.

Observations of Higgins J. in *Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation* (1919), 26 C.L.R. 508, at pp. 572-573, and *Australian Insurance Staffs' Federation v. Accident Underwriters' Association* (1923), 33 C.L.R. 517, at p. 535, *applied*.

Jumbunna Coal Mine N.L. v. Victorian Coal Miners' Association (1908), 6 C.L.R. 309 and *Ex parte Professional Engineers' Association* (1959), 107 C.L.R. 208, *considered*.

"Industrial dispute" is defined by s. 4(1) of the *Conciliation and Arbitration Act* 1904 to include "a dispute ... as to industrial matters which extends beyond the limits of any one State". "Industrial matters" is defined as "all matters pertaining to the relations of employers and employees". "Employee" and "employer" mean respectively "any employee in any industry" and "any employer in any industry". "Industry" includes "(a) any business, trade, manufacture, undertaking, or calling of employers; (b) any calling, service, employment, handicraft, or industrial occupation or vocation of employees; and (c) a branch of an industry and a group of industries".

Held: (1) The method of definition of "industrial dispute" employed in s. 4(1) does not narrow or exclude the application of the definition of "industry".

Observation of Dixon C.J. in *Ex parte Professional Engineers' Association* (1959), 107 C.L.R. 208, at p. 243, *applied*.

(2) Each item in pars. (a), (b) and (c) of the definition of "industry" is an industry, and an employer and an employee is "in any industry" if the employer is in an "industry" specified in par. (a) and employs the employee therein or if the employee is in an "industry" defined in par. (b) and is employed as such by an employer, or if the employer employs the employee or the employee is employed by the employer in an "industry" defined in par. (c). It is not essential that the employers and employees should be found independently to be in a defined "industry".

PROHIBITION, CERTIOARARI and MANDAMUS.

On 10 July 1979 Deputy President Isaac in the Australian Conciliation and Arbitration Commission made a finding of an industrial dispute under s. 24 of the *Conciliation and Arbitration Act* 1904 (Cth) between The Australian Social Welfare Union, an organization of social workers, and the workers' employers, various Community Youth Support Scheme Committees. The dispute arose out of the nonacceptance of a log of claims served by the Union relating to the pay and conditions of project officers employed by the Committees. The Committees sought a revocation of the finding on the ground, amongst others, that neither the Committees nor the officers were engaged in or in connexion with an industry. Deputy President Isaac dismissed the application. One of the committees, by its charman Morris Newton Owen, appealed to the Full Bench of the Commission (Deputy President Coldham and Commissioner Turbet, Deputy President Cohen dissenting) which allowed the appeal and set aside the finding of dispute on the ground that the activities of the Committees were not incidental to industry. The Union obtained orders nisi for prohibition and certiorari directed to the members of the Full Bench and Mr. Owen, and for mandamus directed to the Deputy President. Further facts are set out in the judgment of the Court.

P. R. A. Gray, for the prosecutor. The dispute is an "industrial dispute" within s. 51(xxxv) of the Constitution even within the narrow meaning adopted in *Federated State School Teachers' Association of Australia v. Victoria ("the Schoolteachers' Case")* 1 . The project officers are not engaged in government service and do not stand outside the world of productive industry and organized business. They are engaged in enterprises which are ancillary, incidental or an adjunct to industry in its narrow sense. Those enterprises perform for the labour element of industry the kind of function performed for the financial element by insurance and banking enterprises. Their role is more specifically directed to the work force than is the general educational role of universities.

Alternatively, the Court should adopt a wide meaning of "industrial dispute" so as to include in its ambit all disputes between employers and employees as to the terms and conditions on which work is performed. Broad definitions were adopted in this Court's early years: *Jumbunna Coal Mine N.L. v. Victorian Coal Miners' Association ("the Jumbunna Case")* 2 , at pp. 332-333, 364-365, 370-371 and *Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation ("the Municipalities' Case")* 3 , at pp. 554-555. The Court should overrule the *Schoolteachers' Case*. No sound reason was advanced for the exclusion from the industrial power of "services of all kinds". [He referred to *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* 4 ; *Ex parte Professional Engineers' Association* 5 ; *Reg. v. Holmes; Ex parte Public Service Association (N.S.W.)* 6 ; *Pitfield v. Franki* 7 .] It is accepted that it is unnecessary for employees to be engaged in manual labour or for them to be employed in a profit-making enterprise for their employment to be in industry. Nor does it matter that their work can be considered to be "professional" work. The Court has recently recognized the need for a broader definition of "industrial dispute": *Reg. v. Marshall; Ex parte Federated Clubs' Union of Australia* 8 , at pp. 608-609; *Reg. v. Holmes; Ex parte Public Service Association (N.S.W.)* 9 , at pp. 74, 88-90; *Reg. v. McMahon; Ex parte Darvall* 10 , at pp. 60-61, 65-66, 71-72. The dispute found to exist was an "industrial dispute" as defined in s. 4(1) having regard to the definitions of "industrial matters", "employee", "employer" and "industry".

Sir Maurice Byers Q.C., Solicitor-General for the Commonwealth, (with him Miss *M. R. Hickey*), for the Attorney-General for the Commonwealth, intervening in support of the prosecutor. Whether a dispute is "industrial" within s. 51(xxxv) depends on what is disputed. If the claim is about terms of employment, conditions of work or circumstances of the relationship between employers and employees, the dispute is industrial, whatever the type of work done and whatever the employer's business or industry. The proper approach is found in the *Jumbunna Case* 11 , 370-371 and *Federated Saw Mill Employees' Association of Australia v. J. Moore & Sons Pty.*

Ltd. 12 , at p. 488. [He also referred to the *Municipalities' Case* 13 and *Australian Insurance Staffs' Federation v. Accident Underwriters' Association* 14 , at pp. 527, 528-530, 534-535]. The *Schoolteachers' Case; R. v. Court of Conciliation and Arbitration, Ex parte Victoria and Pitfield v. Franki* should no longer be applied in so far as they restrict the meaning of "industrial dispute". They do not give the expression its natural meaning of disputes between all employers and employees about terms and conditions of work, and place a restrictive construction on a beneficial power.

K. R. Handley Q.C. (with him *M. F. Holmes*), for the respondent Owen. The Court should not depart from its earlier decisions upon the meaning of "industrial disputes" in s. 51 (xxxv). The statements of Griffith C.J. and O'Connor J. in the *Jumbunna Case* 15 have never been the basis of any subsequent decision of the Court. The decisions that disputes with local government authorities (the *Municipalities' Case*), clerks (*Federated Gas Employees' Industrial Union v. Metropolitan Gas Co. Ltd.* 16), journalists (*Daily News Ltd. v. Australian Journalists' Association* 17) employees in State industrial activities (*Merchant Service Guild of Australia v. Commonwealth Steamship Owners' Association* 18), employees of banks and insurance companies (*Australian Insurance Staffs' Federation v. Accident Underwriters' Association*) were industrial disputes did not depend on the expressions of opinion in the *Jumbunna Case*. Isaacs J.'s dissent in the *Schoolteachers' Case* was based in part on the view that education was ancillary to industry, a view which was rejected in *Reg. v. McMahon; Ex parte Darvall*. In that case the Court rejected the view that all employment is industrial. It was unanimous in doing so because Isaacs J. held that State public servants engaged in "administrative" functions were not within s. 51(xxxv). The following cases depend upon the reasoning in the *Schoolteachers' Case* and would have to be overruled if the view of Griffith C.J. and O'Connor J. in the *Jumbunna Case* were to be resurrected: *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria; Ex parte Professional Engineers' Association*; *Reg. v. Holmes; Ex parte Public Service Association (N.S.W.)*; *Pitfield v. Franki*; *Reg. v. McMahon; Ex parte Darvall*. Moreover the Court has applied the tests established before the *Schoolteachers' Case* and in that case in the following cases where employment was

found to be industrial in character: *Reg. v. Marshall; Ex parte Federated Clubs' Union*; *Reg. v. Cohen; Ex parte Motor Accidents Insurance Board* 19 ; *Reg. v. Holmes; Ex parte Manchester Unity Independent Order of Oddfellows in Victoria* 20 . The Court should not overrule a case that has stood for fifty-four years: cf. *Queensland v. The Commonwealth* 21 . In *Reg. v. Holmes, Ex parte Public Service Association* 22 the Court was invited to overrule the *Schoolteachers' Case* and declined to do so. Nothing has occurred since then which justifies reopening the matter.

P. R. A. Gray, in reply.

Cur. adv. vult.

June 9.

THE COURT delivered the following written judgment:—

This order nisi for prohibition, certiorari and mandamus made by Brennan J. raises for decision the important question whether a dispute between the prosecutor, which is an organization of social workers, and their employers, Community Youth Support Scheme Committees ("the Committees"), about their terms and conditions of employment is an "industrial dispute" within the meaning of s. 51(xxxv) of the Constitution. The prosecutor submits that the Court should reject the notion that s. 51(xxxv) looks to a dispute in an industry and decides that any dispute between employer and employees about the terms and conditions of employment is an "industrial dispute" according to the constitutional conception of that expression. A related question is whether the dispute is an "industrial dispute" within the meaning of the *Conciliation and Arbitration Act* 1904 (Cth), as amended, ("the Act").

On 10 July 1979 the Australian Conciliation and Arbitration Commission ("the Commission") made a finding of an industrial dispute under s. 24 of the Act between the prosecutor and a number of Committees. The dispute arose out of the non-acceptance of a log of claims served by the prosecutor relating to the pay and conditions of project officers employed by the Committees. The Committees, supported by the Minister for Employment and Youth Affairs (who intervened), sought a revocation of the finding on the ground that neither the Committees nor the project officers were engaged in or in connexion with an industry, that project officers were not engaged in work of an industrial nature and that the eligibility rules of the prosecutor do not embrace project officers employed by the

Committees. The application for revocation of the finding was rejected by Mr. Deputy President Isaac. On appeal, the Full Bench of the Commission (Coldham J. and Mr. Commissioner Turbet, with Cohen J. dissenting) allowed the appeal and set aside the finding of dispute on the ground that the activities of the Committees were not incidental to industry.

The relevant facts are conveniently reviewed in the decision of Mr. Deputy President Isaac and in the decisions of the members of the Full Bench. The Community Youth Support Scheme (hereinafter referred to as "CYSS" or "the Scheme") was inaugurated in 1976 with the authority of the Minister for Employment and Industrial Relations. There is a hierarchy of Committees in each State, ranging from State Committees, down through Electorate Committees, to the Local Committees. Members of the Local Committees are elected annually at public meetings and are responsible for engaging a project officer — some Committees may engage more than one such officer — whose job it is to carry out the objects of the Scheme in the manner endorsed by the Local Committees which are in turn under the surveillance of the Committees standing above them in the hierarchy.

According to the 1978 Statement of Policy and Guidelines issued by the Department, the objectives of the Scheme are "to operate projects which provide appropriate activities to help unemployed young people maintain their morale and orientation towards work". The Statement goes on to say that the Scheme:

> " ... does not, in itself, create or find jobs for young people. It provides activities for young unemployed people which:
>
> • develop or maintain their orientation to work; • improve their abilities to apply for jobs as well as locate sources of employment; • improve their ability to keep a job once they have found it, and • help them to maintain their sense of direction and usefulness until they find employment. Preference is given to approval of projects in areas of relatively high youth unemployment."

The objectives of the Scheme were redefined in a Ministerial Statement of 4 December 1979 as follows:

> "1. CYSS is a manpower program designed to assist communities in their varied responses to the needs of the young unemployed.
>
> 2. To this end CYSS provides financial support to representative community committees to conduct programs and activities within supportive environments which: • provide assistance to young people in their job search

• maintain the employability of the young unemployed by maintaining or developing; — job skills — their ability to seek and obtain jobs — their sense of purpose and direction

3. CYSS is only one of several manpower programs and is designed to assist these other programs. It operates at a community level and to the greatest extent possible draws upon existing community resources as well as assisting with the development and mobilisation of further voluntary action within the community."

It is the function of a project officer to implement the approved Scheme programme under the management of the Local Committee. He is the manager of particular projects on the day-to-day basis in accordance with local rules and procedures determined by the Local Committee. He plans and supervises the daily programme of activities by participants, monitors the programme and reports to his Committee. He seeks the co-operative support of the Commonwealth Employment Service, Government departments and welfare organizations. He also undertakes the required administrative tasks.

The Deputy President summarized the evidence in this way:

"The participants of the scheme being generally young persons of poor motivation and low self-esteem and lacking the employment skill, the courses organized by project officers are designed to enhance the employability of participants by improving their motivation, confidence, self-esteem and sometimes their skills and in these ways assisting their entry into the workforce, occasionally by direct placement. The project officers counsel the participants, liaise with various organizations (e.g., Department of Social Security and the Commonwealth Employment Service), refer participants to them and whenever appropriate speak on their behalf, and administer, organize and supervise various activities — typing, leather works, woodwork, karate, guitar lessons, photography, air-brush work, drama, gardening, silk screen printing, drawing and so on."

Speaking of the project officers, he found:

"Their work is directed in various ways to improving the employability of young unemployed people and therefore to increasing the supply of productive labour, mostly of the manual and unskilled type, as part of an overall manpower programme. This is clear from the guidelines of the Scheme noted above which emphasize the employment related activities of CYSS programmes, and from inspections. It is clear also from evidence and inspections that CYSS is primarily not a welfare or educational activity but one concerned with increasing the supply of employable labour ... "

And he concluded that:

> "In assisting to add in a direct way to the supply of labour for productive employment, CYSS is comparable in concept, even if not in scale, to banks and consumer credit institutions: all assist in the supply of the means of production, in the case of CYSS, of labour and in the others, of capital."

In the result he thought the activities of the Committees were ancillary to or incidental to industry.

The majority of the Full Bench on examining the evidence arrived at a different conclusion, observing:

> "It is sufficient to say that those to whom the scheme, and by reason of that fact the work of the project officer, is directed are separated from industry and indeed it is only during periods when the youthful participants remain so separated that the scheme and the work directed to those participants has any relevance."

In this Court the prosecutor's case is presented on two grounds: (1) that the constitutional concept of "industrial dispute" is sufficiently wide to embrace any dispute between employer and employees as to the terms and conditions of employment; and, alternatively, (2) that the activities of the Committees are incidental to industry as Mr. Deputy President Isaac and Cohen J. found.

As the decision in *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employes Association ("the Railway Servants' Case")* 23 indicated, and as subsequent developments would demonstrate, the early interpretation of s. 51(xxxv) was dominated by a continuing political and legal controversy arising from federal-State conflicts. A, if not the, focal point of that controversy was the question whether the power conferred by s. 51(xxxv) enabled the Commonwealth to confer jurisdiction on the Commonwealth Court of Conciliation and Arbitration ("the Arbitration Court") to settle disputes between State instrumentalities or statutory authorities and their employees. The *Railway Servants' Case* answered that question in the negative, applying the doctrine of intergovernmental immunities to State railway authorities. The effect of the doctrine before *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. ("the Engineers' Case")* 24 made it inevitable in cases affecting State instrumentalities and authorities that the meaning of the expression "industrial dispute" as used in the Constitution and the Act was of secondary importance (*Ex parte Professional Engineers' Association ("the Professional Engineers' Case")* 25 , at p. 254, per Taylor J.). The Court was more concerned with the nature and extent of the restrictions

imposed by the doctrine than with the scope of the legislative power.

An examination of the judicial interpretation of s. 51(xxxv), so far as it relates to the industrial character of the disputes of which it speaks, necessarily begins with *Jumbunna Coal Mine, N.L. v. Victorian Coal Miners' Association* 26 . There a challenge was made to the validity of the provisions of the Act relating to the registration of organizations of employees and of employers on the ground, inter alia, that the subject matter of the power imports a requirement that there must be on both sides of the dispute parties whose operations are carried on in more than one State. The Court rejected this argument and upheld the validity of the provisions in question. Griffith C.J., O'Connor and Isaacs JJ. each took a broad view of the expression "industrial disputes". Griffith C.J. was alone in placing emphasis on the notion that a dispute should involve a large number of employees. And the comments of O'Connor J. reflect the impact of the doctrine of intergovernmental immunities. Subject to these qualifications their Honours' remarks supported a broad interpretation of the power. The Chief Justice said 27 :

> "An industrial dispute exists where a considerable number of employes engaged in some branch of industry make common cause in demanding from or refusing to their employers (whether one or more) some change in the conditions of employment which is denied to them or asked of them."

His Honour went on to say 28 :

> "A question which arises at the outset is, what is an `industrial dispute' within the meaning of the Constitution? It must, of course, be a dispute relating to an `industry', and, in my judgment, the term `industry' should be construed as including all forms of employment in which large numbers of persons are employed the sudden cessation of whose work might prejudicially affect the orderly conduct of the ordinary operations of civil life."

O'Connor J. 29 began his discussion by observing:

> "The appellants contend that the word `industrial' in the Constitution does not cover so wide a field, that it is restricted to work connected directly or indirectly with production and manufacture. `Industrial dispute' was not, when the Constitution was framed, a technical or legal expression. It had not then, nor has it now, any acquired meaning. It meant just what the two English words in their ordinary meaning conveyed to ordinary persons, and the meaning of these words seems to be now much what it was then."

After noting that the expression "industrial disputes" was "commonly used in Australia to cover every kind of dispute between master and workman in relation to any kind of labour" 30 , his Honour continued 31 :

> "There is nothing in the Constitution to show that the word was intended to be used in the narrower sense. On the contrary, the scope and purpose of sub-s. xxxv. would lead to an opposite conclusion. The use of the word in its wider sense does not offend against any prohibition of the Constitution, nor is it inconsistent with any of its provisions. The control and regulation of employment and the relations of employers and employes within the State are, no doubt, within the exclusive powers of the State Parliaments, but disputes extending beyond the limits of a State are within State cognizance only in so far as the parties are within State territory. Such disputes cannot be reached effectively except by Commonwealth authority."

Isaacs J. 32 also took a wide view of the power. He spoke of it extending—

> " ... over the whole range of Australian industry in the largest sense without qualification, wherever ... it does or may give rise to a dispute extending beyond the limits of any one State, and thereby, in a manner beyond the control of any single State, disorganise the general operations of society or interfere with the satisfaction of public requirements in relation to the service interrupted."

He suggested that the statutory definition of "industry" might be narrower than the constitutional conception of "industrial", observing:

> "An industry contemplated by the Act is apparently one in which both employers and employes are engaged, and not merely industry in the abstract sense, or in other words, the labour of the employe given in return for the remuneration received from his employer."

There was no major obstacle to the acceptance of an interpretation of the arbitration power in accordance with that favoured by Griffith C.J. or O'Connor J. in *Jumbunna*, so long as the Court held firmly to the doctrine of intergovernmental immunities. If, however, the Court were to abandon that doctrine, as it did in the *Engineers' Case*, then a broad interpretation of the power would expose once again the problem posed by the possible exercise of jurisdiction by the Arbitration Court over State instrumentalities or authorities and their employees.

Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation ("the Municipalities' Case") 33

was a harbinger of things to come. The importance of the immunities doctrine to the interpretation of the arbitration power was recognized by the division of the hearing into two stages. By majority (Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ., with Griffith C.J. and Barton J. dissenting) the Court held that municipalities established under State laws were not State government instrumentalities in relation to the making, maintenance, control or lighting of public streets. The judgments of the majority contain strong indications that the doctrine might have no application in Australia at all, but that question remained to be decided by the *Engineers' Case*. By a further majority (Isaacs, Higgins, Powers and Rich JJ., with Barton and Gavan Duffy JJ. dissenting) the Court also held that the Arbitration Court had authority to determine by award a dispute between an organization of employees and municipal corporations in connexion with those activities of municipal corporations which we have already mentioned.

Higgins J. favoured a broad interpretation of the power. After remarking on the 1911 amendment to the Act and how it gave emphasis to the word "industry", he stated that it was not conclusive as to the meaning of the Constitution 34 — an echo of Isaacs J. in *Jumbunna*. He pointed out that the words in the Constitution are "industrial disputes", not "disputes in an industry", that the phrase "industrial disputes" is not a technical one and that the question whether a particular dispute is an "industrial dispute" is one of fact 35 . In this respect his approach was similar to that of O'Connor J. in *Jumbunna*, the substantial difference being that unlike O'Connor J. he did not subscribe to the immunities doctrine. Leaving demarcation disputes out of account, he concluded that the expression "industrial disputes" "includes, at all events, a dispute between employer and employee as to their reciprocal rights and duties" 36 . He rejected the suggestion that industrial disputes excluded disputes to which non-manual workers only were parties.

The joint judgment of Isaacs and Rich JJ., which involved a retreat on the part of Isaacs J. from the position which he occupied in *Jumbunna*, was to influence the future course of decisions. According to their Honours industrial disputes can only occur in an industry in which capital and labour co-operate to provide goods or services for the community. Their Honours arrived at this conclusion, not because they thought that this was the popular meaning of the expression in Australia, but because it reflected the criteria of industrial disputes as expounded by the contemporary English

"historians of industrial movements" 37 . Isaacs and Rich JJ. then said 38 :

> "Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation."

They went on to say 39 :

> "It implies that `industry', to lead to an industrial dispute, is not, as the claimant contends, merely industry in the abstract sense, as if it alone effected the result, but it must be acting and be considered in association with its co-operator `capital' in some form so that the result is, in a sense, the outcome of their combined efforts."

Thus, notwithstanding Isaacs J.'s comment in *Jumbunna*, the approach of Isaacs and Rich JJ. necessarily involved a search for a dispute in an industry. In this way the constitutional provision was brought into line with the Act in its amended form.

The doctrine of intergovernmental immunities was overthrown in the *Engineers' Case* 40 where it was decided that a dispute between an organization of employees and a Minister of the Crown for a State acting under the authority of a State statute as an employer in the conduct of a trading enterprise was an "industrial dispute" within s. 51(xxxv). The *Railway Servants' Case* 41 was overruled. The new development opened the way to the exercise by the Arbitration Court of jurisdiction over disputes between State instrumentalities and their servants: see, e.g., *Merchant Service Guild of Australasia v. Commonwealth Steamship Owners' Association* [No. 2] 42 .

Australian Insurance Staffs' Federation v. Accident Underwriters' Association ("the Insurance Staffs' Case"); *Bank Officials' Association v. Bank of Australasia* 43 presented a question as to the scope of the expression "industrial disputes" free from any complication arising from employment by the States or their authorities. The Court held, by majority, that a dispute between employers who carried on the business of banking or the business of insurance and their employees engaged in that business about the wages to be paid and the conditions of employment to be observed was an "industrial dispute" within s. 51(xxxv) on the ground that banking and insurance is incidental to industry. Isaacs and Rich JJ. reiterated

and applied the notion of "industrial dispute" which they had expressed in the *Municipalities' Case*. Higgins J. held to the broad view which he had adopted earlier. Powers J. considered that the term "industrial disputes" did include disputes between employers and employees about wages and conditions of work in any "undertaking, business or industry", and not only in an "industry" in the narrowest meaning of the word 44 . And Starke J. thought that the power extended over the whole area of industrial service 45 . Knox C.J. and Gavan Duffy J. favoured a very limited interpretation of the power, that enunciated by Gavan Duffy J. in the *Municipalities' Case* 46 , which limited the expression to disputes between employers and employees with respect to remuneration or matters affecting the performance of their duties "in an undertaking or undertakings carried on for the purpose of gain and wholly or mainly by means of manual labour".

The limits of the power, according to the interpretations which began to find favour in the *Municipalities' Case*, were revealed in *Federated State School Teachers' Association of Australia v. Victoria ("the Schoolteachers' Case")* 47 . The majority of the Court decided that State schoolteachers were not engaged in industry. Isaacs J. alone dissented, though adhering to the joint judgments in which he had participated in the *Municipalities' Case* and the *Insurance Staffs' Case*.

The main judgment in the *Schoolteachers' Case* was that of Knox C.J., Gavan Duffy and Starke JJ. Rich J., who was also in the majority, delivered a separate judgment. The decision in the case was the first to involve a clear rejection of the wide views which had been expressed by members of the Court in *Jumbunna*. There is no indication in the majority judgment in the *Schoolteachers' Case* of any chain of reasoning which leads to that rejection. The closest approximation to a reason for rejecting the view that, in accordance with the ordinary meaning of the phrase, "industrial disputes" in s. 51(xxxv) "includes, at all events, a dispute between employer and employee as to their receiprocal rights and duties" (the *Municipalities' Case* 48 , per Higgins J.) is the statement in the joint judgment of Knox C.J., Gavan Duffy and Starke JJ. 49 that "the view that the sphere of industrialism is to be found in operations in which the relation of employer and employee subsists ... cannot ... be supported, for it ignores the use of the word `industrial' in the composite expression `industrial dispute' in the Constitution".

That statement is plainly per incuriam in that the view which their Honours were rejecting, far from ignoring the word "industrial", relied upon the word to define the composite expression "industrial disputes" in the sphere of relations between employers and employees.

It is evident from the judgments in the *Professional Engineers' Case*, particularly those of Dixon C.J. 50 and Taylor J. 51 , that their Honours regarded the judgments in the *Schoolteachers' Case* with rather less than complete satisfaction. And in more recent decisions members of this Court have indicated a willingness to reconsider a return to a broader interpretation of the constitutional power, more in line with that favoured by Griffith C.J. and O'Connor J. in *Jumbunna* (see *Reg. v. Marshall; Ex parte Federated Clerks Union of Australia* 52 , at pp. 608-609; *Reg. v. Holmes; Ex parte Public Service Association (N.S.W.)* 53 , at pp. 74, 79, 90; *Reg. v. McMahon; Ex parte Darvall* 54 , at pp. 60-61, 65-66, 71-72).

The absence of a disclosed chain of reasoning leading to a rejection of the broader view is but one of several powerful reasons why we should now embark upon that reconsideration. Another is that the course of judicial exposition of s. 51(xxxv) has not resulted in a settled interpretation of the power. True it is that the judgments in the *Professional Engineers' Case*, proceeding from an acceptance of the correctness of the decision in the *Schoolteachers' Case*, reflected a view of s. 51(xxxv) which was uniform, or substantially so. In this respect the judgments of McTiernan, Taylor and Windeyer JJ. did not differ materially from that of Dixon C.J., with whom Fullagar and Kitto JJ. agreed. Dixon C.J. 55 spoke of a dispute between a State and its land tax officers as standing "outside the whole world of productive industry and organized business". Later he referred again to disputes "in production, business or other organized work" 56 . But it is not suggested that his Honour intended to erect these generalized expressions into a firm principle. In the *Professional Engineers' Case* the Court was not asked to reconsider the *Schoolteachers' Case* or to discard it in favour of the *Jumbunna* interpretation. Indeed, the correctness of the *Schoolteachers' Case* was common ground between the parties, each side seeking to use the decision to its advantage. In the result the Court was able to distinguish the professional engineers from the schoolteachers.

As has so often been the case, the judgments were directed to the resolution of a particular facet of an old problem — a dispute between a State and its engineers. It has, of course, been explicitly or implicitly acknowledged from time to time that the *Schoolteachers' Case* is not consistent with the *Jumbunna* interpretation in all its generality (*R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria ("the State Public Servants' Case")* 57 ; *Pitfield v. Franki* 58 , at p. 455; *Holmes* 59). For the most part these cases, like the *Schoolteachers' Case* and the *Professional Engineers' Case*, related to a dispute between a State or State authority and its servants with the attendant difficulties which disputes of this kind bring in their train. In that area the *Schoolteachers' Case* has occupied a central place in the reasoning in a number of cases since it was decided. However, in our opinion that is not a sound reason for refusing to re-examine the basic interpretation of the constitutional power.

We have already noted that before the *Engineers' Case* the scope and extent of the power was a secondary question, subsidiary in importance to the doctrine of intergovernmental immunity. Since the *Engineers' Case* the interpretation of s. 51(xxxv) has been dominated by the continuing problems which have arisen in association with disputes between States and State authorities and their employees. The rejection of the doctrine of intergovernmental immunity did not result in the acceptance of the broad interpretation which had previously prevailed in *Jumbunna*. Instead, it resulted in an apparent contraction of the power as members of the Court based their exclusion of disputes involving certain categories of State employees on different interpretations of the term "industrial disputes". The interaction between the abandonment of the doctrine and the contraction of the power is best seen in the *Municipalities' Case* and Isaacs J.'s change of heart between *Jumbunna* and the *Municipalities' Case*.

The final factor, yet to be elaborated, which calls for reconsideration is the superior attraction, both in point of legal reasoning and in consequence, of the broad interpretation of the provision over the later versions, especially that of Isaacs and Rich JJ. in the *Municipalities' Case* and the *Insurance Staffs' Case*. In this respect, a remarkable feature of the judgments in the two last mentioned cases — as in the *Schoolteachers' Case*— is the absence of discussion of the *Jumbunna* interpretation and of the reasons for departing from

it by those members of the Court who like Isaacs and Rich JJ. expressed a different and, in some respects, a narrower view.

The correct approach to the construction of the expression "industrial disputes" in s. 51(xxxv) was, we think, expressed by Higgins J. in the *Municipalities' Case* 60 and the *Insurance Staffs' Case* 61 , reflecting the view earlier expressed by O'Connor J. in *Jumbunna* shorn of its association with the doctrine of intergovernmental immunities. The words are not a technical or legal expression. They have to be given their popular meaning — what they convey to the man in the street. And that is essentially a question of fact. That the expression is "industrial disputes", not "disputes in an industry", as Higgins J. noted, makes quite inexplicable the emphasis given in the later cases to limitations on the power derived from the meaning of the word "industry". Perhaps this development is to be explained, though not justified, by the amendment made to the Act in 1911 which defined the word "industry" in terms of the undertaking of the employer and the calling, service, employment or industrial occupation of the employee. It may be that the framework of the Act played some part in shaping the interpretation of the constitutional power, although as early as *Jumbunna* Isaacs J., who with Rich J. was to base his later interpretation on the concepts of "industry" and "industrialism", had been quick to perceive that the Act might possibly contemplate a narrower notion of "industrial disputes" than that envisaged by s. 51(xxxv). An alternative explanation is that it was apprehended that, unless some such limitation based on "industry" was introduced, the category of "industrial disputes" might be unlimited. If there was such an apprehension, it was a misapprehension. The content of the popular understanding of the composite expression sets the limits on the category.

It is, we think, beyond question that the popular meaning of "industrial disputes" includes disputes between employees and employers about the terms of employment and the conditions of work. Experience shows that disputes of this kind may lead to industrial action involving disruption or reduction in the supply of goods or services to the community. We reject any notion that the adjective "industrial" imports some restriction which confines the constitutional conception of "industrial disputes" to disputes in productive industry and organized business carried on for the purpose of making profits. The popular meaning of the expression no doubt extends more widely to embrace disputes between parties

other than employer and employee, such as demarcation disputes, but just how widely it may extend is not a matter of present concern.

It is also unnecessary to consider whether or not disputes between a State or a State authority and employees engaged in the administrative services of the State are capable of falling within the constitutional conception. It has been generally accepted, notwithstanding the *Engineers' Case*, that the power conferred by s. 51(xxxv) is inapplicable to the administrative services of the States (see the *Professional Engineers' Case* 62). If the reasons hitherto given for reaching that conclusion are no longer fully acceptable, it may be that the conclusion itself finds support in the prefatory words of s. 51 where the power is made "subject to this Constitution" (cf. *Holmes* 63). The implications which are necessarily drawn from the federal structure of the Constitution itself impose certain limitations on the legislative power of the Commonwealth to enact laws which affect the States (and vice versa). The nature of those limitations was discussed in *Melbourne Corporation v. The Commonwealth* 64 , esp, at pp. 55-60, 66, 70-75, 82-83, *Victoria v. The Commonwealth ("the Pay-roll Tax Case")* 65 , esp, at pp. 386-393, 402-403, 406-411, 417-424, and the other cases there cited. If at least some of the views expressed in those cases are accepted, a Commonwealth law which permitted an instrumentality of the Commonwealth to control the pay, hours of work and conditions of employment of all State public servants could not be sustained as valid, but as Walsh J. pointed out in the *Pay-roll Tax Case* 66 , the limitations have not been completely and precisely formulated and for present purposes the question need not be further examined.

What we have said accords with the view of Higgins J. and that of O'Connor J. It is substantially similar to that of Griffith C.J., though it discards his emphasis on a dispute which involves a large number of employees. Their Honours in *Jumbunna* were able to speak with authority of the popular meaning of the expression in 1900. Indeed, in the later cases, those who joined issue with the *Jumbunna* interpretation did not deny that it reflected the popular meaning of the expression. Instead, as we have seen, they introduced limitations derived from the word "industry". The artificial consequence was that disputes between employees and financial corporations, e.g., banks, insurance companies and credit unions, though popularly recognized as "industrial disputes", were

so classified only because the activities of the employers were held to be ancillary or incidental to industry in a very narrow sense.

The conclusion which we have reached is in conformity with the accepted canons of constitutional construction. In *Jumbunna*, speaking of the construction of a power to legislate, O'Connor J. said 67 :

> " ... it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.
>
> For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose."

(See also *Bank of N.S.W. v. The Commonwealth* 68 , at pp. 332-333; *Worthing v. Rowell and Muston Pty. Ltd.* 69 , at p. 96; *Koowarta v. Bjelke-Petersen* 70) The operation which our construction accords to the power enables its exercise to fulfil the high object for which it was unquestionably designed — the prevention and settlement by conciliation and arbitration of industrial disputes which could not be remedied by any action taken by a single State or its tribunals.

Accordingly, we conclude that the dispute between the prosecutor and the Committees about the terms and conditions of employment of project officers is an "industrial dispute" within s. 51(xxxv).

The question then is whether it is a dispute to which the Act applies. The Act authorizes the Commission to make an award in settlement of an industrial dispute. The expression "Industrial dispute" is defined by s. 4(1) as meaning:

> "(a) a dispute (including a threatened, impending or probable dispute) as to industrial matters which extends beyond the limits of any one State; and (b) a situation which is likely to give rise to a dispute as to industrial matters which so extends, and includes— (c) such a dispute in relation to employment in an industry carried on by, or under the control of, a State or an authority of a State; (d) a dispute in relation to employment in an industry carried on by, or under the control of, the Commonwealth or an authority of the Commonwealth, whether or not the dispute extends beyond the limits of any one State; ... "

The expression "Industrial matters" is defined by the same sub-section as meaning:

> " ... all matters pertaining to the relations of employers and employees and, without limiting the generality of the foregoing includes—
>
> (a) all matters or things affecting or relating to work done or to be done; (b) the privileges, rights and duties of employers and employees; (c) the wages, allowances and remuneration of persons employed or to be employed; (d) the piece-work, contract or other reward paid or to be paid in respect of employment; ... (h) the mode, terms and conditions of employment; ... and includes all questions of what is right and fair in relation to an industrial matter having regard to the interests of the persons immediately concerned and of society as a whole ... "

This expression needs to be read in conjunction with the definitions of "Employee" and "Employer" which speak respectively of "any employee in any industry" and "any employer in any industry".

The inclusive definition of "Industry" then creates a problem because it includes: (a) any business, trade, manufacture, undertaking, or calling of employers; (b) any calling, service, employment, handicraft, or industrial occupation or vocation of employees; and (c) a branch of an industry and a group of industries ... "

The problem is not merely one of circularity, as Latham C.J. acknowledged in the *State Public Servants' Case* 71 . If it were it might be readily solved by not reading "employers" and "employees" in the statutory definition of "industry" in their defined sense. The problem has an extra dimension in that the statutory concept of "industrial dispute" appears to contemplate disputes between parties about matters pertaining to the relation of employers in any industry and employees in any industry as defined, thereby introducing an element which in our view is not an essential element in the constitutional concept of "industrial dispute". However, we agree with Dixon C.J. in the *Professional Engineers' Case* 72 that, notwithstanding what Latham C.J. said in the *State Public Servants' Case*, the circular method of definition does not narrow or exclude the application of the definition of "industry" contained in the three paragraphs (a), (b) and (c).

Each item in the three paragraphs is an industry, so that an

employer and an employee will be "in any industry" if the employer is in an "industry" specified in par. (a) and employs the employee therein, or if the employee is in an "industry" defined in par. (b) and is employed as such by an employer, or if the employer employs the employee or the employee is employed by the employer in an "industry" defined in par. (c). It is not essential that the employers and employees should be found independently to be in a defined "industry". Paragraphs (a) and (b) reflect the fact that there are groupings of employers who employ different classes of employees and groupings of employees who are employed by different classes of employers. There is or may be such a community of interest among the members of those respective groupings that a dispute (or a threatened, impending or probable dispute) between the members of a grouping and their employees or employers, as the case may be, as to an industrial matter is an appropriate subject for prevention or settlement by conciliation or arbitration.

In the present case, the project officers employed by the Committees are in the same "calling" of employees, and their "industry" embraces both themselves and their employers. It may be that, as the respondent submitted, the Committees' activities constitute an "undertaking" but we do not find it necessary to determine this alternative or cumulative foundation for the Commission's jurisdiction. It is sufficient that one industry is found to cover either employers or employees and thereby to bring into that "industry" their respective employees or employers.

For the foregoing reasons the order nisi for prohibition and mandamus should be made absolute.

Order nisi for writs of prohibition and mandamus made absolute.

Solicitors for the prosecutor, *Maurice Blackburn & Co.*

Solicitor for the Attorney-General for the Commonwealth, *B. J. O'Donovan*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Dawson Waldron*.

R. A. S.

1 (1929) 41 C.L.R. 569

2 (1908) 6 C.L.R. 309

3 (1919) 26 C.L.R. 508

4 (1942) 66 C.L.R. 488

5 (1959) 107 C.L.R. 208

6 (1977) 140 C.L.R. 63

7 (1970) 123 C.L.R. 448

8 (1975) 132 C.L.R. 595

9 (1977) 140 C.L.R. 63

10 (1982) 151 C.L.R. 57

11 (1908) 6 C.L.R., at pp. 366-368

12 (1909) 8 C.L.R. 465

13 (1919) 26 C.L.R., at pp. 572-576, 587-588

14 (1923) 33 C.L.R. 517

15 (1908) 6 C.L.R., at pp. 332, 366-367

16 (1919) 27 C.L.R. 72

17 (1920) 27 C.L.R. 532

18 (1920) 28 C.L.R. 436

19 (1979) 141 C.L.R. 577

20 (1980) 147 C.L.R. 65

21 (1977) 139 C.L.R. 585

22 (1977) 140 C.L.R., at p. 66

23 (1906) 4 C.L.R. 488

24 (1920) 29 C.L.R. 129

25 (1959) 107 C.L.R. 208

26 (1908) 6 C.L.R. 309

27 (1908) 6 C.L.R., at p. 332

28 (1908) 6 C.L.R., at pp. 332-333

29 (1908) 6 C.L.R., at p. 365

30 (1908) 6 C.L.R., at p. 366

31 (1908) 6 C.L.R., at p. 367

32 (1908) 6 C.L.R., at p. 370

33 (1919) 26 C.L.R. 508

34 (1919) 26 C.L.R., at p. 572

35 (1919) 26 C.L.R., at p. 573

36 (1919) 26 C.L.R., at p. 575

37 (1919) 26 C.L.R., at p. 554

38 (1919) 26 C.L.R., at p. 554

39 (1919) 26 C.L.R., at p. 555

40 (1920) 28 C.L.R. 129

41 (1906) 4 C.L.R. 488

42 (1920) 28 C.L.R. 436

43 (1923) 33 C.L.R. 517

44 (1923) 33 C.L.R., at p. 535

45 (1923) 33 C.L.R., at p. 537

46 (1919) 26 C.L.R., at p. 584

47 (1929) 41 C.L.R. 569

48 (1919) 26 C.L.R., at p. 575

49 (1929) 41 C.L.R., at p. 574

50 (1959) 107 C.L.R., at pp. 235-237

51 (1959) 107 C.L.R., at pp. 258-261

52 (1975) 132 C.L.R. 595

53 (1977) 140 C.L.R. 63

54 (1982) 151 C.L.R. 57

55 (1959) 107 C.L.R., at p. 234

56 (1959) 107 C.L.R., at p. 235

57 (1942) 66 C.L.R. 488

58 (1970) 123 C.L.R. 448

59 (1977) 140 C.L.R., at p. 74

60 (1919) 26 C.L.R., at pp. 572-575

61 (1923) 33 C.L.R., at pp. 528-530

62 (1959) 107 C.L.R., at p. 233

63 (1977) 140 C.L.R., at p. 90

64 (1947) 74 C.L.R. 31

65 (1971) 122 C.L.R. 353

66 (1977) 140 C.L.R., at p. 410

67 (1908) 6 C.L.R., at pp. 367-368

68 (1948) 76 C.L.R. 1

69 (1970) 123 C.L.R. 89

70 Ante, pp. 227-228.

71 (1942) 66 C.L.R., at p. 500

72 (1959) 107 C.L.R., at p. 243