- A claim by part-time tutors that their rates of pay are below the prescribed level.
- A deputation from a group of staff from a department under threat of dissolution.
- A decision by various university unions to engage in joint action over a salary claim.
- A decision by various university and CAE unions to engage in joint action over tertiary education funding.
- A request from a non-academic union on-campus for support in a dispute over retrenchments.
- A request from the student union for joint staff/student action in defence of a non-discriminatory policy towards access to universities by overseas students.

The examples cited illustrate the flexibility demanded of academic unions which, if they are to function effectively, must have the capacity to move from the industrial to the political arena and must develop corresponding industrial and political negotiating skills. The advent of state industrial boards/commissions for academics (and the imminence of federal registration) while formalising the mechanisms for dispute settlement at a centralised level do little to reduce the plethora of agencies, particularly on-campus, acting in an employer capacity. Moves to establish in-house dispute-settling mechanisms within universities with clearly defined employer and union membership could alleviate some of the problems of undefined and/or dispersed sources of power and responsibility.

However, unless there is a radical expansion of private sponsorship of universities,[11] it is unlikely that the political control over academic purse-strings will be altered, and since this power is the source of industrial basics such as salaries, teaching loads, leave entitlements, superannuation etc., there will remain above (and beyond?) any industrial tribunal mechanism the ultimate political employer. FAUSA is well aware of this situation and occasionally judges it to be industrially advantageous to participate politically in joint lobbying exercises with the Australian Vice-Chancellors' Committee vis-a-vis 'the common enemy'.

Conclusion

This paper has argued two interdependent propositions: Firstly, that it is extremely difficult to substantiate the claim that Australian academic unions attempt to exert political influence at the expense of industrial activity. An examination of FAUSA policies suggests that almost all of them have a direct relationship to the terms and conditions of employment of academics, and that most of the remainder are indirectly related. Secondly, any arbitrary division between industrial and political activity/influence ignores the peculiarities of the academic context which, perhaps more than any other industry, contains a complex web of industrial/political employer-employee relationships and structures; failure to appreciate this and to forsake one arena for the other would, it is argued, lead to a diminution of overall strength of academic unions. The real challenge, then, is how to find ways to strengthen the nexus between the two.

In the final analysis, the strength of any union depends basically upon the commitment of its members and their industrial leverage, potential and actual. Academic unions may never be well placed to exert decisive industrial clout and they still need to convince many more academics of the need to become unionists, much less convert them to more sophisticated behavioural norms, for example, to adopt an industrial as well as a professional stance, to forge informal and formal links with other unions and peak councils, and to accept and utilise industrial tribunals etc. A realistic assessment would have to conclude that academia remains very much a domain for reluctant unionists. When the concept and practice of unionism becomes a natural part of academic life, and the indications are that this process is accelerating, the membership may cease to agonise over the relative merits of industrial/political interests.

In an industry employing intellectual workers, surely it is to be expected that unionists concerned will eventually consider it is as appropriate for them to be concerned with, say, world peace, as with academic salaries. It is important to recognise that unionists themselves will determine their choices, and that arguments by others as to the legitimacy of those choices are 'purely academic'. To date, activity in the political sphere by academic unions has been predominantly for industrial ends; experience suggests that, should the reverse option be taken up, the industrial base would need to be substantial or the exercise, however well-intentioned, would be futile. In short, it is argued that while there are many unions which are industrially strong and politically weak, there are none which are industrially weak and politically strong. For academic unions, given the blurred distinctions of their industry's proprietorial/managerial profile, combined with the mix of their members' present and possible future proclivities, strengthening the nexus is essential for growth, if not sheer survival.

Footnotes

1. The Australian 'Wobblies' — Industrial Workers of the World — were strongly influenced by their American counterparts and had been very active on the Australian union scene for the first quarter of the 20th century.
2. The most notable of these are John R. Commons whose most influential work is, *Labour and Administration*, MacMillan, New York, 1913, and Selig Perlman, *A Theory of the Labour Movement*, Augustus M. Kelly, New York, 1949 (first published in 1928).
3. The fact that American unions throughout the 1980s have covered less than 20% of the workforce surely casts serious doubts on the efficacy of business unionism.
4. See K. Marx and F. Engels, *Selected Works*, Foreign Languages Publishing House, Moscow, 1962 vol. II; V.I. Lenin, *What Is To Be Done*, International Publishers, New York, 1928; V.L. Allen. *The Sociology of Industrial Relations*, Longmans, 1971; and Hyman, *Industrial Relations: A Marxist Introduction*, McMillan, London, 1975.
5. For a further discussion of the record of union involvement in political activity see, S. Silverman, *Political Strikes in Australia*, in J.E. Isaac and G.W. Ford (eds) *Australia Labour Relations: Readings*, Sun Books, 2nd ed. 1971, ch.3; P. Hay, 'Political Strikes: Three Burning Questions', in *Journal of Industrial Relations*, 20, 1, March 1979, and Les Cupper and June M. Hearn, 'Unions and the Environment: Some Recent Australian Experiences', in *Industrial Relations Journal of Economy and Society*, Berkeley, Spring, 1981.
6. W.A. Howard, 'Australian Trade Unions in the Context of Union Theory', in G.W. Ford, J.M. Hearn and R.D. Landsbury, *Australian Labour Relations: Readings*, MacMillan, 3rd ed. 1980, ch.4.
7. Since the establisment of the Academic Salaries Tribunal in 1974, various state tribunals have been set up with powers to determine non-salary terms and conditions of employment of academics.
8. FAUSA, *Policies and Attitudes*, January, 1984.
9. The 1984 'Blainey Immigration Debate' is a recent example.
10. The selection of issues is based on the writer's experience as a member of the Melbourne University Staff Association from 1973-81 and as President of that body from 1979-81.
11. This suggestion which might have seemed ridiculous a few years ago has certainly been given explicit credence by the present Federal Labour Government in the guidelines for the tertiary education system announced this year (1984) by Senator Ryan, the Minister for Education.

THE FUTURE OF ACADEMIC UNIONS: IMPLICATIONS OF RECENT LEGAL CASES

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The employment conditions of academic staff in Australian universities have come under strong attack in recent times. In particular, relative to the classifications of employees with whom traditionally they have been compared, academic salaries have suffered a significant decline. These developments have prompted many academics to demand that staff associations become more effective and aggressive in the protection and improvement of their conditions of employment. One important consequence of these demands has been a considerable increase in activity, at the State level, of the staff associations of various universities. A number of these associations have registered, or are preparing to register, as unions under State industrial arbitration legislation. Another consequence, potentially far more important, is taking place at the federal level. Since the funding for practically all university expenditures (including salaries) is provided almost entirely by the Federal Government, and since the Australian Conciliation and Arbitration Commission is unquestionably in both law and practice the country's dominant industrial tribunal, many academics regard it as imperative that FAUSA (or an alter ego of that association) be able to participate in proceedings before that Commission. So it is that the first AAUS (Association of Australian University Staff) (unsuccessfully) sought,[1] and the current AAUS (Australian Association of University Staff) actively seeks, registration as an organisation of employees pursuant to s.132(1) of the Conciliation and Arbitration Act 1904.

The Industrial Registrar's power to register organisations of employees (or employers) and the Commission's power to make awards governing the employment conditions of the members of these organisations are contained in the provisions of the Conciliation and Arbitration Act. But the jurisdiction of both the Registrar and the Commission, although based on that Act, are derived ultimately from, and therefore constrained by, the terms of the Federal Commission. The Act is valid in its conferment of this jurisdiction only to the extent that it is in conformity with the powers granted to the Federal Parliament by the Constitution. Since the head of power most directly and substantially relied upon by the Parliament in support of the provisions of the statute is s.51 (xxxv), the industrial disputes power, an appreciation of the ambit of that power is necessary to any understanding of the reach of the Act and the award making authority of the Commission.

Awards governing whom?

The High Court has been called upon many times to intepret the terms of s.51 (xxxv) and in particular the words 'industrial dispute' as they appear in that paragraph and in s.18 and s.4 of the Conciliation and Arbitration Act. According to the view which prevailed for more than half a century the presence of the word 'industrial' in that power imports certain specific and crucial limitations. One of these limitations concerns the arena in which any dispute must arise if it is to be within federal power.[2]

Only organisations of employees which can engage in disputes with employers that are characterizable as *industrial* disputes are able to be brought within the scope of s.51 (xxxv) and thus within the Commission's jurisdiction.[3] Hence it is that s.132 of the Conciliation and Arbitration Act, which restricts registration with its attendant benefits and burdens to associations of employees engaged in or in connection with any industrial pursuit and associations of employers engaged in or in connection with any industry, has been treated as raising substantially the same issues as the constitutional stipulation that the dispute be industrial. As Gibbs C.J. explained in *R* v. *McMahon; Ex parte Darvall:*

> *Section 132(1) of the Act is enacted under the power conferred by s.51 (xxxv) of the Constitution and could not validly extend to an association which consisted of employees who were not capable of being involved in an industrial dispute within s.51 (xxxv). The meaning of "industry" and "industrial pursuit or pursuits" in s.132(1) must therefore depend on the nature and scope of the concept of "industry" to which para. (xxxv) refers ...*[4]

In the earliest case in which this issue was discussed by the High Court, *Jumbunna Coal Mine (no liability) v. Victorian Coal Miners Association* ('Jumbunna'),[1] the view apparently favoured by the majority of the Justices was, in substance, that the industrial character of a dispute derived primarily from the condition that the relevant employment involve large numbers of persons the sudden withdrawal or cessation of whose labour might prejudicially affect the orderly conduct of the operations of civil life.[6]

There emerged, however, from a series of subsequent cases stretching over a period of several decades, a considerably more restrictive view of the scope of s.51 (xxxv).[7] As a consequence of this course of decisions significant groups of workers — including state schoolteachers, the academic staff of tertiary education institutions, firemen and a substantial number of persons employed in state and federal government departments and various statutory authorities — have been held to be beyond the jurisdiction of the Australian Commission. It was not always possible in each instance, however, to be certain whether the decision as to exclusion was the result merely of the provisions of the Act as framed (in which case, of course, the situation could be remedied by appropriate statutory amendments) or whether it flowed from the terms of the constitutional grant itself (and in particular the condition that the dispute be industrial).

Some of the problems focussed on in these cases were the product of a tendency on the part of members of the Court to translate or paraphrase industrial disputes as disputes in an industry.[8] This is an approach which, however unfortunate, has been encouraged by the terms of the Conciliation and Arbitration Act. Section 4(1) of the Act defines industrial dispute as a dispute as to an industrial matter. Industrial matter is then defined in terms of employers and employees, and employers and employees in terms of industry. Industry, I should add, is in turn defined by reference to employers and employees — an unhelpful circularity of definition which has attracted adverse comment from the Court on more than one occasion.

But whatever the explanation for this tendency to equate industrial dispute with dispute in an industry, its effect has clearly been to concentrate attention and debate on the concept of industry rather than on the meaning and scope of the composite phrase industrial dispute. As the Court now concedes, this has been an important source of error and confusion over the years.[9]

What then makes a dispute industrial in the constitutional sense? Until very recently it was not possible to point to any single general principle or test which commanded widespread judicial support. What could be said with some confidence however was that:

(i) any dispute between employers and employees in the production or distribution of tangible goods or commodities was industrial;

(ii) a dispute was industrial if it involved employers whose activities, although not directly concerning the production of tangible goods and commodities, were so closely associated with such production or distribution that they could be described as incidental to or ancillary to industry proper. This involved questions of degree. Banking and insurance qualified but teaching and fire-fighting did not;

(iii) a dispute between employees and employers was industrial, regardless of the nature of the employers activity, if the occupation of the employees was of a type followed by employees who worked for employers directly engaged in the manufacture and distribution of material goods.[11]

(iv) neither the involvement of manual labour nor the presence of the profit motive was regarded as a necessary ingredient, although both were commonly supposed to be powerful (even perhaps conclusive) indications that the employment (and therefore the dispute) was requisitely industrial.[12] The mere fact that the work involved was that of one of the so-called professions provided no prima facie reason why it should not be considered industrial.[13]

Although public employment as such was not outside para. (xxxv), the cases which presented the Court with the greatest difficulties were those involving persons engaged in such employment

and in particular persons engaged to perform clerical or administrative duties in the departments and authorities of the States.

In *Ex parte Professional Engineers' Association* Dixon C.J. summarized in the following terms his interpretation of the decisions dealing with this issue:

> *The expression "industrial disputes" in s.51 (xxxv) of course does not of itself amount to a definition and is in fact merely a descriptive name of the dislocations, differences and tensions among employers and employees which in various forms had grown only too familiar in production, business or other organised work ... Until* **Proprietors of the Daily News** *v.* **Australian Journalists' Association** *and* **Insurance Staffs' & Bank Officials' Case** *it had not been made clear that employment in a form of business involving neither manual labour nor the production or handling of material things, a financial business for example, might form the subject of an industrial dispute because it was found to be ancillary or incidental to the organised production, transportation and distribution of commodities or other forms of material wealth. Before that it might have been considered that employment in a business could not be the subject of an industrial dispute if, as in banking and insurance, it was concerned directly only with intangibles. However, at length it became clear that the propriety of applying the word "industrial" to a dispute might depend upon any one of a number of factors. If the dispute is about employment to do work of a manual character always it has been regarded as typically industrial and I doubt if it was ever considered necessary to go further. Indeed that would be a sufficient reason for regarding the dispute as within s.51 (xxxv) although there was no "industry" or business organised for profit ... On the other hand the dispute might arise in an industry organised as an undertaking for some productive purpose or some purpose of transportation and distribution. Then whatever the capacity in which a man is employed, however removed he might be from the performance of manual work or labour, he has been regarded as capable of being involved in an "industrial" dispute ...*
> *It would be possible to point to many other elements or aspects of disagreements and differences among employers and employees any one of which would or might be considered enough to bring the dispute within the category of industrial dispute. That is because it is natural that such a very wide and flexible phrase should apply according to conceptions of usage and a practical life rather than to some logical connotation or precise analysis.*[14]

The effect of the decision in *R.* v. *Coldham; ex parte the Australian Social Welfare Union*[15] is that much of this accumulated authority has now been swept aside as unnecessary, artificial or misconceived. The Court's decision, delivered per curiam, is obviously intended to clear the ground and permit it to branch out in a rather different direction. Although, as it is to be expected in such circumstances, it explicitly eschewed any attempt to provide a complete and definitive exposition of the scope of s.51 (xxxv), the service its decision has performed was widely regarded as long overdue.

The facts of that case can be stated very briefly. It concerned a dispute as to terms and conditions of employment between, on the one hand, the A.S.W.U., a registered organisation of social workers, and on the other their employers, the Community Youth Support Scheme committees. The point in issue was whether the dispute was industrial within the meaning of the provisions of both the Conciliation and Arbitration Act and s.51 (xxxv) of the Constitution. In the event the Court held that it was.

There were 'powerful reasons', the Court said, for embarking upon a reconsideration of the scope of s.51 (xxxv). Having noted that 'the course of judicial exposition ... has not resulted in a settled interpretation of the power'[2], it proceeded to signal 'a return to a broader intepretation ... more in line with that favoured in *Jumbunna*'.[17] Although conceding that this reorientation of doctrine and approach involved an acceptance, not to say a resuscitation, of propositions and principles expressly disapproved of or ignored in several major decisions of longstanding, the position adopted by the Court was that 'the absence (from those judgments) of a disclosed chain of reasoning leading to a rejection of the broader view[18] seriously weakened the authority of those cases in this regard.

A review of the line of decisions since *Jumbunna* led the Court to conclude that, as a consequence of a subscription to certain constitutional heresies, various considerations now recognised to be irrelevant to a proper interpretation of s.51 (xxxv) had consistently been allowed to intrude into and to distort judicial expositions of that head of power:

> *[B]efore 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.31 (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 cate-*

gories of State employees of different interpretations of the term 'industrial disputes'.[19]

Recognising these heresies to have been the source of serious doctrinal error and confusion, the Court turned to identifying 'the correct approach to the construction of the expression 'industrial disputes' in s.51 (xxxv)':

> *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'... makes quite inexplicable the emphasis given in the later cases to limitations on the power derived from the meaning of the word 'industry'...*
> *It is ... 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 organised business carried on for the purpose of making profits. The popular meaning of the expression no doubt extends more widely ... but just how widely it may extend is not a matter of present concern.*[20]

The decision in the *Social Welfare Union Case* clearly announces that the potential reach of the industrial disputes power is more extensive than has hitherto been conceded. Many persons engaged in activities and occupations previously thought to be beyond that head of power now appear to fall within its scope, although it is true that some doubt continues as to the position of certain relatively small categories of persons employed in the various government department and instrumentalities of the States.[21]

There can be no question but that the approach to the construction of the industrial disputes power propounded in the *Australian Social Welfare Union Case* involves a return to an expansive reading of that power. The principle of constitutional construction to be applied and adhered to is that an express grant of legislative power should be construed liberally. The words of the grant are to be given their natural and literal meaning. Paragraph (xxxv), being a constitutional power intended to endure for all time, is to be accorded a construction which '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.[22]

The implications for AAUS in its attempt to register as an organisation of employees pursuant to s.132(1) of the Act are clear. It is now quite likely to succeed. It appears that on the last occasion (the application by the first AAUS) no serious attempt was made to dispute the correctness of the doctrine expounded in the line of cases since disapproved by the Court in the *Social Welfare Union Case*.

Instead reliance seems to have been placed on the argument that the activities of universities and their academic staff are ancillary or incidental to industry — to the organised production, transportation or distribution of commodities or other forms of material wealth — in the sense outlined in the then prevailing authorities.[23] This submission was rejected unanimously by the Full Court.

Since those authorities have now themselves been rejected by the Court AAUS can argue its application for registration on the basis of the broad tests put forward by members of the Court in the *Jumbunna Case* and approved in general terms in the decision in the *Social Welfare Union Case*. It does not seem unreasonable to believe that in all probability a submission in these terms will succeed.

Awards governing what?

An industrial dispute must involve a disagreement as to some subject. In the words of the statute, it must be a dispute as to an industrial matter. The relatively expansive interpretation which, for a period at least, it seemed, was to be given to the range of matters that could form the subject of an arbitrable (i.e. industrial) dispute[24] quickly fell into disfavour also. This fact should not be permitted to obscure the force and good sense of much that was said in those early cases however. In particular it needs to be kept firmly in mind that to the extent that important jurisdictional limitations are attributed to — discovered in — the text of the Constitution, those tribunals are dealing with a legislative instrument which was intended to endure and to accommodate to major changes in the social, political and economic life of the nation.[25] In relation to the legislative power with which we are presently concerned it was principally this latter consideration which led Isaacs and Rich J.J. in the *Union Badge Case* to observe that:

> *The words of the Constitution 'industrial dispute' stand unabridged by any specified subject matter of dispute; they fit themselves to every phase of industrial growth, and look only to the single fact of an industrial dispute. Parliament, shaping the national policy in accordance with the predominant political ideas for the time being, may or may not restrict the causes upon which public intervention shall proceed; but unless it does so, we are unable to see how the court can impose any limitation on the matters which, at any given moment in the life of the Common-*
> *wealth, do in fact, and by their practical operation, affect at some stage the inter-relations of employers and employed so as to give rise to what would then be regarded as an industrial dispute ...*[26]

For some time now, however, the court has been given the clear impression that much, if not most, of the otherwise relevant dicta contained in those early decisions are of little more than historical interest.[27] It has proceeded largely on the basis that the decision in *R. v. Kelly; ex parte Victoria* should be regarded as marking the beginning of the modern exposition of industrial matters.[28]

The approach thus favoured involves a narrow view of the range of subjects available to be regulated by award. What is more, it is a view which purports to locate its authority in the very terms of both the statute and the constitution:

> *A matter does not become an 'industrial matter' or the subject of an 'industrial dispute' simply because it is a matter with respect to which persons who are employers and employees are disputing ...*[29]

The view is not without its difficulties however. There is for a start the problem of its supposed textual authority. It is not at all self-evident that the consitution requires the narrow construction which is suggested. The relevant paragraph is very brief and provides no indication as to what might constitute an industrial dispute.[30] Further it is not markedly more evident why section 4 of the Conciliation and Arbitration Act, in defining industrial matters, should be taken as endorsing any such restrictive view of disputes which are arbitrable. Ever since the Act was first proclaimed the definition of industrial matters has been couched in the widest possible terms.[31] The language of the section is and always has been sweeping and untechnical.[32] The position is, however, that in the absence of clear and unambiguous direction by either the framers of the constitution or the federal legislature it has fallen to the court to set, as distinct from merely enforce, the limits of the Commission's jurisdiction.[33]

This situation is far from satisfactory for a number of reasons, one of which (although hardly novel) deserves special mention. The High Court is not a tribunal particularly well equipped to deliberate on questions involving the practical realities of industrial relations.[34] The jurisdictional issues upon which it is required to rule are only in the most artificial sense separable from the substantive industrial issues which raise them. All too often formalistic analysis of exceedingly general statutory and constitutional provisions has produced results which are far from conducive to the effective management of industrial conflict.[35]

In fairness to the Court is has to be said in the last few years it has shown itself to be increasingly conscious of this difficulty.[36] Nor should the criticism itself be made without regard to the very real dilemma faced by the Court in attempting to discharge its obligations under the constitution.[37] The fact remains however that a number of important decisions in this field appear to be unjustifiably legalistic and insensitive to consideration of industrial practice.[38]

The Conciliation and Arbritration Act defines industrial matters to be 'all matters pertaining to the relations of employers and employees'[39] and then proceeds to list sixteen particular matters which that expression is said to include 'without limiting the generality of the foregoing.' The approved paraphrase explains these general words as meaning all matters 'belonging to' or 'within' the sphere of' the relations of employers and employees as employers and employees![40]

The problem lies, of course, in determining those matters which properly belong to or come within the sphere of the relations of employers and employees. What distinguishes an industrial from non-industrial matter?

A number of different tests have been proposed but none of them can be regarded as particularly helpful or satisfactory.[41] It is evident that the actual conditions of employment, in the sense of the incidents of the employment relationship, fall within the conception of industrial matters. It is equally clear, however, that any view which seeks to confine the concept to these conditions is too narrow.[44] On the other hand a test which focuses on the capacity of a particular subject to affect the successful conduct of the business or the working conditions of employees is regarded as unacceptably wide.[43] It is too broad in that it would encourage and authorize arbitration upon employee demands in respect of a variety of matters which have 'only the possibility of an indirect, consequential and remote effect'[44] on the relations of employers and employees: 'Businesses are every day affected by matters quite extraneous to them, and it would be absurd to say that such matters become for that reason industrial.[45]

More recently there has been a tendency for decisions to focus on what Mr. Justice Stephen has described as the two 'broad aspects of the relations between employers and employees, namely the performance of work by the employee and the receipt of reward for that work.[46] It seems that, by and large demands as to industrial matters will be those demands for some advantage or condition 'which it is within the capacity of the employers to bring about'[47] and which can be considered 'in some real sense' to be 'the fruit of employment'.[48] It is, apparently, a necessary quality of such a matter 'that it be, of itself, inherently associated with the relations of employee and employer and not with some other type of relationship'.[49]

After more than eighty years of constitutional and statutory interpretation, then, there is very little available in the way of clearly formulated and firmly established doctrine or principle to permit disputes as to industrial matters to be distinguished from disputes as to non-industrial matters. Perhaps it is unreasonable to expect it to be otherwise in relation to characterization questions of this kind. As often as not, however, what we are left with are reasons for judgement which are themselves hardly more illuminating than the statutory definition they attempt to explain. Thus, for example:

> *Whether or not in any particular case a dispute concerns an industrial matter may depend ultimately upon the degree to which what is in dispute can be said to be demanded by employees in their role as employees and* **of** *employers in their role as employers ... The reflection, in the subject matter of a demand, of some other role, whether played by the employee or employer, or of the attempted imposition upon employers of another role, is likely to result in the subject matter being no longer industrial in character ...*[50]

Although explanations of this kind are of very limited predictive value they have commonly formed the basis of decisions confining the Commission's power to settle or prevent interstate disputes. They have been used, for instance, to prohibit the Commission from arbitrating upon subjects which the court characterises as managerial prerogatives, including the freedom to subcontract work,[51] whether (as distinct from whom) to retrench or to promote,[52] the investment and allocation of the employer's receipts,[53] the introduction of technological changes,[54] and so on. Such matters, it is argued, do not come within the realm of the relations of employers and employees and thus cannot be governed by award:

> *Whilst it may be no objection to an award or order settling an industrial dispute or question that the award or order may impinge upon management or the exercise of managerial discretion, management or managerial policy as such is not ... a proper subject for an award or order.*[55]

That the matters involved affect the work of employees is not denied, but they do so in a way which is only 'remote' and 'consequential'.[56] To recognize a capacity to affect indirectly employer-employee relations as sufficient to make matters fit subjects for awards would be, it seems, to imperil the distinction between constitutionally authorised arbitration and unauthorised general regulation.

> *If once we begin to introduce and include [in the Scope of the Act] matters indirectly affecting work in the industry, it becomes very difficult to draw any line so as to prevent the power of the Arbitration [Commission] from being extended to the regulation and control of businesses and industries in every part.*[57]

Disappointing as it may be, the court's reluctance to engage in a more extensive and detailed exposition of the conception of industrial matters is in keeping with its preferred practice, when considering the scope of constitutional or statutory powers that raise problematic and controversial political, social or economic issues, of confining discussion and analysis to that which is necessary for deciding the case in hand:

> *Hewing close to the issues raised by each case, the court avoids the possibility of having its judgement applied to issues which were not envisaged in the arguments before it and which may have implications emerging only in the future. Development of principle from the concrete cases may be slow, but it gives assurance that the principle will not be unsuited to the solution of practical problems.*[58]

The fact is, however, that even measured according to those criteria, the court's record in cases involving the statutory or constitutional conception of "industrial dispute" has not been very impressive.[59]

Is this general situation likely to change, or improve, in the immediate future? There are very real grounds for believing it will. Quite apart from passing references to the fact that there may be particular decisions which stand in special need of review,[60] the tenor and spirit of several recent decisions of the court suggests a preparedness on its part to reconsider even long established doctrine should it be demonstrated that such doctrine fails to recognise or effectively assist in the achievement of constitutional and/or statutory objectives.[61]

In relation to the federal industrial disputes power the obvious example is, of course, the *Social Welfare Union Case*.[62] Although it is true that the decision in that case does not explore the question of industrial matters, its thrust nevertheless strongly suggests the likely adoption by the court of an approach to that issue more consistent with the expansive view of the early High Court than with the more restrictive interpretations which emerged from the Dixon and Barwick courts. It can be anticipated for instance that a rather less sympathetic response will be forthcoming to arguments that rely on characterizing demands as claims pertaining to managerial prerogatives and not to the relations of employers and employees.[63]

Conclusion

The inevitable effect of a wider meaning being given to the scope of industrial disputes, and in particular to the scope of industrial matters, will be an increase in the importance of the role of registered organisations of employees and their officials. It will also mean, of course, a corresponding increase in the powers and importance of the Conciliation and Arbitration Commission. These developments will have profound implications for the whole of the trade union movement. These implications will extend, dare one say it, to any federally registered association of academic staff. Quite apart from salaries, AAUS may well find itself able to argue for award regulation of such matters as superannuation and pensions, tenure, study leave, the number of and conditions attached to fixed term appointments, criteria for promotion and dismissal, redundancy and so on. Whether or not this would be wise is another question, and one upon which views are sure to differ radically.

Footnotes

1. *R.* v. *McMahon; Ex parte Darvall* (1982) 42 A.L.R. 449.
2. Ibid. (where the relevant authorities are cited and discussed).
3. *Jumbunna Coal Mine (no liability)* v. *Victorian Coal Miners Association* (1908) 6 C.L.R. 309.
4. (1982) 42 A.L.R. 449 at 450.
5. (1908) 6 C.L.R. 309.
6. In fairness it ought to be pointed out that the *Jumbunna Case* involved employment which, according to any criterion ever seriously suggested by the Court, would be regarded as industrial. Since all judicial decisions have to be subject to their particular facts, a respectable argument could well be mounted that not all (if perhaps any) of the Justices who express general support for this proposition necessarily subscribed to the view that the satisfaction of this requirement constituted a sufficient condition irrespective of the nature (in the sense of a kind or type) of the employment.
7. See the authorities cited in *R.* v. *McMahon; Ex parte Darvall* (1982) 42 A.L.R. 449.
8. Ibid. at 459-60.
9. *R.* v. *Coldham; Ex parte Australian Social Welfare Union* (1983) 47 A.L.R. 225 at 135.
10. See *Pitfield* v. *Franki* (1970) 123 C.L.R. 448.
11. See *R.* v. *Holmes; Ex parte Public Service Association of N.S.W.* (1978) 140 C.L.R. 63.
12. This seems to have been the case notwithstanding the remarkable outcome of the court's deliberations in *Pitfield* v. *Franki* (1970) 123 C.L.R. 448, surely one of the least satisfactory (even plausible) of its decisions in this general area.
13. In practice both the Commission and the Court were, however, for some time much disposed to lines of argument which had the effect of leaving the majority of 'professional' occupations free from regulation by federal awards.
14. (1959) 107 C.L.R. 208 at 235-36. See also at 270-71 per Windeyer J.
15. (1983) 47 A.L.R. 225 at 234.
16. Ibid. at 233.
17. Ibid. at 234.
18. Ibid.
19. Ibid. at 235.
20. Ibid. at 236. Should precedent be considered necessary it indicated that this could be found in decisions delivered in the early years of the Court's interpretation of s.51 (xxxv).
21. Ibid. It is ... 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 ... 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 ...". Whether or not employees engaged in a State's administrative services are able to be brought within federal legislative power will be, at least in part, a function of the nature and extent of regulation sought to be imposed. Thus, it seems, that "If at least some of the views expressed in [previous] case 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 ..."
22. Ibid. at 237.
23. *R.* v. *McMahon; Ex parte Darvall* (1982) 42 A.L.R. 449 at 451 per Gibbs C.J.
24. See e.g. *Australian Tramways Employees Association* v. *Prahran and Malvern Tramways Trust* (1913) 12 C.L.R. 680 exp. at 702-705 per Isaacs & Rich J.J.; *Federated Clothing Trades* v. *Archer* (1910) 27 C.L.R. 207; *Metal Trades Employers' Association* v. *Amalgamated Engineering Union* (1935) 54 C.L.R. 387.
25. See, e.g. *Jumbunna Case* (1908) 6 C.L.R. 309 at 367-8 per O'Connor J.; *Municipal Employee's Case* (1919) 26 C.L.R. 542 at 575 per Higgins J. There is no suggestion, in spite of the provision made for constitutional alteration by way of referenda, that this was to be achieved by repeated constitutional amendment.
26. (1913) 12 C.L.R. 680 at 702.
27. See, e.g. *R.* v. *Judges of the Commonwealth Industrial Court; ex parte Cocks* (1968) 121 C.L.R. 313 at 304.
28. (1950) 81 C.L.R. 64.
29. Ibid. at 85.
30. See, e.g. comments of Isaacs & Rich J.J. in *Tramways Employers Case* (1913) 12 C.L.R. 680 at 701-702.
31. *Metal Trades Case* (1935) 54 C.L.R. 387 at 420 per Rich & Evatt J.J.
32. Ibid.; see also, e.g. *Municipal Employees Case* (1919) 26 C.L.R. 542 at 573 per Higgins J.
33. This difference of course, is a matter of degree. For analytical purposes it should not be pushed too far. The point really involves the extent of the discretion that the court has in dealing with the matter.
34. Comprising, as it does, persons who, however eminent as counsel, have little experience of institutionalized industrial relations and whose practice at the bar may never have included industrial cases.
35. See, e.g. the discussion of one man bus cases in Maher & Sexton, 'The High Court and Industrial Relations' (1972) 26 *A.L.J.* 409.
36. Although contrary examples are not impossible to find: see, e.g. *R.* v. *Gough; ex parte Key Meats Pty Ltd* (1982) 39 A.L.R. 507.
37. See, e.g. Barwick C.J. in R. v. *Heagney; Ex parte A.C.T. Employers' Federation* (1976) 137 C.L.R. 86 at 88-89: 'the settled doctrine of this [High] Court comfortably to the Constitution in relation to the power of the Commonwealth Conciliation and Arbitration Commission to entertain an application for an award or to make an award is that there must in

fact exist between the parties an industrial dispute extending beyond the limits of any one State. Under that doctrine, only this Court can finally decide whether such a dispute exists ... it is inevitable that there should be an appearance of a degree of artificiality in this Court thus supervising the exercise of jurisdiction by the Commission. But that consequence stems not from any attitude on the part of the Court but from the basic circumstance that the power granted by the Constitution to the Parliament in this field is limited to providing for the settlement of [Interstate] industrial disputes by means of conciliation and arbitration ...'

38. See, e.g. *R.* v. *Portus; ex parte A.N.Z. Banking Group* (1972) 127 C.L.R. 353; *R.* v. *Portus; ex parte City of Perth* (1973) 129 C.L.R. 312; *R.* v. *Judges of the Commonwealth Industrial Court; ex parte Cocks* (1968) 121 C.L.R. 313 and the cases discussed in Maher and Sexton, supra n.35.

39. s.4.

40. *R.* v. *Kelly; ex parte Victoria* (1950) 81 C.L.R. 64 at 84 per curiam.

41. Ibid. See also, e.g. *Tramways Employees' Case* (1913) 12 C.L.R. 680.

42. *R.* v. *Findlay; ex parte Commonwealth Steamship Owners' Association* (1954) 90 C.L.R. 621 at 630 per Dixon C.J.: *R.* v. *Coldham; ex parte Fitzsimmons* (1976) 137 C.L.R. 153 at 163 per Stephen J.

43. *R.* v. *Kelly; ex parte Victoria* (1950) 81 C.L.R. 64 at 84.

44. Ibid.

45. Ibid. at 85.

46. *R.* v. *Portus; ex parte A.N.Z. Banking Group* (1972) 127 C.L.R. 353 at 370.

47. *R.* v. *Portus; ex parte City of Perth* (1973) 129 C.L.R. 312 at 325 per Gibbs J. Note, however, the comments of Stephen J. in *R.* v. *Coldham; ex parte Fitzsimmons* (1976) 137 C.L.R. 153 at 161-2 per Stephen J.

48. *R.* v. *Portus; ex parte City of Perth* (1973) 129 C.L.R. 312 at 329 per Stephen J.

49. *R.* v. *Portus; ex parte A.N.Z. Banking Group* (1972) 127 C.L.R. 353 at 371 per Stephen J. Note, however, his concession in the same case (at 372).

50. R. v. *Coldham; ex parte Fitzsimmons* (1976) 137 C.L.R. 153 at 163 per Stephen J. Note his concession in that same case (at 372) 'there may, no doubt, be instances where the subject matter of the demand appears to have no connection with the employer-employee relationship but is nevertheless ancillary to matters forming part of that relationship and is, for that reason, an industrial matter.

51. R. v. *Judges of the Commonwealth Industrial Court; ex parte Cocks* (1968) 121 C.L.R. 313.

52. R. v. *Flight Crew Officers' Industrial Tribunal; ex parte Australia Federation of Air Pilots* (1971) 127 C.L.R. 11; see also *Ansett Transport Industries (Operators) Pty. Ltd.* v. *Wardley* (1980) 28 A.L.R. 449 at 463 per Mason J: '... an admitted right of dismissal for reasons of redundancy, involving as it does questions of management and managerial policy, cannot constitute industrial matter ... '.

53. See, e.g. *R.* v. *Kelly; Ex parte Victoria* (1950) 81 C.L.R. 64 at 84.

54. Although note that the High Court is currently considering this particular question.

55. *R.* v. *Flight Crew Officers' Industrial Tribunal; ex parte Australian Federation of Airline Pilots* (1971) 127 C.L.R. 11 at 20 per Barwick C.J. Note also his comment in *R.* v. *Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board* (1966) 115 C.L.R. 443 at 450-1; 'To create an industrial dispute, the relationship of employer and employee must be directly involved in the demand. Demands which in themselves do not do so will not be industrial in a relevant sense, however, much the relationship of employer employee may be indirectly affected by the result of acceptance or refusal of the demand ... Whilst it is a truism that industrial disputes and awards made in their settlement may consequentially have an impact upon the management of an enterprise and upon otherwise unfettered managerial discretions, the management of the enterprise is not itself the subject matter of industrial dispute'.

56. See *R.* v. *Kelly; ex parte Victoria* (1950) 81 C.L.R. 64 at 84.

57. Ibid. Quoting with approval Higgins J. in *Clancy* v. *Butchers' Shop Employees' Union* (1904) 1 C.L.R. 181. Note also *R.* v. *Judges of the Commonwealth Industrial Court; Ex parte Cocks* (1968) 121 C.L.R. 313 at 318 per Barwick C.J., Taylor and Owen J.J.: 'Disputes may, of course, arise between employers and employees with respect to any practice in an industry but the Act does not commit to the Commission authority to regulate generally the manner in which industry shall be carried on ...'.

58. (1982) 40 A.L.R. 609 at 645-6 per Brennan J. The passage continues 'It follows that it is undesirable to answer a question left open in an earlier case unless an answer is invoked by the issues in the case in hand'.

59. See the references given in footnote 38 above.

60. See *Metal Trades Industry Association of Australia* v. *Amalgamated Metal Workers' and Shipwrights' Union* (1983) 48 A.L.R. 385 at 398 where, in a joint judgement, Mason, Brennan and Deane J.J. cast doubt on the authority of *R.* v. *Hamilton Knight; Ex parte Commonwealth Steamship Owners Association* (1952) 86 C.L.R. 283.

61. See, e.g. *Commonwealth* v. *Tasmania* (1983) 46 A.L.R. 625 ("Tasmanian Dam's Case").

62. *R.* v. *Coldham; Ex parte Australian Social Welfare Union* (1983) 47 A.L.R. 225.

63. Ibid. esp. at 235-7. For similar reasons it seems almost as unlikely that, in the absence of clear statutory direction, industrial matters will continue to be confined by reference to the common law relationship of (in the old terminology) master and servant.

AUSTRALIA AND INTERNATIONAL EDUCATION: THE GOLDRING AND JACKSON REPORTS — MUTUAL AID OR UNCOMMON ADVANTAGE?

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Every human being has some claim of access to the resources necessary to develop himself or herself. This claim is not unqualified, but it is substantial, and its consequence is that nations and individuals should be prepared to share access to these resources, which in a real sense are the property of humanity as a whole. More specifically, it is in the interest of any nation to take a not unduly proprietorial attitude to the share of humanity's resources within its geographical boundaries.[1]

The overseas student program has brought a great many political, economic, educational and other benefits to Australia, particularly in the context of our relations with the countries of the Asian and Pacific region. Many of the benefits cannot be measured in monetary terms, but they are nonetheless very real and, collectively, show that the program has served Australia's interests well.[2]

Goldring Report ... Mutual Advantage ... Review of Private Overseas Student Policy, March 1984.

Education, specialised training, research and technical assistance are closely linked and fundamental inputs into the development process. They increase productivity, improve management and contribute to equality. Australia's strength in some of these fields has already attracted considerable interest from developing countries outside the official program. The share of Australian aid flowing to education and associated areas should be increased. Education should be regarded as an export industry in which institutions are encouraged to compete for students and funds. This would require a more positive attitude towards acceptance of foreign students in Australia. Scholarship funds would be simultaneously provided through the aid vote to promote development and equity. Improvements in the Australian graduate training system are urgently needed to enable Australia to compete with countries such as the United States for students of high calibre. This would provide education that is more relevant to developmental needs, benefit Australian students and assist the Australian economy.[3]

Jackson Report ... The Australian Overseas Aid Program, March 1984.

The statements above, succinctly but accurately, reflect the essential essence of two foreign policy reports recently released by the Australian Government. They both focus on the important place that overseas students play in Australia's international-educational exchanges and in regional economic aid and development programs. One is primarily an educational assessment in both social and economic cost benefit terms (Goldring Report) and the other (Jackson Report) involves *inter alia,* a business evaluation of Australia's training and research contributions to the predominantly Asia and Pacific regions. The former tends towards a humanistic, holistic and educational approach and the latter favours a systems manpower analysis and efficiency approach towards somewhat similar problems.

The two documents, with major international implications for the future of Australian tertiary education, were released to the public in May 1984. Both reflected on the past development as well as the likely future contributions of Australia as a major regional centre for advanced training and research. The Goldring Report on overseas students and the Jackson Report on overseas aid were published co-incidentally at a particularly sensitive time when foreign aid programs, immigration policies and community racial attitudes were all receiving inordinate and increasing attention. The intermix of national policies, international relations, economic and development priorities, not to mention cross-cultural, multicultural, polycultural and perhaps even cosmocultural concerns has further contributed additional invective to a variety of disputative fields already fuelled by a range of disparate academic and sectional interests. The selective inputs, as submissions to both Committees from many sections of the business community and ethnic organisations, as well as educational interests, have been considerable. Over four hundred written submissions were provided to the Jackson Committee on Australia's Aid Program which took nearly two years to accomplish its tasks. The Goldring Committee on the Private Overseas Student Policy (POSP) received some 280 written submissions and completed its work in about nine months initially so that any recommended policy changes could be implemented well before the school year commencing in 1985. Unfortunately this was not feasible and likely changes can now only be implemented for the 1986 academic year.