A Constitutional Basis for the Federal Coalition's Industrial Relations Policy - and Related Matters

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Abstract

This paper argues that previous discussion of this question has erred when it looks for a particular provision of the Constitution to support the Coalition's policy. It may be a matter of depending on several sources of power. The relevant question is: to what extent can this power help to achieve the policy? The author's opinion is that, when considered in this light, the achievement of the Coalition's policy is not beyond the constitutional competence of the Commonwealth.

1. Introduction

The Federal Coalition's industrial relations policy calls for a system of industrial relations radically different from that which has existed in this country in the past. In a paper delivered at a conference of the H.R. Nicholls Society in September 1991, Mr. Greg Craven raised the question whether the constitutional powers of the Commonwealth would suffice for the implementation of that policy.[1] He came to the view that legislation "will

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be attended by major constitutional difficulties", which might not be insuperable, but which "are undeniably grave". This paper revisits that area.

2. Some Features of the Established Industrial Relations System

It is convenient to call to mind certain facts concerning the existing Commonwealth system.

(1) The Commonwealth Parliament's principal power with respect to industrial relations is that given by placitum (xxxv) of s. 51 of the Constitution, to make laws "with respect to

> "(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:".

It is under that power that the existing system exists.

(2) Placitum (xxxv) does not give the Parliament power to legislate directly for the prevention and settlement of industrial disputes. The power is to legislate for conciliation and arbitration for such prevention and settlement, so that what is done for prevention and settlement of disputes is done by the conciliator and arbitrator, not by a law passed by the Parliament. The power is to create an agent having a power which the principal does not.

(3) Parliament exercised that power in enacting the *Conciliation and Arbitration Act* 1904. The Act's statement of its principal objects included the establishment of a Court of Conciliation and Arbitration "having jurisdiction for the prevention and sefflement of industrial disputes". The Court, supplemented by Conciliation Commissioners, was to prevent and settle disputes by conciliation and arbitration.

(4) Following the decision of the High Court in *R. v Kirby: ex p. Boilermakers' Society of Australia (The Boilermakers' Case!* (1956) 94 C.L.R 254, the conciliation and arbitral functions of the Court passed to a Conciliation and Arbitration Commission, later transmuted to the Industrial Relations Commission: see the *Industrial Relations Act* 1988. ~or the purposes of this paper the variety of names is irrelevant. What is said here as to the Court is true as to the successive Commissions.

(5) The power given to the Court by the words of pl. (xxxv) as repeated in the legislation, turned out over the years to be very wide. For a start, the "dispute" was seen not as the strike (or other overt incident), but as the underlying disagreement. And it was held that such a disagreement could be deliberately created for the purpose of creating an industrial dispute which the Court could then arbitrate. Windeyer J. once commented:

"The dispute here is a "paper dispute". To permit the creation of a malady so that a particular brand of physic may be administered must still seem to some people a strange way to cure the ills and ensure the health of the body politic. But the expansive expositions by this Court of the meaning and effect of par. (xxxv), especially in the Burwood Cinema Case (1925) 35 C.L.R. 528 and in *Amalgamated Engineering Union v Metal Trades Employers' Association* (1935) 53 C.L.R. 658 have brought a great part of the Australian economy directly or indirectly within the reach of Australian industrial law and of the jurisdiction of the Commonwealth industrial tribunal."

See *Ex parte Professional Engineers' Association* (1959) 107 C.L.R 208 at p. 268.

(6) Thus the power was not merely a power to deal with overt confrontations in fact extending beyond one State; it extended to dealing with paper disputes as to conditions of work, with the interstate element being provided by having a multiplicity of parties. An intended function of preventing and settling disputes became a function of prescribing conditions of work. The fixing of a "fair" wage for this dispute became an ongoing function of fixing a basic wage for award after award, and finally for awards generally.

(7) Skilful use of the "ambit claim" and of the power to "reopen" an award already made often enabled the parties to keep a subsequent dispute within the jurisdiction of the Court even though that subsequent dispute had no real interstate element at all.

(8) By 1947 the activities of the Court itself were in fact confined to a few large matters (in particular the "basic wage"), and all other disputes were handled by Conciliation Commissioners (whose functions involved arbitrating as well as conciliating): see the comments of Mr. R.M. Egleston O.C. in his paper *Industrial Relations, in Essays on the Australian Constitution* (1st edn., 1952) at pp. 186187.

(9) The range of matters capable of giving rise to an industrial dispute, and the range of things an award might properly do, was steadily extended. In particular the principle was adopted that an award could relate to the conditions of employment of persons other than the members of the union which had created the dispute. The decision of the High Court in *Metal Trades Employers Associations v Amalgamated Engineering Union* (1935) 54 C.L.R 387, Dixon J. dissenting, was based on a principle which Dixon J. later described as follows:

"The principle upon which the decision rests is that the interest which an organization of employees possesses in the establishment or maintenance of industrial conditions for its members gives a founda-

> tion for an attempt on its part to prevent employers employing anyone on less favourable terms. As a result an industrial dispute may be raised by it with employers employing none of its members and an award may be made binding such employers and regulating the terms and conditions upon which they may employ unionists or nonunionists." See *R. v The Commonwealth Court of Conciliation and Arbitration; ex parte Kirsch (1938)* 60 C.L.R. 507 at p. 537.

(10) The concept of "industrial dispute", long read down as if the relevant words were something like "disputes in industry", was finally seen as applying to disputes arising with respect to employment of all types, and as including all "disputes between employees and employers about the terms of employment and the conditions of work": see *R. v Coldham: ex parte Australian Social Welfare Union* (1983) 153 C.L.R. 297 at p. 312.

The result was the growth of the powers of the tribunal under its various names, laying down conditions of employment including those relating to hours and wages and cost of living increases and such things for people before or not before the tribunal, with a freedom which a Commonwealth Treasurer or Parliament might well envy. Further years confirmed Eggleston's summingup of 1952:

> "But enough has been said to demonstrate that the interpretation in the provision by the High Court has enabled Commonwealth tribunals to extend their influence to an extent which the framers of the Constitution could hardly have contemplated." Eggleston op. cit. at p. 208.

Perhaps I can intrude here that in private conversation in the late 1950's Sir Owen Dixon made the comment that it had been a fundamental mistake to attach the name "Court" to the Commonwealth Court of Conciliation and Arbitration, and the name "Judge" to the persons constituting it. The principal function was essentially different from that of a court. A court determines what the parties' rights are. This tribunal lays down what the parties' rights shall be, which is essentially a legislative function, not a judicial one. No good could come, he believed, from the people of Australia being led to believe that what was done by this arbitral tribunal was done by a court. The realisation of the nature of the function led of course to the *Boilermakers' Case,* and to the jurisdiction of the initial Court being split between two new bodies the Commonwealth Industrial Court (now replaced by the Federal Court) and the Commonwealth Conciliation and Arbitration Commission (now the Industrial Relations Commission). The Commission has no "Judges", but appointments of its Presidential Members can be made only from practising lawyers, and once appointed they look like and have rights like judges. If it be true that only lawyers can properly fulfil the role

of Presidential Members of a body set up to determine what ought to be, not what is, that itself may be a serious criticism of the system.

3. Coalition Policy

The Coalition's Industrial Relations policy (I speak from the document "Industrial Relations Policy 20 October 1992", which has different paragraph and page numbering from that of the document dated 1990 referred to in earlier commentaries) sets out to handle industrial relations matters in this country in a very different manner from that described earlier. In particular, for present purposes:

(1) Persons not in an "award area" can enter into whatever employment relationships they wish, with or without a contract in writing, and with no prescribed minimum conditions: para. 2.9. I take an "award area" to include an area covered by an award and an area for which an award is sought. (It is curious that one has to get so far into the Policy document to find this proposition. The early part of the Policy centres on people who need to obtain their freedom from the award system. Only at para. 2.9 does it deal with people who, like the Apostle Paul and Mrs. Adamson's lioness Elsa, were *born* free.)

(2) Individuals or groups of employees within the award area are to be free to enter into workplace agreements with their employer.

Alternatively they may:

i. Remain for the being time under their award and the total Commission system;

ii. Remain for the time being under a certified agreement under s. 115 of the *Industrial Relations Act* 1988):

see Policy 1992 paras. 2.13, 2.6., 2.15.

(3) To enter into a workplace agreement is to exercise an option to leave the award system: paras. 2.2, 2.9. The Commission will have no function in relation to disputes arising in relationships other than those for which the parties have accepted its jurisdiction: para. 2.1. So the Commission will have no function in relation to disputes under workplace agreements.

(4) Workplace agreements can be entered into only between an individual employer and one or more of his employees: para. 2.7. A union or employer organisation cannot be a party to a workplace agreement: *ibid.*

(5) Workplace agreements must observe minimum rates of pay and conditions of employment: paras. 2.45. They must contain their own disputesettling procedure: para. 2.4.

(6) Once entered into the workplace agreement will be legally enforce-

able. This is assumed (as in para. 5.4, imposing a limit on the awarding of damages) rather than stated. The assumption is justified. The workplace agreement will constitute a contract, and will automatically be enforceable at common law unless some statutory provision intrudes.

(7) The law will be amended to enable a date to be proclaimed for the termination of every award on its next anniversary, unless the parties to an award apply jointly for its continuation in relation to particular workplaces: para. 2.12.

(i) If they so apply, the award will continue to apply in full force.

(ii) Where an award terminates under para. 2.12 and no replacement workplace agreement has been entered into, the employee will continue to enjoy the conditions which applied under the terminated award: para. 2.13. This will be achieved by legislation "to incorporate those terms and conditions into the relationship" between employer and employee: *ibid.* Changes in the conditions will come by agreement: 2.1314. The legislation will provide a dispute settling procedure, for although the employee is enjoying the conditions which applied under the award, the award will in fact have terminated, and disputes under it will not be within the jurisdiction of the Commission: para. 2.14. In effect the parties will inherit by legislation a contractual position.

4. The Constitutional Fears

As noted earlier, questions as to the constitutional basis for the necessary legislation were raised, and doubt expressed, in a paper read by Mr. Greg Craven to a conference of the H.R. Nicholls Society in September 1991.1. There is also in limited circulation a research assignment "The Constitutional Aspects of Deregulating the Labour Market", prepared in 1991 by Mr. D.G.C. Purvis. Its Bibliography collects other literature on the matter. Mr. Craven's title, *You Agree, I Agree, But Will the High Court Agree ?,*[2] indicates one large part of Mr. Craven's concern, namely the High Court. Mr. Craven identified three principal grounds for concern:

a. That the essentially Irish Catholic labour background of several of the judges would lead them to see the Coalition proposals as "outlandish, unusual, threatening, and radical", with a cultural aversion to them arising instinctively.

b. That as regards "the scope of Commonwealth power" the Court reached a "highwater mark" in 1982 (he meant 1983) in the *Dams Case* (in fact there was only one dam, but no one likes to call it the

Dam Case) and is now in a trend of retreat from that position, as shown by the *Corporations Case.* (Formally, *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 C.L.R. 1, and *New South Wales v The Commonwealth (The Corporations Case)* (1990) 169 C.L.R. 482). It is said to be "clear" that the Court has lost some of its taste for an ascendant Commonwealth".

c. That decisions such as the *Bank Nationalisation Case* (*Bank of New South Wales v The Commonwealth* (1948) 76 C.L.R. 1) show that the High Court "is inclined to look askance at radicalism" (which ironically comes these days from the right), so that one must fear that the Coalition legislation "will not find a naturally sympathetic High Court".

The result of all this, it is said, is that one must fear that the Court would be likely to treat as fatal any constitutional doubts which might fairly be found to exist.

I return to such considerations in due course. Meanwhile my task is to consider what the constitutional position is under some of the various heads of power which have been seen as relevant.

5. The Constitutional Basis for the Coalition Policy

1. Section 51 (xxxv) The Arbitration Power

Mr. Craven gives this power no detailed consideration, on the basis that it is "rightly ... conceded that it would not justify the enactment of industrial agreement legislation". He says in particular:

a. From its nature the provision looks to laws dealing with aggregated industrial interests, whereas Coalition policy is for the legislative individualisation of such interests.

b. It would be hard to characterise a law with respect to voluntary industrial agreements as a law with respect to conciliation and arbitration.

c. It would in very many cases be difficult to create the element of interstateness.

From those considerations the conclusion is drawn that it will be necessary to look for the necessary constitutional support in more esoteric places, as in the corporations power and other powers, not directly related to the issue. I note that Mr. Purvis likewise finds "considerable obstacles" for the Coalition arising from the wording of pl. (xxxv): p. 19.

This is the main area I wish to deal with. And I have to say that there seems to me significant error in treating pl. (xxxv) as being anything like as irrelevant as does Mr. Craven. I accept readily enough that pl. (xxxv) may not suffice to support the whole policy. Probably no single provision of the Constitution will do that. It may well be a matter of depending on several sources of power. But once one accepts that, the relevant question ceases to be, Can I achieve the policy under this power ? It becomes the more limited one, To what extent can this power help me to achieve the policy ? And if one comes at pl. (xxxv) with that humbler question, which Mr. Craven did not, I think the answer is in fact, Quite a lot.

Several matters need to be borne in mind:

(1) A law which repeals a law which is within a head of power, is itself within that head of power.[3] A law repealing the *Industrial Relations Act* entirely would be valid, as a law with respect to conciliation and arbitration, within pl. (xxxv).

(2) There is no constitutional requirement that Parliament shall exercise the power conferred by pl. (xxxv)or (in general at least) any other power at all, or to any particular extent. That is entirely a matter for Parliament.

(3) If Parliament does enact a law with respect to conciliation and arbitration under pl. (xxxv), there is no constitutional requirement:

a. That the conciliating and arbitrating be by a commission. (Parliament may enact that it is to be done by Three Wise Men, or a panel from the committee of the Housewives' Association, or the winner of the Brownlow Medal.)

b. That the conciliating and arbitrating be by one body. (Parliament might establish a different body for each industry, or however else it chooses.)

c. That the power to conciliate and arbitrate be given to someone with respect to every dispute which the Constitution would *permit* the Parliament to vest in someone. (Indeed if Parliament established a number of tribunals it would be *forced* to lay down which of them had power to conciliate and arbitrate which disputes.) It is for the Parliament to say what power to conciliate and arbitrate in respect of what disputes it chooses to confer on which body.

(4) There is no constitutional principle that the jurisdiction be given permanently. What Parliament has given, Parliament can take away. (Though I will not add, Blessed be the name of the Parliament.)

(5) A law saying how long an award made under the system the Act establishes shall remain in force seems to me a law "with respect to"

awards already in force.

(6) It is too simplistic to describe the Coalition Policy as being about "voluntary industrial agreements" and then to say that laws about voluntary industrial agreements are not laws about conciliation and arbitration. That may all be true, but it misses the point. People can enter into *voluntary* agreements without Parliament saying that they can, and laws which are laws with respect to conciliation and arbitration *can* be conditioned on the presence or absence of a voluntary agreement.

For reasons (1) to (5) just given I would for myself see little reason to doubt that the arbitration power would support laws providing:

a. That existing awards shall cease to apply to persons who enter into a workplace agreement.

b. That existing awards shall terminate on their next anniversary, unless continuation is sought by the parties.

c. That the Commission shall not have jurisdiction as to disputes arising between parties who have entered into a workplace agreement, or between such other persons as Parliament prescribes.

d. That the Commission shall not have jurisdiction as to a dispute as to the conditions of employment of persons employed under workplace agreements.

All that would not of course get all of the workplace agreement side of things set up. But it would bring about the untying of things under the existing system, to accommodate such workplace agreement events as in fact happened. And doing that would open the way to much more: see point (6) above. Putting aside the case of minors (which is in fact specially dealt with), an employee (a person) does not need an Act of Parliament to authorise him to enter into a workplace agreement (contract) with his employer (another person). He has that right under common law, as a free person. All he needs is that no Act of Parliament (or award thereunder) tells him that he can't. And a law cutting back the *Industrial Relations Act* to ensure that neither that Act nor an award thereunder says any such thing is in my view a valid law, as a law under pl. (xxxv).

The comment would of course be justified, that laws such as these would merely remove obstructions to people binding themselves to agreements, and would not empower compulsion. ~Difficulties are then seen as regards such things as requiring that workplace agreements meet minimum conditions. If there is no power to make laws with respect to workplace agreements, how does Parliament ensure that workplace agreements meet minimum conditions?

This is not the occasion to pursue the detail of legislative drafting. But I can say that I doubt if the problem is beyond the wit of man. Many laws

about one matter affect conduct in other matters. Tax law offers many examples. The right to a deduction or a reduced rate of tax is frequently made conditional on arrangements meeting certain conditions which the Commonwealth cannot itself compel. No Commonwealth or other law says that any owner of an item of property on the Register of the National Estate must, or that he is authorized to, give it to the National Trust; or that the National Trust must, or is authorized to, agree to preserve that item of property for the benefit of the public. Section 78 (1)(aaa) of the *Income Tax Assessment Act* merely says that if those events do happen then the owner shall have a deduction of the value of the item of property. Practical control over superannuation has been assumed in much the same way. There are many other examples. Now a formal workplace agreement can only exist in an award area: cf. paras. 2.2 and 2.9 of the Policy. And only if a negotiated agreement fits the definition of workplace agreement will entry into it exclude the award. If the Act says that to qualify as a "workplace agreement" the agreement in fact negotiated must require payment of minimum rates and contain a dispute settling procedure, I would have thought that the problem of making such agreements meet minimum conditions and contain a dispute settling procedure would disappear. Why bother to sign an agreement which doesn't achieve anything ? And certainly the employee will be protected, for if the agreement is not a workplace agreement he will remain under the award.

I can see the possibility, if it were thought necessary, of a system of registration of workplace agreements, with only registered agreements having the effect of excluding the operation of awards, and with registration requiring compliance with the relevant conditions.

I do not mean that such devices are altogether easy, or that they will solve all problems. But it does seem to me that a very great deal of what is sought can be achieved by skilful (not always present these days) drafting well within the arbitration power. I feel very much more bullish as to this power than did Mr. Craven.

2. Other Powers: General

I fear that what I have said as to calling pl. (xxxv) itself in aid does not exempt me from dealing with other possible sources of power, though I will do so much more briefly than I might have done otherwise. I make two preliminary comments.

A. Mr Craven says:

> "Put simply, there is no fully satisfactory head of power for the passage of such legislation."

Again I suggest the more humble question: To what extent can this power help ?

B. The Industrial Relations Act has already adopted drafting devices as long found in the *Trade Practices Act* 1974, for attracting all practicable heads of constitutional support: cf. s. 6 of that Act. Section 127C of the *Industrial Relations Act* as inserted by the *Industrial Relations Act* 1992, provides as follows:

"127C. (1) Section 127A and 127B apply only as follows:

(a) in relation to a contract to which a constitutional corporation is a party;

(b) in relation to a contract relating to the business of a constitutional corporation;

(c) in relation to a contract entered into by a constitutional corporation for the purposes of the business of the corporation;

(d) in relation to a contract relating to work in trade or commerce to which paragraph 51 (i) of the Constitution applies;

(e) in relation to a contract so far as it affects matters that take place in or are otherwise connected with a Territory;

(f) in relation to a contract to which the Commonwealth or a Commonwealth authority is a party.

(2) In this section:

- "constitutional corporation" means a corporation to which paragraph 51 (xx) of the Constitution applies;
- "contract" has the same meaning as in section 129A."

There will be nothing new in a similar device being applied more widely.

3. Section 51 (xx!: The Corporations Power

The precise terms of the power are:

"(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."

It has become clear through a series of cases that the phrase "trading or financial corporations" has a wide meaning: see e.g. *R. v Federal Court of Australia: ex p. W A. National Football League* (1979) 143 C.L.R. 190, State Superannuation Board v Trade Practices Commission (1982) 150

C.L.R. 282, *Actors and Announcers Equitv Association of Australia* v Fontana Films Pty. Ltd. (1982) 150 C.L.R. 169, Fencott v Muller (1983) 152 C.L.R. 570, The *Tasmanian Dam Case* (1983) 158 C.L.R. 1. It will apply to the vast majority of corporations, statutory or otherwise, which employ people in Australia..

There has been discussion as to whether the power is limited to enacting laws with respect to those activities of trading corporations which make them such, namely their trading activities; or whether the power extends to all things to do with such corporations. The latter view has prospered. The view is increasingly supported, that the provision will support any law directed at trading corporations: see *The Tasmanian Dam Case* (1983) 158 C.L.R per Mason J. at pp. 148-153, per Murphy J. at p. 179, per Brennan J. at p. 241, tending that way as earlier in *Fontana Films,* and per Deane J. at pp. 268-272. In his Southey Memorial Lecture, *The Constitution-Maior Overhaul or Simple Tuneup* ?, Dawson J. has accepted that the majority view now is that pl. (xx) authorises laws with respect to anything to do with a trading corporation (1984) 14 M.U.L.R. 353. The view has been summed up in the phrase that any law in the form "No trading corporation shall" or "Every trading corporation shall" is valid: see per Mason J. at p. 149, quoting interestingly a passage from the 1909 judgment of Griffith CJ. in Huddart, Parker & Co. Ptv. Ltd. v Moorehead (1909) 8 C.L.R 330.

I doubt if that view will now be departed from. And I observe that a judge who was subject to attitudes of the kind Mr. Craven notices would find himself in something of a quandary on this point. Attitudes of that kind lead one toward liking a wide corporations power. A judge who gave the power a limited ambit here would restrict what the power would justify in areas the judge did like to see the Commonwealth control.

If the alternative view were in fact accepted, that the law must relate in some way to the trading activities of the trading corporation, the question would arise whether a law governing the conditions of employment of those employed by the trading corporation was sufficiently related to the trading activities to be a law relating to the trading corporation's trading activities. I should have thought that it was. What Dawson J. (dissenting from the majority) required in *The Tasmanian Dam Case,* was that "the fact that the corporation is a trading corporation should be significant in the way in which the law relates to it": 158 C.L.R at p. 316. Trading corporations are the great employers in this country, and the connection between the trading and the employment seems direct and obvious. They could not trade in any substantial sense without employing; they employ so that they can trade. Mr. Craven suggests validity on the basis that the law is one for the protection and enhancement of the companies' trading activities, and alternatively that

it is a law regulating activities undertaken by the companies for the purpose of trade. The second seems to me particularly true.

I should mention, to exclude it, the possibility of arguing that Parliament could not use the corporations power to support laws as to conditions of work, because that would be inconsistent with the existence of a particular conciliation and arbitration power in pl. (xxxv). It is true that in certain cases the existence of a limlt in the expression of one power will lead to another being cut down. Thus pl. (xiii) enables the Parliament to make laws with respect to "Banking, other than State banking ..." It is established that the corporations power would not authorise a law with respect to State banking, because the restriction in pl. (xiii) is seen as being intended as a general restriction on Commonwealth power, not merely as a restriction on the banking power of pl. (xiii): see *Bourke v State Bank of New South Wales* (1990) 170 C.L.R. 276. It seems to me impossible to get from pl. (xxxv) any restriction limiting the making of laws with respect to conditions of work under other heads of power, and I note that the Commonwealth has long enacted such laws, as e.g. with relation to its own employees, and (under the trade and commerce power, pl. (i)) with respect to stevedoring.

The principal weakness of course with reliance on the corporations power is that its use says nothing where the employer is not a financial or trading corporation. But if I am right in thinking that a great deal of what is sought can be achieved through the arbitration power, very useful support could be gained from the corporations power. In particular:

A. Most of the *large* employers would be covered. As I recall the figures, although very many people in aggregate are employed by noncorporate employers, large noncorporate employers are rare indeed.

B. The home of awards is in government and large corporations. Noncorporate employers and their employees want little but to be left alone, and that is what the Policy seeks to do for them. Corporate cover would enable the Parliament to eliminate the interference otherwise flowing from the award system.

4. Section 51 (i): The Trade and Commerce Power

This power gives the Commonwealth power to make laws with respect to:

> " (i) Trade and commerce with other countries, and among the States."

It is premature to call this a sleeping giant of a power, but it has long been noted that a very similarly worded power in the Constitution of the United States is a very active giant of a power: see generally the remarks of Sir Owen Dixon in the *Bank Nationalisation Case* (1948) 76 C.L.R 1 at pp.

380383, to which on appeal the Privy Council said it could add nothing: (1949) 79 C.L.R 497 at p. 633. It would not surprise if this power were a growth stock over the next generation or so.

Propositions already established are that:

1. The power extends to laws as to the employment of persons actually engaged in trade and commerce with foreign countries and among the States:

   Seamens' Union of Australia v Utah Development Co. (1978) 144 C.L.R 120.

2. The power extends to laws as to the employment of persons directly connected with such trade and commerce, as e.g. in stevedoring:

   Huddart Parker v The Commonwealth (1931) 44 C.L.R. 492.

3. The power extends to industrial relations matters in relation to such persons:

   R. v Wright ex p. Waterside Workers' Federation (1955) 93 C.L.R. 528.

The power is called in aid for the extended operation of the *Trade Practices Act* (see s. 6 (2)(a)(i) and (ii) of that Act), and in s. 127C of the *Industrial Relations Act* 1988 referred to earlier.

There seems to me the likelihood of a large supporting power here. And again one notices that any judge predisposed in favour of Commonwealth power is likely to be predisposed in favour of a large trade and commerce power. His quandary here would arise from the fact that the trade and commerce power would, unusually, be being used in support of legislation *not* leading to Commonwealth control. But in restricting the power he would be throwing a pretty big baby out with the bathwater.

5. The Nationhood Argument

Without going into detail, the observation seems sufficient that if the Policy is calling these powers in aid, it is in serious trouble.

6. Section 51 (xxix) The External Affairs Power

This power gives the Commonwealth power to make laws with respect to:

"(xxix) External affairs."

The power became notorious in the *Tasmanian Dam Case,* and has justly been seen as threatening the entire balance of the Constitution. It is no doubt for this reason that the Coalition Policy says that to the extent that it is necessary "the Commonwealth's full constitutional power, *except the ex-*

ternal affairs power, will be used.": see the Executive Summary at p. v of the Policy document

My only comment as to this, is to pose the question as to how the Commonwealth, in enacting legislation, abstains from relying on a particular power. It is one thing to abstain from so drafting as to call a power in aid, in the manner that s. 6 of the *Trade Practices Act* and s. 127C of the *Industrial Relations Act* do. But a constitutional power can be relevant without being called in aid in that way. If a challenge to the Act were mounted, the High Court might well say that the issue was whether the Act was valid, not whether it was valid because falling within such powers as the Government of the day found politically correct, and wished to rely on. Or is the Act itself, as passed by Parliament, to take the surprising course of saying that to the extent that a provision is valid only because justified by the external affairs power, Parliament's intention is that the provision shall be invalid ? I think the Coalition might have more difficulty in *not* relying on the external affairs power than it recognised when it put the entirely understandable disclaimer into the Policy.

6. Conclusion

Generally then, and while seeing significant tasks for drafting, I would not have thought that achievement of the Policy was beyond the constitutional competence of the Commonwealth. And I cannot but observe that leaving people free to make their own agreements if they wish ought *not* to be.

Notes

1. Craven's paper was published in the June 1992 issue of this Review under the title "The Coalition and Voluntary Industrial Agreements: Some Constitutional Questions".
2. As the previous footnote indicates, the title was changed when the paper was published.
3. I can see at least one probable exception to this proposition, namely an Act to repeal those provisions of the *Judiciary Act* 1903 which operate to bring into existence the High Court of Australia. Section 71 of the Constitution says that "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia... " There could be an argument that once Parliament has exercised its legislative power to call that Court into existence, s. 71 requires the continuance of that Court. And if you don't think that argument would win, I do.