

CHAPTER 16 §3

The principles relied on to govern the relationship between distinct heads of power were crucial to the decision in *New South Wales v Commonwealth (WorkChoices Case)* (2006) 231 ALR 1, which held by a 5:2 majority (Kirby and Callinan JJ dissenting) that the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), substantially reshaping the *Workplace Relations Act 1996* (Cth), was valid. Previously the 1996 Act, though repeatedly renamed and renumbered, had maintained a significant continuity with its original enactment as the *Conciliation and Arbitration Act 1904* (Cth): that is, as an exercise of power under s 51(xxxv) (see Chapter 22). The 2005 amendments substantially repealed the provisions based on s 51(xxxv), and replaced them with provisions based on s 51(xx). The majority decision rested primarily on a holding that this was a valid exercise of power under s 51(xx) (see Chapter 17, §3). Yet Kirby J pointed out in dissent that this was not the crucial question.

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Kirby J: [130] As the joint reasons demonstrate, this Court’s explanation of the ambit of the corporations power, granted by s 51(xx), has changed, and effectively expanded, in the course of judicial authority decided over a century. It would be contrary to my inclination, and in any case fruitless in these proceedings, to question such developments. I would accept the submission of Victoria, quoting from the *Concrete Pipes Case* [(1971) 124 CLR 468 at 515], that it is unnecessary in these proceedings to determine “the full ambit of the power conferred by s 51(xx) or to state definitive tests or criteria by which in every case the question may be determined whether a law is or is not a law with respect to the topic described in that paragraph”.

[131] *The intersection issue:* What is, in my view, essential to the disposition of these proceedings is a decision on a narrower constitutional question. That question concerns the inter-relationship between s 51(xx) and s 51(xxxv). The issue posed by that inter-relationship may be stated in the alternative: Does the existence of par (xxxv) in s 51 limit the ambit and operation of par (xx), by restricting the availability of the latter to sustain a federal law? Or, is the content of par (xx) itself limited by any restriction upon laws with respect to industrial disputes inherent in giving true effect also to the provisions of par (xxxv)? In my view, although the same result is achieved by either approach, the latter expresses the correct constitutional principle.

It follows that the content of s 51(xx) takes on a reduced scope from what it otherwise might have had if par (xxxv) had not appeared in the Constitution at all, indeed in the very same section within which each paragraph is to be read together with the others. A law can be validly made with respect to more than one head of power. The fact that it might be characterised as a law with respect to some other subject matter(s) is irrelevant if it properly answers to the description of a law with respect to another subject matter designated in s 51. This will be so even if there is no independent connection between the two constitutional subject matters [*Re F; Ex parte F* (1986) 161 CLR 376 at 388]. What is forbidden is the making of a law in reliance upon a specified subject matter (such as s 51(xx)) when that law is properly characterised as one *with respect to* another head of power (such as s 51(xxxv)) in circumstances where the latter power is afforded to the Federal Parliament “subject to a safeguard, restriction or qualification” [*Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371] ...

It follows from the foregoing analysis that the central issue in these proceedings is not, as such, the reach of the corporations power, standing alone. For present purposes, it may be accepted, on the authority of this Court, that it is wide and comprehensive. Its exact contours and boundaries need not be defined in order to reach my orders in these proceedings.

The issue, rather, is to what extent the ambit of the corporations power is qualified (if at all) by the existence of the power to make laws with respect to industrial disputes ...

However, the development of this approach as a basis for dissenting judgment was not easy to reconcile with the conventional understanding of the relevant principles, and neither Kirby J nor Callinan J was able to do so convincingly. As we have seen, the conventional

understanding postulates a *primary* rule that one head of power cannot be used to limit the scope of another; and a *secondary* rule (by way of exception) that restrictions expressed in one head of power may operate to restrict the scope of other heads of power as well. The primary rule was illustrated most obviously by *Pidoto v Victoria* (1943) 68 CLR 87, the secondary rule by *Bourke v State Bank of New South Wales* (1990) 170 CLR 276. The joint majority judgment in the *WorkChoices* case had no difficulty in holding that the issue before them was governed by the primary rule and not by the secondary rule, since the attributes forming the compound conception in s 51(xxxv) (“conciliation and arbitration”, “extending beyond the limits of any one State”) were not expressed as limitations on power in a manner analogous to those contained in s 51(xiii), as discussed in *Bourke v State Bank*.

Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ: [61] In the course of their treatment of the exhaustive operation of Ch III of the Constitution in the *Boilermakers’ Case* [(1956) 94 CLR 254 at 270], Dixon CJ, McTiernan, Fullagar and Kitto JJ remarked that:

“affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise”.

The submissions by the AWU implicitly relied upon a negative implication of the kind identified in the *Boilermakers’ Case*. However, it will always be necessary first to identify the particular “order or form of things” upon which the negative implication may then operate.

It is here that several difficulties with the submissions of the AWU appear. First, the text of s 51(xxxv) (as the Commonwealth stressed and Victoria recognised) is concerned with a narrower subject-matter than industrial matters or relations and their regulation. Legislation may prescribe, independently of any mechanism for the resolution of disputes, a wide range of matters which may fairly be regarded as affecting the mutual relations of employers and employees who from time to time are engaged in an industry. Part 7 of the Act, which prescribes what are identified in s 171 as “key minimum entitlements of employment”, is a law of this description. Why should the heads of power, particularly s 51(xx), which are relied upon by the Commonwealth as supporting a law such as Pt 7, be construed as not doing so for the reason that s 51(xxxv) identifies particular means for the prevention and settlement of certain industrial disputes? The other heads of power should not be so construed.

Secondly, it is contrary to established principle, in the case of a law which may bear several characters, one of which attracts a particular head of legislative power, to ask, as a requirement of validity, whether there is anything in that [62] head of power which suggests it may be used to deal with those other matters. It will be convenient to return to this point later in these reasons.

The third point ... concerns reliance by the AWU upon the settled body of authority which construes what the AWU identified as the guarantee of just terms provided by s 51 of the Constitution. In *Attorney-General (Cth) v Schmidt* [(1961) 105 CLR 361 at 371-2], Dixon CJ remarked:

“It is hardly necessary to say that when you have, as you do in par (xxx), *an express power, subject to a safeguard, restriction or qualification*, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification.” (emphasis added)

These remarks were cited in the joint judgment of the whole Court in *Bourke v State Bank of New South Wales*, a decision to which it will be necessary to return ...

Victoria took its preferred stand on the footing that, as a matter of substantive limitation, the Parliament of the Commonwealth lacks the power to enact a law with respect to trading corporations formed within the limits of the Commonwealth which also has the character of a law with respect to conciliation and arbitration for the prevention and settlement of industrial disputes within the limits of any one State. The substantive limitation upon the entry of federal law into the sphere of industrial relations is said to be that any industrial dispute so regulated must extend beyond the limits of any one State and the mechanism adopted must be conciliation and arbitration.

None of the various submissions by the plaintiffs should be accepted. Their rejection is favoured by a consideration of the text and structure of the Constitution and by the course of authority in this Court since at least the demise of the reserved powers doctrine in 1920. That outcome is supported also by

recourse to the provenance of s 51(xxxv) to identify the contemporary meaning in 1900 of the language used in that paragraph and the subject to which that language was directed.

The judgment went on to suggest that, given the general concern with industrial disputes at the time the Constitution was drafted, it was unlikely that the framers would have intended to confine the power to deal with such disputes to a single paragraph. For example, in 1898 John Quick had suggested that s 98, extending the trade and commerce power to “navigation and shipping”, would also extend “to labour disputes in connexion with navigation and shipping” (*Convention Debates* (Melbourne 1898) vol IV, p 182). More audaciously, the joint judgment also suggested that the Inter-State Commission envisaged by s 101 of the Constitution (see Chapter 14, §1) might have been intended to play such a role.

Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ: [64] Industrial relations intimately concerns terms and conditions of employment and the state of the workplace. Changes therein might alleviate industrial disputation without the laws making these changes also being laws providing for the settlement of industrial disputes ... The powers conferred by s 51(i) and s 98 of the Constitution were relied on, for example, to support the enactment of the *Seamen’s Compensation Act 1911* (Cth) [*Australian Steamships Ltd v Malcolm* (1914) 19 CLR 298]. The same may be said of the posts and telegraphs power, as is illustrated by the federal compensation legislation considered in *Telstra Corporation Ltd v Worthing* [(1999) 197 CLR 61].

Section 51(xxxv) speaks of the use of particular means to prevent and settle industrial disputes of a certain geographical character. Why, as Victoria particularly would have it, should the text of the Constitution be so read as to pre-empt the exercise of other heads of legislative power to deal with industrial disputations to which s 51(xxxv) could not apply?

To answer that question it is necessary first to deal with some general and settled propositions respecting the scope of the various heads of legislative power and their interrelation ...

First, as to motive. In *Huddart Parker Ltd v Commonwealth* [(1931) 44 CLR 492 at 515], Dixon J emphasised that once legislative power over a subject-matter is established it is irrelevant to inquire into the motives for its exercise. In the same case Evatt J said [44 CLR at 526]:

“Given the appropriate subject matter, the Commonwealth Parliament may prohibit as well as it may restrict; it may remove restrictions, alter restrictions or add restrictions; it may encourage or discourage; it may facilitate or obstruct. The phraseology is political, and question-begging terms necessarily abound.”

[65] Isaacs J had spoken to the same effect in *State of New South Wales v Commonwealth; Commonwealth v State of New South Wales* (“the *Wheat Case*”) [(1915) 20 CLR 54 at 98].

There is a further general proposition that “a law with respect to a subject-matter within Commonwealth power does not cease to be valid because it affects a subject outside power or can be characterized as a law with respect to a subject-matter outside power”. That proposition, however, does not apply when, as it was put in *Bourke v State Bank of New South Wales* [(1990) 170 CLR 276 at 285], “the second subject-matter with respect to which the law can be characterized is not only outside power *but is the subject of a positive prohibition or restriction*” (emphasis added). That positive prohibition or restriction may merely confine the ambit of the particular head of legislative power within which it is found, or it may be of general application. If the latter, then the other paragraphs in s 51 are to be construed as subject to the limitation.

In *Bourke* itself, it was held that the phrase in s 51(xiii) “other than State banking” imposes a restriction upon federal legislative power generally, rather than a restriction only upon the ambit of s 51(xiii). Other examples of positive prohibitions or restrictions are found in the paragraphs of s 51 dealing with taxation (s 51(ii)) – “but so as not to discriminate between States or parts of States”; bounties (s 51(iii)) – “but so that such bounties shall be uniform throughout the Commonwealth”; insurance (s 51(xiv)) – “other than State insurance”; and medical and dental services (s 51(xxiiiA)) – “but not so as to authorize any form of civil conscription”.

Paragraph (xxxv) is to be read as a whole; it does not contain any element which answers the description in *Bourke* of a positive prohibition or restriction upon what otherwise would be the ambit of the power conferred by that paragraph. Accordingly, there does not arise the further question addressed in *Bourke*, namely, whether other paragraphs of s 51, in particular par (xx), are to be construed subject to a positive prohibition or restriction found ... in s 51(xxxv).

The phrase “conciliation and arbitration” identifies a species of process or procedure embarked upon or engaged in with the objectives introduced by the word “for”, namely, the prevention and settlement of certain industrial disputes, those “extending beyond the limits of any one State”. The AWU submits that the latter words are “functionally equivalent” to the imposition of a direct limit on the powers of the Parliament of the Commonwealth “to deal with industrial matters”. But ... [t]he text of par (xxxv) ... expresses a compound conception; the paragraph contains within it, and not as an exception or reservation upon what otherwise would be its scope, the element of interstate dispute.

[66] *The course of authority*

The course of authority in this Court denies to par (xxxv) a negative implication of exclusivity which would deny the validity of laws with respect to other heads of power which also had the character of laws regulating industrial relations in a fashion other than as required by par (xxxv).

In *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* {(2003) 214 CLR 397}, the Court upheld the validity of laws pertaining to the relationship between employers and maritime employees, so far as they were supported by s 51(i) of the Constitution ...

Victoria did not seek to reopen *CSL* but submitted that it was to be distinguished. This was said to be because (a) par (i) of s 51 contains, by reason of the phrase “among the States”, essentially the same geographical limit as par (xxxv); and (b) this made it “unlikely” that there arose from par (xxxv) “essentially the same limit” when par (i) was relied on to support laws regulating “industrial relations” of those engaged in interstate or overseas trade or commerce. But the presence of a common geographical limit, if that be accepted, is beside the point ... [E]ach head of power expresses a compound and distinct concept; that a law with respect to par (i) of s 51 also bears upon industrial relations does not deny to the law that character, whether or not it might fall outside par (xxxv).

Reference also should be made to *Pidoto v Victoria* [(1943) 68 CLR 87]. The decision in that case necessarily denied the proposition that the defence power is limited by par (xxxv). Whether all that was said on the subject by Latham CJ necessarily **[67]** represents the views of the other members of the majority (Rich, McTiernan and Williams JJ) need not be pursued here. This is because the reasoning of Latham CJ is compelling and should be followed. Latham CJ rejected the submission (in substance, repeated in the present litigation) that par (xxxv) implies a negative. He understood that to mean:

“not only that the Commonwealth Parliament shall have power to legislate in relation to the industrial disputes there defined and in the manner there prescribed, but also that the Commonwealth Parliament shall not have power to deal with any other industrial matter or with any industrial dispute in any other manner” [68 CLR at 101].

Latham CJ continued:

“Section 51 (xxxv) is a positive provision conferring a specific power. The particular terms in which this power is conferred are not, in my opinion, so expressed as to be capable of being so construed as to impose a limitation upon other powers positively conferred. Further, if s 51 (xxxv) were construed so as to prevent the Parliament from dealing with industrial matters except under that specific provision, similar reasoning would lead to the conclusion that the Commonwealth Parliament could not (under *any* legislative power) provide for the use of conciliation and arbitration in relation to any other matter than inter-State industrial disputes. It must, I think, be conceded, for example, that the Commonwealth Parliament can, in legislating with respect to the public service of the Commonwealth (Constitution, s 52 (ii)), provide for conciliation and arbitration in relation to matters such as wages, conditions and hours, whether or not any dispute about those matters is industrial, and whether or not it extends beyond the limits of any one State.” (original emphasis)

The terms in which his Honour expressed his conclusion deny the reservation urged by the AWU that this turned upon the special nature of the defence power in war-time. More recently, in *Re Pacific Coal* [(2000) 203 CLR 346 at 359-60], Gleeson CJ approved what had been decided in *Pidoto* in a passage which now also should be accepted and followed. The Chief Justice said:

“It has often been pointed out that s 51(xxxv) does not empower the Parliament to legislate directly to regulate conditions of employment. 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*. 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 [68] 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’ [*Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 at 522]. 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.”

The attempt by Kirby J to respond to this reasoning sought essentially to substitute for the general principle derived from *Pidoto v Victoria*, a different general principle derived from what Dixon CJ had said in *Attorney-General (Cth) v Schmidt* [(1961) 105 CLR 361 about grants of power “subject to a safeguard, restriction or qualification”:

Kirby J: [133] Whilst the ample approach to the elucidation of the meaning of the several heads of legislative power in ss 51 and 52 of the Constitution is well settled, it is subject to a qualification that derives from the requirement to construe the Constitution as one coherent instrument of government. Such an approach is really rudimentary. It derives not from implications external to the Constitution but from that document’s text and structure. As Latham CJ explained in *Bank of NSW v Commonwealth* (“the *Bank Nationalisation Case*”) [(1948) 76 CLR 1 at 184-5]:

“[N]o single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament. Each provision of the Constitution should be regarded, not as operating independently, but as intended to be construed and applied in the light of other provisions of the Constitution. Thus an endeavour should be made to ‘reconcile the respective powers ... and give effect to all’.”

In the same decision, Rich and Williams JJ said, to like effect [76 CLR at 256-7]:

“[There is] no reason why a Constitution, like any other statute or document, should not be subject to the general rule that every clause should be construed with reference to the context of the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute and to give a meaning if possible to every part thereof.”

In fact, this approach has been consistently applied in at least two particular categories of constitutional interpretation. These are outlined below. The issue is whether, in these proceedings, the same principle applies, by analogy, in the intersection between s 51(xx) and (xxxv).

Express exclusions from power: The first category arises where the head of power in question contains an express exception from the subject matter that it states. There are several paragraphs of s 51 that answer to this description. They include par (xxxii) with respect to the control of railways by the [134] Commonwealth which is limited to “transport for ... naval and military purposes”; and par (xxxiii) referring to the acquisition of any railways of a State but only “with the consent of [the] State” and “on terms arranged between the Commonwealth and the State”. Likewise, par (xxxiv) concerns railway construction and extension in any State but only “with the consent of that State”. Obviously, the grant of power with respect to trading and financial corporations in par (xx) could not be given effect so as to ride roughshod over these restrictions.

Two further express provisions in s 51 make the point even more clearly, being pars (xiii) and (xiv), which empower the Federal Parliament to make laws respectively with respect to banking and insurance. In each such head of power State banking or insurance, as the case may be, is excluded from the designated subject of federal lawmaking but may yet be the subject of federal laws where

such excluded activities “extend[] beyond the limits of the State concerned”. These provisions were the subject of close examination ... in the *Bank Nationalisation Case* and in several cases since.

In *Bourke v State Bank of New South Wales* [(1990) 170 CLR 276], the relationship between the constitutional provision with respect to laws on “State banking” (s 51(xiii)) and the corporations power (s 51(xx)) received particular attention. The reasons of the entire Court, comprising Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, observed [170 CLR at 285]:

“In this context, some qualification must be made to the general principle that a law with respect to a subject-matter within Commonwealth power does not cease to be valid because it affects a subject outside power or can be characterized as a law with respect to a subject-matter outside power ... The principle cannot apply when the second subject-matter with respect to which the law can be characterized is not only outside power but is the subject of a positive *prohibition* or *restriction*. If a limitation is found to be of general application, then the fact that it is contained within one of the paragraphs of s 51 does not deny it a wider operation; the remaining paragraphs are then to be construed as being subject to the limitation” [emphasis added].

The result of this analysis was that, in *Bourke*, this Court unanimously, and in a single opinion, accepted that the words of limitation in s 51(xiii) restricted what would otherwise ... involve such an ample scope for s 51(xx) as to render the prohibition or restriction in par (xiii) nugatory. This Court held that the proper way to understand the limitation expressed in the latter paragraph was so that:

“the words of s 51(xiii) ... require that, when the Commonwealth enacts a law which can be characterized as a law with respect to banking, that law does not touch or concern State banking, except to the extent that any interference with State banking is so incidental as not to affect the character of the law as one with respect to banking other than State banking” [170 CLR at 288-9].

Section 51(xx) refers expressly to “financial corporations formed within the limits of the Commonwealth”. It also refers expressly to “foreign corporations”. Giving those phrases an “ample” meaning, they would obviously [135] include many, if not most (perhaps all), banking corporations operating in Australia ... Clearly, if those words are to be given the full and unrestricted (“plenary”) approach which the Commonwealth urges to the entirety of the language of s 51(xx) of the Constitution, this would render the limitation on federal laws with respect to banking (and insurance), expressed in s 51(xiii) and (xiv), worthless. Parliamentary counsel would simply express the law in question as one with respect to “foreign corporations” and “financial corporations” and the law would, on this hypothesis, walk straight out of the restrictions that the Constitution imposes on the grant of power to make laws with respect to banking and insurance ... Because that could not possibly be the way to construe the Constitution, read as a whole, coherently and consistently, this Court has denied that possibility. By analogy, the plaintiffs invoke a similar approach to the available federal legislative powers in issue in the present proceedings, namely pars (xx) and (xxxv) of s 51.

Powers subject to a guarantee: A second category where, to be made effective as obviously intended, a federal head of power has been read so as to diminish or confine what might otherwise seem to be the grant of plenary powers without restrictions, arises ... where the constitutional text contains a specific provision with respect to a subject matter but limits the exercise of the power by reference to a constitutional guarantee, protective of the legal rights of those potentially affected by the federal law.

One such obvious case arises where the Federal Parliament is empowered to make laws with respect to the “acquisition of property ... from any State or person” [s 51(xxxi)]. In respect of this head of power, there is a restriction of the first type, already described. It limits the acquisition of property envisaged to acquisition of property “for any purpose in respect of which the Parliament has power to make laws”. However, there is, as well, a second, express, restriction, stated by reference to a guarantee protective of the rights of persons who are subject to the exercise of the power. This is the guarantee that such acquisition must be “on just terms”.

This second safeguard, restriction or qualification has been described as a “guarantee” in countless cases, since *Commonwealth v Tasmania (Tasmanian Dam Case)* [(1983) 158 CLR 1] and even before [in *Minister of State for the Army v Dalziel* (1944) 68 CLR 261]. In the face of such a “constitutional [136] guarantee”, this Court has been unwilling to permit federal legislation to avoid the obligation of providing “just terms” by the simple expedient of nominating some other head of legislative power, or subject matter, as the source of the law’s constitutional validity. In *Theophanous v Commonwealth* [(2006) 226 ALR 602 at 604], Gleeson CJ explained the relationship between s 51(xxxi) and the other heads of federal legislative power in s 51 on this footing:

“The qualification to the power [in s 51(xxxi)], contained in the reference to just terms, protects rights of private property. Whatever arguments there may be about the extent of that protection in various circumstances, the existence of the protection has been recognised as an ‘implied guarantee’, with significant consequences for an understanding of the relationship between par (xxxi) and the rest of s 51. If par (xxxi) were intended to be no more than an express conferral of a power of acquisition that would otherwise be implicit in other paragraphs of s 51, then that would not explain the presence of the qualification. *It is an important limitation on power*” [emphasis added].

In a number of cases, particular members of this Court have questioned the use of the language of “guarantee”. They have preferred to describe s 51(xxxi) as the grant of a “power hedged with a qualification” [*Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 48 (McHugh J)]. For my own part, I am content with the description of the requirement of “just terms” as a “constitutional guarantee” ... But whatever the label, it is now established that the legislative powers existing in many of the other paragraphs of s 51, to authorise federal acquisitions, are subject to the “just terms” requirement in s 51(xxxi). No other interpretation of the interacting powers of the Federal Parliament would uphold the purpose of the Constitution, viewed as an entire, inter-related and coherent instrument. It is no answer, in such a case, for the Commonwealth to incant, as it does here, that this is merely another instance of “dual characterisation”.

In *Nintendo Co Ltd v Centronics Systems Pty Ltd* [(1994) 181 CLR 134 at 160], six Justices of this Court explained:

“It is well settled that s 51(xxxi)’s indirect operation to reduce the content of other grants of legislative power is through the medium of a rule of construction, namely, that ‘it is in accordance with the soundest principles of interpretation to treat’ the conferral of ‘an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect’ as inconsistent with ‘any construction of other powers conferred in the context which would mean that they included the same [137] subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification’.”

The principle of construction, cited in *Nintendo*, is taken directly from the reasons of Dixon CJ in *Attorney-General (Cth) v Schmidt* [(1961) 105 CLR 361 at 371-72]. Three points must be noted about the oft-quoted passage in *Schmidt*. First, the principle stated is founded on a general rule of construction. It is not a consequence peculiar to constitutional interpretation, still less the language and purposes of s 51(xxxi). Secondly, the principle explained in *Schmidt* attracted the concurrence of four other Justices. It has been repeatedly applied by this Court so that it is now to be regarded as “settled”. Thirdly ..., the principle is addressed not to a paragraph in s 51 expressed in terms of a “prohibition” but by reference to the existence in the paragraph of a “safeguard, restriction or qualification”. That phrase connotes a provision that may not, as such, be expressed in prohibitive terms.

In the joint reasons in these proceedings, the majority endorses a passage in the reasons of Gleeson CJ in *Pacific Coal* [(2000) 203 CLR 346 at 359-60]. In those reasons, Gleeson CJ states that the constitutional limitation on doing indirectly what could not be done directly is confined to circumstances where the allegedly indirect activity is “prohibited directly”. This criterion is then applied to s 51(xxxv) of the Constitution in its relation to s 51(xx). Because no express “prohibition” is found in s 51(xxxv), it is concluded that that paragraph affords no obstacle to an unbridled interpretation of the ambit of s 51(xx).

The majority in these proceedings may re-express the law to adopt a principle of construction different from that which this Court has earlier adopted and treated as settled. Their Honours may, as they please, adopt a test of “prohibition” in deriving their conclusion about the Constitution’s meaning in this case. However, they should at least do so acknowledging that they are altering the expression of the criterion stated by Dixon CJ in *Schmidt* and applied many times since. That criterion asks not whether the competing head of power ... contains a *prohibition* upon a law based on s 51(xx). As applied to the facts of this case, it asks whether, if a law were enacted, reliant on s 51(xx), it would involve legislation “without the *safeguard, restriction or qualification*” on the propounded subject matter that must be included in order to conform to the constitutional requirements of s 51(xxxv).

If one asks a different constitutional question, one will often receive a different constitutional answer. I prefer to ask the constitutional question that is “well settled” in this Court. I prefer not to substitute a new question, which has not hitherto been endorsed by the Court ...

[138] In my opinion, s 51(xxxv) is analogous to other provisions in s 51 of the Constitution so that it attracts the settled rule of constitutional construction stated by this Court in *Schmidt*. The paragraph

authorises federal legislation on industrial disputes but subject to the two “safeguards, restrictions or qualifications” already mentioned. To be valid, such federal legislation must have the character of interstate nature. It must also provide for the means of independent resolution, that is, resolving ultimate differences by the decision of an independent person or body in a process that answers to the description of “conciliation” or “arbitration”. The Federal Parliament does not enjoy a more general power to make laws with respect to industrial disputes. It cannot do so by purporting to invoke another, less specific, head of power ...

[139] It is not irrelevant that the legislative power conferred on the Federal Parliament by s 51(xxxv) appears amongst the powers granted towards the end of the list in s 51. Each of the immediately preceding legislative powers (s 51(xxxi), (xxxii), (xxxiii) and (xxxiv)) contains a grant of power subject to a “safeguard, restriction or qualification”. As a matter of structure, therefore, it would not be surprising to view s 51(xxxv) in the same light ...

Strong reservations were expressed at the Conventions about the idea (initially propounded by Mr Charles Kingston) that *any* legislative power should be given to the new Federal Parliament to make laws with respect to industrial disputes. In the end, only by restricting the grant of power in the two ways stated (compliance with the necessity of interstate nature and indirect, independent, decision-making) did the provision squeak through to find its place [140] in par (xxxv) of s 51. Clearly, had those two requirements not been included, s 51(xxxv) would not have become part of the Constitution. Having become part, it is not historically or textually valid to treat the paragraph as no more than a grant of legislative power in respect of interstate disputes for which independent resolution by conciliation and arbitration is selected and provided in the law. That would be to turn the clearly intended *restrictions* on federal lawmaking into nothing more than an *optional feature* of a power of a confined kind that could be ignored by invoking other, unconfined, heads of power.

Neither history, nor text, support such an optional meaning for par (xxxv). The reading which the Commonwealth now urges would effectively render the head of power irrelevant. Indeed, this is evident in the major reconstruction of the Act, attempted by the Amending Act. Substantially, save for a few particular provisions, transitional and residual circumstances, the constitutional underpinning upon which the new Act relies is the corporations power. On this hypothesis, s 51(xx) has become a power to make laws with respect to the industrial disputes, industrial relations and workplace relations of constitutional corporations. Yet this is to ignore what s 51(xxxv) says. To confine s 51(xx) by reference to s 51(xxxv) involves no more than giving meaning to both paragraphs of the Constitution, paying due regard to the safeguards, restrictions or qualifications expressed in par (xxxv).

It is not an inappropriate choice of language to describe the preconditions for federal legislation with respect to “industrial disputes”, contained in s 51(xxxv), as fitting within the tripartite expression described by Dixon CJ in *Schmidt*. Indeed, even if one were to confine the broad principle of constitutional construction stated in that decision to instances where the expressed elements of the grant of power constitute a constitutional “guarantee”, the requirement that federal laws operate indirectly through independent resolution by way of conciliation and arbitration can, in my view, properly be described as a type of “guarantee”. Both in its language, and in its history, this is how the power in par (xxxv) has been understood and has operated in Australia for more than a century.

As to *Pidoto v Victoria* Kirby J said:

Kirby J: [152] In the joint reasons, reliance is placed upon this Court’s wartime decision in *Pidoto v Victoria* [(1943) 68 CLR 87]. Reference is made to the interpretation of that case by Gleeson CJ in *Pacific Coal* [203 CLR at 359-60]. In that decision, his Honour stated that *Pidoto* denied an interpretation of s 51(xxxv) as importing a negative implication on the use of other heads of federal power to enact laws with respect to conditions of employment – in other words, laws generically answering to the description of laws with respect to industrial relations. The holding in *Pidoto* was that laws enacted under the defence power in time of war, dealing with industrial matters in ways that would not have been valid if enacted under s 51(xxxv), were nonetheless valid. The decision is one unique to the exceptional circumstances affecting the ambit of the defence power during hostilities that threaten the life of the nation.

In his reasons in *Pidoto* [68 CLR at 127-8], Williams J referred to an earlier elaboration of the law in *Victorian Chamber of Manufactures v Commonwealth (Women’s Employment Regulations)* [(1943) 67 CLR 347 at 400-1]. In that decision, his Honour had said of the defence power in this connection:

“The paramount consideration is that the Commonwealth is undergoing the dangers of a world war, and that when a nation is in peril, applying the maxim *salus populi suprema lex*, the courts must concede to the Parliament and to the Executive which it controls a wide latitude to determine what legislation is required to protect the safety of the realm ...

Similar circumstances to those which in times of war enable the Parliament of Canada to encroach upon matters which in normal times are exclusively reserved to the States [*sic*] enlarge the operation of the defence power of the Commonwealth Parliament to enable it to legislate so as to affect rights which in normal times are within the domain reserved to the States”.

The reference in these passages to “reserved to the States” is not a reference to the pre-*Engineers Case* doctrine of reserved State powers. Williams J would have been fully aware of the decision in the *Engineers Case*. His reference should therefore be understood as meaning that, in times of war, the defence power may permit the Federal Parliament to legislate on matters, and in ways, that are ordinarily forbidden as beyond federal legislative power, and which would in fact be beyond the scope of the defence power during peacetime ...

[153] In *Pidoto*, drawing on his earlier analysis, Williams J said [68 CLR at 127]:

“It follows from [*Victorian Chamber of Manufactures*] that the fact that there is an express power to legislate under placitum xxxv with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State does not deprive the Commonwealth Parliament of its power under placitum vi to legislate with respect to intra-State disputes where that legislation can be justified as legislation capable of aiding in the prosecution of the war.”

This conclusion is inherent in the longstanding doctrine of this Court that the defence power, provided to the Federal Parliament in s 51(vi) of the Constitution, expands and contracts in its content, having regard to the needs for its engagement [*Andrews v Howell* (1941) 65 CLR 255].

In his reasons in *Pidoto*, invoked by the majority in these proceedings in support of an ambit of s 51(vi) uncontrolled by reference to s 51(xxxv), Latham CJ relied on the longstanding power of the Commonwealth to legislate with respect to the employment of its public service [s 52]. He put that instance forward as a supposed illustration of the inapplicability of par (xxxv) of s 51 to limit the meaning of par (vi) as a universal proposition. However, this argument was not sound. The power of the Federal Parliament to legislate with respect to the federal public service is one of the exclusive powers contained in s 52 of the Constitution, not a concurrent power expressed in s 51. No State Parliament would, accordingly, have any power to deal with industrial disputes concerning the federal public service. As well, the restriction and limitation in s 51(xxxv), appearing in another section of the Constitution, is not so obviously applicable to the ambit of a grant of power in, say, s 52(ii).

In any case, the regulations challenged by Mr *Pidoto* and other members of the Public Works Department of Victoria in *Pidoto* are also clearly distinguishable from the Amending Act challenged in this case. *Pidoto* concerned the validity of the National Security (Industrial Peace) Regulations and of particular provisions of the National Security (Supplementary) Regulations. [154] These regulations were intimately connected with the efficient prosecution of the Second World War. They did not purport to transfer to s 51(vi) the constitutional foundation for federal legislation relating to the prevention and settlement by conciliation and arbitration of particular industrial disputes. This was clearly understood by Latham CJ, who said [68 CLR at 100]:

“The Regulations, therefore, do not deal with industrial matters generally, but only with industrial matters which in the opinion of the Court or of the Minister or of a conciliation commissioner are actual or probable sources of industrial disturbance, or in the opinion of the Court should be dealt with in the interests of national security. The Regulations do not relate to industrial matters irrespective of the possibility of industrial disputes or of relation to national security. They are, therefore, in my opinion, distinguishable in this essential particular from the regulations considered in the *Victorian Chamber of Manufactures v Commonwealth (Industrial Lighting Regulations)* [(1943) 67 CLR 413]. Those Regulations were not limited in any way by reference to possible industrial disturbance or to possible effect upon national security.”

The result is that neither the decision in *Pidoto*, nor the presence of par (vi) in s 51, causes serious difficulty for the plaintiffs’ central argument. By its essential nature and purpose, the defence power is a very special one, particularly in the urgencies of actual wartime. Whilst subject to the other provisions of the Constitution, in time of hostilities the defence power is given a large and exceptional

reading so that it can fulfil its objective purpose in the overall constitutional design. This is the correct explanation of *Pidoto*.

Callinan J (at 238) agreed that *Pidoto* could be explained away on a similar basis. As for the proposition derived from *Bourke*, confining the relevant cases to those of “[234] a positive prohibition or restriction”, he opined that “that statement cannot be accepted in the absolute terms in which it is put”. He added that: “In any event, *Bourke* was decided before *Lange* [*v Australian Broadcasting Corporation* (1997) 189 CLR 520], which holds that the exercise of any constitutional power is, if relevant to it, subject, not just to a positive restriction, but to a negative one and a merely implied one at that, of freedom of political communication.”

Yet if the dissenting arguments were to succeed, it may have been necessary to carry them further, and to give apodeistic rather than merely emotive force to Kirby J’s protest that the majority view “[118] would, in effect, render the industrial disputes power in par (xxxv) otiose, or at least optional for most purposes, effectively consigning it to ... insignificance”.

On every question of characterisation, the ultimate test to be satisfied is that of “sufficient connection”. But this is not a self-contained or self-executing test. The *Oxford English Dictionary* defines “sufficient” as meaning “[o]f a quantity, extent, or scope *adequate to a certain purpose or object*” (emphasis added). That is, the relevant assessment of “adequacy” can only be made by reference to the “purpose or object” to be served. The connection that is required between a law and its supporting head of legislative power need not be “close” or “direct”; it need only be *sufficiently* “close” or “direct” to support that particular law. But what is sufficient to support one law may not suffice to support another: a particular law may “go too far” for the sufficiency of the connection to be sustained.

There is some analogy here with the test laid down in the *Bank Nationalisation Case* (*Commonwealth v Bank of New South Wales* [1950] AC 235) for impermissible interference with freedom of interstate trade: a law will not be invalid merely because it results in “[310] some indirect or consequential impediment which may fairly be regarded as remote”. In *SOS (Mowbray) Pty Ltd v Mead* (1972) 124 CLR 529, Barwick CJ explained that test by using the metaphor of widening ripples from a stone cast into a pond: he concluded that “[551] all that the law produces in its application to the facts is within its operation until [the] point of remoteness is reached; or it can be seen that the effect is but a consequence. All that impact which is not remote or mere consequence is direct and immediate in the relevant sense.” In short, everything is sufficiently direct until it is too remote – that is, until it “goes too far”.

The joint majority judgment in the *WorkChoices* case did in effect consider two ways in which a law might be said to “go too far” for the sufficiency of its connection with power to be maintained. One was “Higgins’ list of horrors” (see Chapter 17, §1): the catalogue of anomalous consequences that might follow if s 51(xx) were not confined within justiciable limits. The other was a perceived distortion of the “federal balance”. The five majority judges rejected the first of these yardsticks by insisting that constitutional interpretation ought not to be swayed by “[57] extreme examples or distorting possibilities”. (See also Mason J in *Western Australia v Commonwealth (First Territory Senators Case)* (1975) 134 CLR 201 at 271.) They rejected the second by asserting, first, that the notion of “federal balance” was merely a presupposition, erroneously smuggled in as antecedent to the task of characterisation; and, second, that in any event it supplied no objective content against which the sufficiency of connection with power could be determined.

Yet it is possible to conceive of other ways in which a law might be said to “go too far”, and which do provide an objective yardstick. One is the extent to which a law offends against traditional notions of civil liberties (such as freedom of speech) or the rule of law. It was on such a ground that in *Davis v Commonwealth* (1988) 166 CLR 79 a unanimous High Court held that federal legislative power did not extend to the restricted lexical choices allowed by the *Australian Bicentennial Authority Act 1980* (Cth), on the ground that the restrictions were “[100] grossly disproportionate” and “reach too far”. Similarly, it was on such a ground that

in *Actors & Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, the “deeming” provision imputing responsibility to trade unions for the acts of their officers was held to have, as Mason J put it, “[211] a very remote connexion with corporations, a connexion so remote that the provision cannot be characterized as a law with respect to corporations”.

Such decisions do not entail a suggestion that legislation can *never* interfere with basic common law values. On the contrary, it constantly does so. What is involved is a double question of degree: the impugned law is measured both for the degree of strength or directness or obviousness of its connection with the head of power relied upon, and for the extent and severity of its adverse impact on traditional values. The question is whether *this* degree of connection is sufficient to support *this* degree of adverse impact.

In just the same way, one might argue that a law enacted in purported reliance on one head of power might “go too far” because of the extent and severity of its adverse impact on another head of power. The argument would be that where the impact of legislation under one head of power entails such an extensive incursion into the territorial “field” of another as to leave it with no operative content (or very little operative content), the incursion will only be valid in a case where the connection with the head of power relied on is sufficiently “strong” or “close” to support *that incursion*. In the *WorkChoices* context, such an argument would be fully compatible with recognition that legislation under other heads of power (including s 51(xx)) may sometimes operate validly and even extensively on the subject matter of s 51(xxxv).

Obviously, such an argument would also be compatible with the result in *Pidoto v Victoria*, where the relevance of the legislation to defence purposes was close and obvious, and the incursion into the area of conciliation and arbitration was relatively minor. (Indeed, the actual decision involved no incursion into the sphere of s 51(xxxv) at all, since the applicants were State employees whose claims *could not* have attracted jurisdiction under s 51(xxxv).) Nor would the argument entail any conflict with the language used in *Pidoto*, since (adapting the language of Latham CJ in that case) it does not depend on any suggestion that the “[101] terms” of one head of power are “capable of being so construed as to impose a limitation upon other powers positively conferred”. The argument entails no definitional limit on the ambit of any head of power, but only a limit on the extent to which a power can sometimes be used.

It is unclear whether, in order to be persuasive, such an argument would have to be shown to hold good for the relations between *all* heads of Commonwealth power. One possibility is that the issues arising from particular powers, or particular combinations of powers, are so different that it is simply a mistake to seek for a single uniform rule to govern all possible cases. On the face of it, for example, the above argument would be difficult to reconcile with the settled understanding of the relationship between paragraph (xxix) of s 51 and paragraphs (x) and (xxx), the former relating to “external affairs” and the latter respectively to “fisheries in Australian waters beyond territorial limits” and “the relations of the Commonwealth with the islands of the Pacific”. In both cases, it seems clear that laws validly enacted under s 51(xxix) might so comprehensively “cover the field” of the other paragraphs referred to as to leave them with no effective operation at all. On the other hand, the proposed understanding of “sufficient connection” might be satisfied in these cases because any such laws would have such a strong or obvious connection with “external affairs” as to satisfy the suggested criterion.

Alternatively, it might be possible to explain these cases as reflecting the particular history of paragraphs (x) and (xxx). Thus, in the *Seas and Submerged Lands Case* (1975) 135 CLR 337, Mason J rebutted the argument relating to paragraph (x) by explaining “[471] that control and regulation of fisheries beyond territorial limits was regarded as having such importance as to require its specific mention in s 51”: because the power had been included in

the *Federal Council of Australasia Act 1885* (Imp), its omission might have had “untoward significance”. A similar argument can be made for paragraph (xxx): indeed, at the 1898 Convention, the overlap of paragraph (xxix) with paragraphs (xxix) and (xxx) was justified by Edmund Barton in precisely those terms (*Convention Debates* (Melbourne 1898) vol IV, p 30).

Whether an argument on the above lines would have sufficed to change the result in the *WorkChoices* case is (to say the least) open to doubt. Yet it might at least have enabled the dissenters to mount a more persuasive case.

CHAPTER 16 §4

If the *Fairfax* decision (*Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1) represented a crucial step in the transition away from the older assumption that any law must have a “true” characterisation, so that as between alternative characterisations it was possible and necessary to choose that one which was “really” appropriate, it is not surprising that the judgments continued at times to use language appropriate to that older assumption. As already noted, what Menzies J said about the “[18] true character” of a law directed to the suppression of heroin was rejected in the *Second Fringe Benefits Tax Case* (1987) 163 CLR 329. But equally, Kitto J had prefaced his analysis by postulating a question “[7] 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 of those subjects than an interference so incidental as not *in truth* to affect its character?” (Emphasis added.)

In *New South Wales v Commonwealth (WorkChoices Case)* (2006) 231 ALR 1, Kirby J seized on this language to support his contention that the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), substantially reshaping the *Workplace Relations Act 1996* (Cth), was “in truth” to be characterised as an exercise of power under s 51(xxxv) of the Constitution – though he sought to dissociate himself from the fallacy of a single objective “truth” which such language might appear to imply.

New South Wales v Commonwealth (WorkChoices Case)
(2006) 231 ALR 1

Kirby J: [128] Any decision-maker, approaching criteria expressed by reference to adjectival [129] expressions such as “true”, “real” or “in truth”, will understand that he or she has reached the point where further verbal explanation is impossible. An opinion, in the nature of a judgment, must be provided. Legal analysis, expressed in words, can only go so far. To pretend otherwise is to succumb to the mesmerising effect of verbal formulae. It is to deny the inescapably personal judgment of the decision-maker in an illusory quest for an entirely scientific objectivity that does not exist in the task of legal characterisation.

This conclusion does not make the task at hand extra legal in its basic character. But it does demand recognition of the opinionative assessment that is ultimately involved in constitutional characterisation. Such assessments are matters upon which, inevitably, reasonable minds can differ. Of their nature, there will often be more than a single available answer.

On that basis he went on to hold “[148] that the content of the power afforded to the Federal Parliament under s 51(xx) ... does not extend to a power to make laws that, *in truth*, relate to industrial disputes” (italics added); and that “[151] *properly characterised*, the Amending Act is one with respect to the prevention and settlement of industrial disputes necessary for the regulation of industrial relations”, so that “s 51(xx) will not sustain its validity” (italics added).

The joint majority judgment was quick to point out that this approach was fallacious.

Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ: [19] To describe a law as “really”, “truly” or “properly” characterised as a law with respect to one subject-matter, rather than another, bespeaks fundamental constitutional error. That error is compounded if the conclusion which is reached about the one “real” or “true” or “proper” character of a law proceeds from a premise which assumes, rather than demonstrates, a particular division of governmental or legislative power, or if it proceeds from the mischaracterisation of the subject-matter of s 51(xxxv) as “industrial relations”. Resort to undefined concepts of “industrial affairs”, “industrial relations”, and “industrial matters” (all of which have somewhat different meanings) should not be permitted to obscure the fact that s 51(xxxv) uses none of those expressions; it speaks of “industrial disputes”.

Kirby J responded unrepentantly: “[129] To have heresy alleged by those who participated in the joint reasons of this Court in *Combet* [*v Commonwealth* (2005) 221 ALR 621] is an accusation to be borne with an easy heart.” (As to *Combet* see Chapter 24, §1).