

The plaintiffs in *New South Wales v Commonwealth (WorkChoices Case)* (2006) 231 ALR 1 relied on the *Melbourne Corporation* principle in part as directly applicable in its own right, and in part as supporting a broader argument that the majority view would disturb the “federal balance” by giving the Commonwealth too much power at the expense of the States. The specific application of the *Melbourne Corporation* principle was said to arise particularly in relation to s 117 of the amended *Workplace Relations Act* 1996 (Cth), which empowers the Australian Industrial Relations Commission to make an order restraining a State industrial authority from dealing with any matter “that is the subject of a proceeding before the Commission under this Act”. The argument against s 117 was also put in other ways. It was said that any order made under s 117 would purport to restrain a State authority from any attempt “[101] to apply, enforce and uphold valid and [102] operational State laws” or alternatively that such an order would be “a direct prohibition on the performance by an organ of State government of its constitutional functions”; and on either of these bases there was said to be an infringement of s 106 of the Constitution (“The Constitution of each State ... shall, subject to this Constitution, continue as at the establishment of the Commonwealth”). There was also a more general argument that the legislative powers of the Commonwealth could not be used “in such a way as to interfere with the functions of State executives”.

The joint majority judgment pointed out that none of these objections had ever been raised against previous versions of s 117, which had given similar powers to the Industrial Relations Commission in the exercise of its functions as conferred by legislation under s 51(xxxv) of the Constitution. On the contrary, there were several cases in which it had been said or assumed that such provisions were valid.

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Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ: [102] It is true that these cases are not, strictly speaking, authorities against the first two arguments advanced by South Australia [ie those based on s 106 and on *Melbourne Corporation*], for the arguments do not appear to have been advanced in those cases or at any other stage in the last 100 years. On the other hand, the novelty of the arguments may be seen as a badge of their lack of merit. And if the fact that no-one has ever thought it [103] worthwhile to argue that the precursors of s 117, which were supported by s 51(xxxv) and (xxxix), were invalidated by s 106 or by the doctrine in *Melbourne Corporation* is an indication that the arguments to that effect lack merit, similar arguments employed against a provision to the effect of s 117, supported by s 51(xx), are likely to have no greater merit.

Turning to the first argument advanced by South Australia [in reliance on s 106], it is necessary to note three respects in which s 117 is of limited application. First, the power only exists where the State industrial authority is dealing or about to deal with a matter that is the subject of the proceeding before the AIRC – that is, the same matter, not some other matter remotely connected to the matter before the Commission. Secondly, contrary to the submissions of South Australia, it is not the case that in its standard operation s 117 will permit orders preventing a State from enforcing one of its own valid laws, because of s 16(1)(a) [see Chapter 9, §4]: if the matter in the State industrial authority involves an industrial law of that State, and if s 16(2) and (3) do not apply, the law is invalid to the extent of its inconsistency with s 16(1)(a) by reason of s 109 of the Constitution. Thirdly, when s 117 is read with pars (a) and (b) of the definition of “State industrial authority”, it can be seen that it does not give power to make orders directed against courts, for example State Supreme Courts, exercising their ordinary civil and criminal jurisdiction. It is true that par (c) of the definition of “State industrial authority” gives power to prescribe a “court” for the purposes of that definition, but no prescription has been made, and the question whether s 117 is valid in its grant of power to make orders against a State Supreme Court if a State Supreme Court were ever prescribed can be left to the day when it is. Hence, s 117 at present gives no power to make orders directed at the core of State judicial systems. It follows that the reasoning of Brennan and Toohey JJ in *Re Tracey; Ex parte Ryan* [(1989) 166 CLR

518 at 574-5, invoking s 106 against interference with ordinary State courts] is not applicable to the present case ...

[The reliance on s 106] raises the question of whether the constitution and operation of a board or court of conciliation or arbitration, or a tribunal, body or person, having authority under a State Act to exercise any power of conciliation or arbitration in relation to industrial disputes within the limits of that State could be described as part of the “Constitution” of the State within the meaning of s 106. The content of that term used in s 106 is not finally settled in this Court. Certainly, determination of the answer to that question would call for a close examination of the laws of that State with a view to deciding which are, and which are not, part of its Constitution ... South Australia essayed no examination along these lines ... It is not for this Court to engage in that type of analysis of its own motion in a case in which no concrete industrial dispute between litigants is before the courts “and where, as a consequence, there is no factual situation against which the relevant [104] limits of the constitutional power can be brought into focus” [*R v Moore; Ex parte NSW Public Service Professional Officers’ Association* (1984) 154 CLR 1 at 22]. The Court ordinarily seeks to decide the issues before it in the light of detailed submissions advanced with notice to all parties, rather than by pursuing suggestions by one party for lines of research to be conducted by the Court independently after the hearing, without assistance from counsel and without notice to opponents of the party making the suggestion. It may be said, however, that normally the bodies dealing with industrial disputes or factories are specialist entities established for specific purposes and liable to change from time to time as the legislature sees fit. Even if it were to be accepted that the laws regulating State bodies of this kind may be part of the Constitution of the relevant State, it has not been demonstrated in these proceedings that that is the case in any State.

The same difficulty prevents acceptance of South Australia’s contention that, so far as a relevant State industrial authority is an “executive tribunal”, a s 117 order by a Full Bench would be a direct prohibition on the performance by an organ of the State government of its constitutional functions. It has not been shown that the “constitutional” functions referred to in South Australia’s submission are part of any State’s “Constitution”.

South Australia’s second argument, that based on *Melbourne Corporation*, must also be rejected. The interference which s 117 permits is relatively minor. The interest of a State in having a “State industrial authority” determine a matter in a way which is likely to lead to a conflict with the handling of that matter by a Full Bench of the AIRC is not so vital to the functioning of the State that it can be said, as South Australia asserted, that it affects the capacity of the State to “function as a government” or to “exercise constitutional functions”.

South Australia’s third argument, too, must be rejected. The argument was that s 51(xx) could not support the consequences which would flow from s 117. However, if, as Knox CJ, Isaacs, Higgins, Gavan Duffy, Powers, Rich and Starke JJ held in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Engineers & c (State) Conciliation Committee* [(1926) 38 CLR 563], the earlier provisions to the effect of s 117 are within the power conferred by s 51(xxxv) and (xxxix) of the Constitution, and if, as held elsewhere in this judgment, s 51(xx) supports the other provisions of the new Act, one could not conclude that s 51(xx) and (xxxix) do not support s 117 unless some relevant difference between s 51(xxxv) and s 51(xx) were identified. No relevant difference has been identified. Both the precursors to s 117, and s 117 itself, enable an otherwise valid federal system for the regulation of industrial relations to operate efficaciously without interference from a State body dealing with the same matter under State law. It was not explained why s 117 was not incidental to the exercise by the Parliament of its power under s 51(xx) to enact the rest of the new Act. To put the same point in a different way, the submission identified a desired conclusion, but advanced no reason why that conclusion should be drawn.

Hence all the challenges to s 117 fail.

It was also argued that s 16 of the Act, excluding the operation of State laws, “[100] impermissibly curtails, or interferes with, the capacity of the States to function as governments”. However, a more direct attack on s 16 as an attempt to “manufacture inconsistency” was rejected by the joint judgment (see Chapter 9, §4), and that rejection was said to make the argument based on *Melbourne Corporation* “very difficult to sustain”.

The dissenting judgments took these issues much more seriously: indeed, for Callinan J the essential vice of the impugned legislation was its distortion of “the federal balance”.

Callinan J; [225] Let me make clear what I mean by the “federal balance” before I continue. It is, essentially, a sharing of power, even of power which the Commonwealth can monopolize under a specific constitutional grant if and when it chooses to ... invoke s 109 of the Constitution, and the exercise of different powers of varying importance by each of the Commonwealth and the States, but not so that, relevantly for present purposes, the essential functions and institutions of the States, for example, internal law and order, their judiciaries, and their Executives are obstructed, impeded, diminished, or curtailed. Even when the Commonwealth does have the relevant power, the exercise of it may be unconstitutional ...

The text, indeed the whole structure, of the Constitution clearly mandates the co-existence of the Commonwealth and the States. Whilst Griffith CJ well understood that it was the Court’s duty to construe the Constitution as a constitution for a nation and not some assemblage of minor organizations, he never lost sight of the fact that it was a “compact” for a federation. He and other founders also understood from their knowledge of the Constitution and history of the United States that a federation of robust components was not antithetical to nationhood. The Commonwealth is the creature of the Constitution. Its powers are specific and enumerated. All not so specified and enumerated are powers of the States. Those that they possessed at the establishment of the Commonwealth “continue” [s 107]. It is only in certain circumstances that the Commonwealth may act exclusively, and in others the States enjoy what is in truth an immunity, despite the distaste of the majority in the *Engineers’ Case* for that concept.

There is nothing in the text or the structure of the Constitution to suggest that the Commonwealth’s powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society. This Court too is a creature of the Constitution. Its powers are defined in Ch III, and legislation made under [226] it. The Court goes beyond power if it reshape the federation. By doing that it also subverts the sacred and exclusive role of the people to do so under s 128 ...

There are statements in the joint judgment, impliedly at least, disparaging, not only of the expression, “the federal balance”, but also of the very concept of it. In my respectful opinion they fail to pay due regard to our predecessors on this Court who never doubted the importance of that concept. Starke J, who had joined in the joint reasons in the *Engineers’ Case*, made clear in subsequent cases that the Court’s reliance upon textualism in the *Engineers’ Case* is qualified by the existence and need to maintain the federal balance. In *South Australia v Commonwealth [(First Uniform Tax Case) (1942) 65 CLR 373 at 442]* he said:

“The government of Australia is a dual system based upon a separation of organs and of powers. The maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers. Therefore it is beyond the power of either to abolish or destroy the other. *The limited grant of powers to the Commonwealth cannot be exercised for ends inconsistent with the separate existence and self-government of the States, nor for ends inconsistent with its limited grants*”. (emphasis added)

Later, in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria [(1942) 66 CLR 488 at 515]*, Starke J said this:

“The maintenance of the States and their powers, as I have said before, is as much the object of the Constitution as the maintenance of the Commonwealth and its powers. It is inconsistent with the Federal system set up by the Constitution that the Commonwealth should enact legislation compelling the States, as such, to take or to refrain from taking any action, or to expend their revenues, in manner prescribed by the Commonwealth.”

Starke J repeated these two passages in *Melbourne Corporation v Commonwealth*.

In a well-known passage in *Victoria v Commonwealth (Payroll Tax Case) (1971) 122 CLR 353 at 395-7* (see Chapter 7, §4), Windeyer J explained the *Engineers Case* as part of a wider historical process in which the States (which had never been “[395] sovereign bodies in any strict legal sense”) had progressively lost power to the Commonwealth. Callinan J found that passage unhelpful:

Callinan J; [228] I do not, with respect, regard all of his Honour’s statement there as helpful for several reasons. To say that the colonies were not before federation “sovereign bodies” in any strict legal sense leads nowhere. As the history of very infrequent sovereign intervention in colonial affairs

discussed in *Attorney-General (WA) v Marquet* [(2003) 217 CLR 545 at 562] shows, intervention by the Imperial Parliament or the Executive practically never occurred after separation of the respective colonies. The *Colonial Laws Validity Act 1865* (Imp) conferred very extensive powers to legislate upon the colonies which they vigorously exercised. Relevantly for present purposes, they legislated in all necessary detail for and in respect of companies. Nor does it lead anywhere to say, as Windeyer J did, and the majority has approved, that the Constitution did not make the States sovereign [229] bodies. What is of real relevance, however they may be described, was that they are, and were, polities with popularly elected governments exercising extensive powers with the capacity to affect the rights, obligations and property of people, including one of the most important powers of all, to establish and maintain Supreme Courts with the same powers as the ancient courts at Westminster and their successors. The States may not have gained any new powers at federation, but federation affirmed and enlarged them as substantial and permanent polities of a kind quite different from mere colonies. Windeyer J argues that it was seen from an early date that it was likely that the Commonwealth would “enter progressively ... [and] indirectly, into fields that had formerly been occupied by the States” and that this process was accelerated by the *Engineers’ Case*. His Honour does not mention by whom or when this was foreseen as likely to occur.

The disagreement in *Austin v Commonwealth* (2003) 215 CLR 185, as to whether the two “limbs” of *Melbourne Corporation* should be seen as “[249] but one limitation”, was not one which Callinan J saw any need to resolve:

[232] Regardless of the differences between the two sets of reasons [in *Austin*], and regardless whether the two concerns of Dixon J in *Melbourne Corporation* should be seen as really being the one, each of the Justices clearly subscribed to the concept of a real division of power, that is to say, the realities of a federal system and the necessity of its constitutional survival. Neither *Melbourne Corporation*, other cases in which it has been cited with approval, nor *Austin* is determinative of this one. What all of those cases do however, is compel that in any constitutional contest between the Commonwealth and the States, careful regard be had, and significance attached to what I have described as the federal balance ...

[233] The federal balance is not to be maintained as a matter of political or social preference, but as a matter of constitutional imperative. It may only yield, if it is to yield at all, to the exercise of the defence power (or perhaps, on occasions, the external affairs power) in circumstances of the gravest danger to the nation. As Dixon J said in *Australian Communist Party v Commonwealth* [(1951) 83 CLR 1 at 203]:

“The Federal nature of the Constitution is not lost during a perilous war. If it is obscured, the Federal form of government must come into full view when the war ends and is wound up. The factors which give such a wide scope to the defence power in a desperate conflict are for the most part wanting.”

The Constitution mandates a federal balance. That this is so should be closely and carefully kept in mind when construing the Constitution. That the federal balance exists, and that it must continue to exist, and that the States must continue to exist and exercise political power and function independently both in form and substance, until the people otherwise decide in a referendum under s 128 of the Constitution, are matters that necessarily inform and influence the proper construction of the Constitution. The Act here seeks to distort that federal balance by intruding into industrial and commercial affairs of the States ...

[236] It is important to notice that s 51(i) specifically recognizes and contemplates legislation by the Commonwealth for the promotion of trade and commerce, not only with other countries but also “among the States”. In doing so, it necessarily recognizes that the States have their own economies, that is, internal trade and commerce, which exist side-by-side with, but may also be part of, the national economy. The enhancement and the regulation of a State economy [237] and industrial affairs within it could hardly be fairly described as anything other than essential functions of a State ...

Some of the other placita of s 51 have ... language which carefully distinguishes between what can be done legislatively by the Commonwealth independently and exclusively of the States, and what can only be done deferentially to State power or State action, for example banking and insurance. Other placita and sections of the Constitution insist upon non-discrimination. The taxation power (s 51(ii)) prevents the Commonwealth from enacting taxation laws discriminating between States or parts of States. Section 51(iii) may be contrasted with s 51(xxxv) in that the former provides that bounties shall

be uniform throughout the Commonwealth, whereas the latter contemplates Commonwealth intervention ... only when there is, as it has inelegantly been put, the “interstateness” of an industrial dispute ...

[238] Section 51(xiii) and (xiv) ... use relevantly similar language to s 51(xxxv), by confining Commonwealth powers, with respect to banking and insurance, to banking and insurance extending “beyond the limits of the State concerned”. It seems to me to be objectively reasonable and correct to infer from s 51(xiii), (xiv) and (xxxv), that those who wrote the Constitution very carefully turned their minds to, and adopted language to mark out and distinguish, as this [239] Court should, between federal legislative powers that could be exercised over activities conducted by or within States, and those conducted across the borders of the States ...

[242] Other relevant provisions of the Constitution ... need to be noticed. Section 107 is one of these. Its use of language, including “power ... unless ... withdrawn from the Parliament of the State [shall] continue”, cannot be airbrushed out of the Constitution by the “explosion” of the doctrine of implied intergovernmental immunities or reserved powers, as Barwick CJ appears to have done in *Rocla Pipes* [124 CLR at 485]. Apart from citing passages from the judgment of Griffith CJ in *Huddart Parker* in which s 107 arises [8 CLR at 352, 354], Barwick CJ made no attempt in *Rocla Pipes* to reconcile that section with other sections of the Constitution, so as to give it real meaning and substance. Section 107 is an important one. Nothing unfavourable to the States turns upon the use of the word “continue” rather than “reserve” which is used in the Tenth Amendment of the Constitution of the United States. Indeed the contrary is the case. The Australian provision is a saving provision, thereby emphasizing the continuation of power unless “exclusively” vested in the Commonwealth.

The language of s 128 of the Constitution has bearing upon the meaning of other sections of the Constitution. It places the States in a special position with respect to constitutional stability. Read with s 107 it necessarily imposes a limitation upon any expansion of central power and is not be circumvented by judicial intervention. It is also of central importance to other matters: the federal balance and the continued existence of discrete State powers. The requirement that for constitutional change there must be a majority of votes *in a majority of the States* makes this clear. Section 128 is not expressed to be subject to any other provision of the Constitution. And of course it is not. It is an overarching provision. It is certainly not to be trumped by Ch III of the Constitution. If it were, the Court would be elevated above the people.

Both Callinan and Kirby JJ concluded, in dissent, that the legislation must be characterised as a law with respect to industrial relations under s 51(xxxv), and that s 51(xx) must be read as subject to what Callinan J described as “[275] the implied negative restriction imposed by s 51(xxxv)”. Among the reasons given by Callinan J for these conclusions were the following:

Callinan J: [275] (vii) To give the Act the valid operation claimed by the Commonwealth would be to authorize it to trespass upon essential functions of the States. This may not be the decisive factor in the case but it at least serves to reinforce the construction of the Constitution which I prefer, that industrial affairs within the States, whether of corporations or of natural persons, are for the States, and are essential for their constitutional existence.

(viii) The validation of the legislation would constitute an unacceptable distortion of the federal balance intended by the founders, accepted on many occasions as a relevant and vital reality by Justices of this Court, and manifested by those provisions of the Constitution to which I have referred, and its structure.

For Kirby J the issue of “federal balance” was not so pressing. In his view the vice of the legislation lay in its departure from the traditional Australian approach to industrial relations established under s 51(xxxv). But he, too, invoked “[144] the federal structure and character of the Constitution” as an “additional consideration” supporting his view that the expressions used to circumscribe legislative power under s 51(xxxv) should also operate as limitations on any relevant exercise of power under s 51(xx). He treated this approach as “[148] reinforced by the overall federal structure and design of the Australian Constitution”, and denied that such arguments entailed “an unacknowledged reversion to the constitutional notions that held sway before this Court’s decision in the *Engineers Case*”.

Kirby J: [148] The rule of construction expressed in the *Engineers Case* is not an absolute one. It does not contemplate that the Federal Parliament could use its identified heads of legislative power to destroy the States and their express and implied role in the Constitution. It is impossible to ignore the place envisaged for the States in the Constitution. Reference is made to that role throughout the constitutional document. It is the people of the several States who “agreed to unite in one indissoluble Federal Commonwealth”. Both in the covering clauses and [149] in the text of the Constitution itself, the federal character of the polity thereby created is announced, and provided for, in great detail.

Under the Constitution, the position of the federal government is necessarily stronger than that of the States for the reasons that Dixon J explained in *Melbourne Corporation v Commonwealth* [(1947) 74 CLR 31 at 82-3]. But it would be completely contrary to the text, structure and design of the Constitution for the States to be reduced, in effect, to service agencies of the Commonwealth, by a sleight of hand deployed in the interpretation by this Court of specified legislative powers of the Federal Parliament. Specifically, this could not be done by the deployment of a near universal power to regulate the “corporations” mentioned in s 51(xx). Such an outcome would be so alien to the place envisaged for the States by the Constitution that the rational mind will reject it as lying outside the true construction of the constitutional provisions, read as a whole, as they were intended to operate in harmony with one another and consistently with a basic law that creates a federal system of government for Australia.

In applying the doctrine in the *Engineers Case*, this Court has repeatedly given effect to reasoning that has confined the ambit of express grants of federal legislative power so that they could not be used to control or hinder the States in the execution of their central governmental functions. Once such an inhibition on the scope of federal legislative powers is acknowledged, derived from nothing more than the implied purpose of the Constitution that the States should continue to operate as effective governmental entities, similar reasoning sustains the inference that repels the expansion of a particular head of power (here, s 51(xx)) so that it would swamp a huge and undifferentiated field of State lawmaking, the continued existence of which is postulated by the constitutional language and structure. Why, for instance, bother to have State Parliaments, with significant federal functions to perform, if by dint of an interpretation of s 51(xx) of the Constitution the legislative powers of such Parliaments could effectively be reduced unilaterally by federal law to minor, or even trivial and continually disappearing functions, specifically in the laws governing industrial disputes? Relatively few important activities in contemporary Australia have no direct or indirect connection with a corporation, its employees, agents and those who trade with it ...

[150] The foregoing conclusion has been reached by reference to the text and structure of the Constitution. However, there is a still further, and connected, consideration. This is the overall design of the Constitution as an instrument of government intended to distribute and limit governmental powers in Australia in specified ways. By the Constitution, such powers are to be divided between the several polities in the Commonwealth (the federal, State and Territory jurisdictions). Moreover, within each jurisdiction, most especially within the federal sphere of government, there is an express or implied division of powers, to a greater or lesser extent, between the legislatures, executive governments and courts of the nation.

No doubt, viewed strictly from an economic perspective, such features of the Australian constitutional design may sometimes result in inefficiencies. Doubtless, they import certain costs, delays and occasional frustrations. Yet such divisions and limitations upon governmental powers have been deliberately chosen in the Commonwealth of Australia because of the common experience of humanity that the concentration of governmental (and other) power is often inimical to the attainment of human freedom and happiness.

Defending the checks and balances of governmental powers in the Constitution is thus a central duty of this Court. Because of the potential of modern government, corporate developments, global forces and contemporary technology to concentrate power even more than was possible in earlier decades, the necessity to uphold the place of the States in the federation has become clearer in recent times. Just as the needs of earlier times in the history of the Commonwealth produced the *Engineers Case*, so the present age suggests a need [151] to rediscover the essential federal character of the Australian Commonwealth.