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THE FEDERAL CONTROL OF STATE EMPLOYEES IN AUSTRALIA

ERIC ARMOUR BEECROFT

In the federal systems of the English-speaking world, businessmen, workers, farmers and economists, as well as lawyers, have been profoundly concerned with the judicial process. Some of the reasons for this concern, in the case of Australia, were shown in an article in the April number of this journal. In that article, I discussed (1) the circumstances leading to the enactment of the "conciliation and arbitration" clause, 51 (xxxv), of the Commonwealth Constitution; (2) the attempts of the Commonwealth Parliament, under that clause, to confer upon the federal Arbitration Court the power to declare a "common rule," that is, a code of conditions for an entire industry, as a function ancillary to its task of preventing and settling inter-state disputes; (3) the disallowance of this power by the High Court in the Whybrow case; (4) the considerable extension, by later practice and by judicial interpretation of the term "disputes," of the Arbitration Court's jurisdiction over industrial conditions; and (5) the difficulties resulting from the maze of technicalities and from the delays involved in determining questions of jurisdiction.

Another problem in political policy and constitutional law in Australia has been the question of the power of the federal Arbitration Court to make awards binding on state employees. Such a matter would, perhaps, not be one of major concern in the United States or Canada; but in a country where an unusually large proportion of the population are employed in state-owned enterprizes, it has had a special importance.

The economic and political factors which gave rise to this problem of interpretation are of particular interest to the student of federalism. The Australian Constitution was enacted by the Imperial Parliament in 1900, and the first Commonwealth Parliament met in 1901. No sooner was the central government established than it became the field of conflict for all of the major forces of Aus-

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2 11 O. L. R. 311 (1910).
3 63 & 64 Vict., c. 12 (1900).
tralian economic life. Itself a result of nationalizing economic and cultural forces, the central government in turn provided a stimulus for the continued growth and consolidation of Australian as distinct from local movements. It is notable that the National Labor Party began its militant career with the first Commonwealth elections and, within three and a half years of federation, its leader was Prime Minister.4

The rapid unification of the labor movement was accompanied by an increasing demand for complete Commonwealth power over industry and commerce. This was apparent even in the first session of the new Commonwealth Parliament in 1901.5 Indeed, federalism in Australian politics may almost be said to have started on its rapid decline as soon as it was put into operation. It is not possible to find in the experience of any other federation so early and so wide a divergence of opinion from the intentions of the constitution-makers.

Unable to persuade the state governments, however, to give up their power over industry and commerce, the advocates of national industrial legislation set about making use of the "conciliation and arbitration" power. Vehement discussions took place in two sessions of Parliament while the arbitration bills were under consideration. Especially heated debate occurred over the provision that the Arbitration Act should not apply to the public servants of the Commonwealth or of a state. This provision was tentatively accepted; but an amendment was proposed by a Labor member that the Act should apply to railway employees of the state.6

In view of the fact that this same object was later attained through judicial interpretation, it is interesting to notice that Mr. Deakin, speaking for the government, warned emphatically that this provision, if enacted, would destroy the self-governing powers of the states. It would place them under a tribunal with authority to decide the terms and conditions under which railway servants should be employed. The amendment was carried against the government, and the bill was abandoned.

When a new conciliation and arbitration bill was introduced in the next session of Parliament, the same controversy over the subordination of the states was raised again. The Labor Party, on which Mr. Deakin's Ministry depended for support, urged with

4 Turner, The First Decade of the Australian Commonwealth (1911) 83 et seq.
5 Supra n. 1, at 206-208.
6 Turner, op. cit. supra n. 4, c. 6.
even more determination the inclusion of all state servants under the jurisdiction of the arbitration tribunal. It was evident in the debate that the Labor Party was aiming ultimately, through the federal Arbitration Court, to secure control of the industrial establishments, both public and private, in all the states. It was thoroughly realized by both sides that the issue was really whether a system should be established to permit employees, by collusion with their fellow-employees in other states, to bring their disputes under a central tribunal which, it was hoped, would enable them to escape from less favorable awards in the states. The bill passed; and the statute then, of course, became subject to judicial interpretation by the High Court and to practical administration by the tribunal which it had established.

The question of the authority of the Arbitration Court in respect to state employees came before the High Court at an early date in the Railway Servants' case. It seems justifiable to discuss this case later at some length, because it gave rise to some of the most interesting issues in Australian constitutional interpretation and because it showed the extent to which the High Court became the arbiter of far-reaching conflicts over social policy.

The three justices of the High Court at this time were Sir Samuel Griffith, Sir Edmund Barton and Mr. Justice O'Connor. All of these men had participated in the framing of the federal constitution and were deeply devoted to the federal, as against the unitary, principle. All three had been close students of the working of the Canadian and American systems. Griffith's preference for the American federal institutions had been made emphatic on many occasions during the '90's. Barton and O'Connor had been emphatic, in the Conventions, as to their preference for the federal form as exhibited in the United States rather than the diluted Canadian form. It is not surprizing, therefore, that these ardent protagonists of the federal principle, who had been among the in-

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7 Ibid., at 73.
8 No. 13 of 1904.
10 See Wise, The Making of the Australian Federation (1913) and Hunt, American Precedents in Australian Federation (1930), for many references to the contributions of these men in the federation conferences.
11 See Official Record of the Proceedings and Debates of the National Australasian Convention, (Sydney, 1891) pp. 16, 54, 254; Hunt, op. cit. supra n. 10.
12 Wise, op. cit. supra n. 10, at 115.
intellectual leaders of the federation movement, continued, upon assuming their judicial tasks, to emphasize the federal principle and to avoid, as far as possible, every unifying tendency in interpretation.

Needless to say, this emphasis upon the federal principle and the disparagement of the more unified Canadian forms by the leaders of federation were not the mere accidental results of personal whims. Such attitudes found acceptance undoubtedly because they expressed the prevalent demand for the protection of "state rights." By comparison with the Canadian of 1867, the Australians of the '90's were relatively indifferent to the idea of unification. Even the defence motive was less impelling than it had been in Canada during the American civil war. The Canadians had thought to profit by the example of what appeared to be an ineffectual union of states to the south.\(^{13}\) The Australians in the '90's were primarily intent upon gaining the practical economic benefits of a central government, without sacrificing many of their long-cherished local institutions. In 1900, no strong continent-wide movements existed to create a sense of Australian nationality. The legal principles formulated by the first three judges, therefore, may be said to represent the consensus of the opinion of the time.

The rationalization in legal and political thought of a growing sense of nationhood had to wait on the actual establishment and operation, for a time, of a central government. In the early years of federation, the nationalizing forces organized rapidly. The reforming labor movement quickly adapted itself to the new system and concentrated its vigorous efforts upon the federal parliament. Finding itself thwarted by the conservative upper chambers in the states, it led the centralizing process by making its demands through the new government. The Commonwealth Parliament offered not only less mechanical obstacles, but a wider scope for achievement in social reform. It was this reforming Labor Party which drew up and presented to the people the early proposals to expand the federal powers. The political pressure of this nationalizing movement was profoundly influential in shaping the policy of the Deakin Liberals, who held office in 1903-04 and alternated in power with the Labor

-\(^{13}\) See the speech of Sir John Macdonald, Feb. 6, 1865, in Kennedy, Statutes, Treaties and Documents of the Canadian Constitution, 1713-1929 (1930) 550 et seq.; Kennedy, The Constitution of Canada (1922) 291 et seq.
Party, led by Fisher, from 1905 to 1913. It was in one of these Deakin ministries that Isaacs served as Attorney-General; and it was the same government which placed Isaacs and Higgins on the High Court in 1906. It was to be expected, therefore, that these two men would give juristic expression to the more nationalistic view of the union of states. Their participation, as counsel, in the Railway Servants’ case occurred within a few months before their appointment to the Bench.

The New South Wales Railway Traffic Employees’ Association, composed of employees on the state railways of New South Wales, had applied to the Registrar of the Arbitration Court to be registered as an organization under the Arbitration Act.\(^{14}\) The application was opposed by a rival organization but was granted by the Registrar. The objecting association then appealed to the President of the Arbitration Court,\(^{15}\) contending that, since the applicant association was an organization of state railway servants, it could not be registered, and that the Act, so far as it purported to include state railway servants was ultra vires and void. The President, treating this as a question of law, stated a case for the opinion of the High Court. Since the Commonwealth and state governments had an interest in the outcome of the case, the High Court permitted the states of New South Wales and Victoria and the Commonwealth to intervene.

On behalf of the states, it was argued that the applicant association of railway servants could not be registered by the Arbitration Court. Since it was an organization of state employees, it could not possibly become engaged in a “dispute extending beyond the limits of any one State.”\(^{16}\) A state did not carry on business outside its territorial limits. Furthermore, it was argued, the Arbitration Court’s power to deal with disputes did not extend to businesses which were instrumentalities of a state. Such a power was not given to the Commonwealth and should not be implied.\(^{17}\)

At that time, it appeared to be settled in previous High Court

\(^{14}\) Part V of the Act, supra n. 8, governs the procedure of registration.


\(^{16}\) The arguments are rather fully reported, supra n. 9, at 496 et seq. The leading counsel for the State of Victoria was Mr. (later Sir) G. M. Mitchell, who was to act for employers in many future cases in which the jurisdiction of the Federal Arbitration Court was challenged. On the other side of the argument were Mr. H. B. Higgins, who was later to become President of the Arbitration Court and a Justice of the High Court; Mr. W. A. Holman, later to be Labor Premier of New South Wales, as counsel for the applicant union, and Mr. I. A. Isaacs (later in the High Court), as Attorney-General for the Commonwealth.
decisions that the agencies of the federal government were not subject to intervention or control under state law. The state governments had been balked in their efforts to assess income taxes on federal officers. However, when the Railway Servants' case arose, this rule of "immunity of instrumentalities" had not yet been applied, reciprocally, to forbid a federal agency to exercise control, by taxation or otherwise, over a state authority.

In answer to the claim that the state governments should be exempted from the operation of the Arbitration Act, it was argued that the doctrine of immunity of instrumentalities, as applied in the United States, where it originated, related only to cases where the exercise of governmental functions, as opposed to business undertakings, was impeded. Governmental functions were those which could not be intended to be delegated to private persons. Furthermore, the Arbitration Court was not intended to impose burdens, but to confer benefits. Part of its work was mediation, which could not possibly impose a burden upon a state.

Mr. Isaacs, for the Commonwealth, argued that the power of the Commonwealth Parliament over inter-state trade and commerce was sufficient to authorize the jurisdiction of the Arbitration Court to make awards affecting state railways. This power, he pointed out, was conferred, not only in general terms by section 51 of the Constitution, but quite specifically with respect to state railways in section 98, which provides that

"The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any state."

This section, said Mr. Isaacs, obviously assumes that the state railway business may extend beyond one state. Counsel on this side of
the case did not confine themselves to purely legal arguments. Mr. Isaacs said that

"no one can say that it is a dangerous thing to leave the settlement of disputes in the inter-state carrying industry to the control of the only body which has any means of dealing with them effectively at one stroke." 20

Messrs. Higgins and Holman urged that the Constitution should be construed in such a way as to effect its purpose, namely, the securing of "peace, order and good government." Legislation could be effective for this purpose only if it applied to state servants. A dispute might be taken up with a common object in different states and the state laws might be powerless to settle it. It should not be assumed that the Arbitration Court would do what was injurious to the states. Only by giving it the power could the mischief aimed at be prevented. 21

The decision of the High Court was that the provisions of the Arbitration Act giving the Court power over state railways were ultra vires of the Commonwealth Parliament and that, therefore, the applicant association could not be registered. Chief Justice Griffith, delivering the opinion of the whole Court, argued (as many were to do later) that if the Arbitration Court had coercive jurisdiction over state railway authorities, "the effective control of the state railways may be to a great extent taken out of their hands," and that the applicant association, if registered, would be able to bring the New South Wales Railway Commissioners into court as litigants for the settlement of any industrial dispute arising between them and extending beyond the limits of New South Wales, "whatever that expression may mean." The revenue of the railways was state revenue, even though the management was entrusted to a body of commissioners. 22

The American case, Collector v. Day; 23 was quoted as authority for the immunity of state instrumentalities. 24 The doctrine was said to be just as applicable to this case as it was to the case of the attempted invasion of the Commonwealth authority by a state government; and that had been settled in D'Emden v. Pedder. 25

To the contention that the doctrine in these cases applied only to

20 Ibid., at 522.
21 Ibid., at 503.
22 Ibid., at 532 et seq.
23 II Wall. 113, 20 L. Ed. 122 (1871).
24 Supra n. 9, at 537.
25 Supra n. 17.
taxation, Chief Justice Griffith answered that taxation was only one instance of interference and control.\textsuperscript{26}

The case of \textit{South Carolina v. United States,}\textsuperscript{27} in which South Carolina’s monopoly of the liquor trade was held, by a six-to-three decision, liable to federal taxation, had been cited to the Court as a case precisely in point. Chief Justice Griffith did not attempt to distinguish the case; and it must be noted that he gave no reason for rejecting it, other than by observing that the minority “were most eminent lawyers.”\textsuperscript{28}

While he did not recognize the validity of the distinction between governmental and trading functions, the Chief Justice did attempt to show that, when the Constitution was adopted, the construction and maintenance of railways was in fact generally regarded as a governmental function in all the Australian colonies, since every one of the six colonial governments had established railways.\textsuperscript{29} This was scarcely a convincing answer to the argument of Messrs. Higgins and Holman that a “governmental” function was one which could not be delegated to private persons.

The Chief Justice then proceeded to answer the argument that the jurisdiction of the Arbitration Court was authorized by the interstate commerce power.\textsuperscript{30} Ignoring the rather broad grant of power over state railways in section 98, which has no counterpart in the Constitution of the United States, he quoted at length from \textit{Hopkins v. United States},\textsuperscript{31} and drew from it the principle that, to warrant federal control, the effect of the factors controlled upon interstate commerce must be “direct and proximate.”\textsuperscript{32} The general conditions of employment on state railways, he said, were not of this character. Yet, in the early part of his opinion, he had not so minimized the importance of employment conditions when he argued that control of such conditions by the Arbitration Court would put the railways to a large extent out of state control.

Chief Justice Griffith thus attempted to answer most of the legal arguments of Messrs. Higgins, Holman and Isaacs. He ignored completely their cogent arguments of social expediency which one might have expected to have some weight, at least where the case

\textsuperscript{26} \textit{Supra} n. 9, at 538.
\textsuperscript{28} Justices White, Peckham and McKenna.
\textsuperscript{29} \textit{Supra} n. 9, at 534-535.
\textsuperscript{30} \textit{Ibid.} at 541 \textit{et seq.}
\textsuperscript{31} 171 U. S. 578, 19 S. Ct. 40 (1898).
\textsuperscript{32} \textit{Ibid.} at 594.
was closely reasoned. As pointed out, however, arguments of expediency were not lacking in his own opinion.

No case could demonstrate more clearly that the federal system, on account of the opportunity it affords for legal controversy, makes it difficult to devise an efficient system of industrial control. Here was an economic-legal situation, in which, apparently, no clearly-recognized rule could be found. Only the framework of a constitution was at hand. The case called for statesmanlike adjudication; yet Griffith's arguments were legal arguments in the narrowest sense, emanating from an underlying devotion to an abstract federal concept. Griffith was fond of repeating that no powers should be allowed to the Commonwealth Parliament unless "by express enactment or necessary implication." Yet in this case he carefully read into the constitution a principle which could be there only "by implication" (as later jurists thought, unnecessary implication), namely, the immunity of state instrumentalities.33

When further cases of this kind came before the High Court, the application of the doctrine of immunity gave the judges a great deal of trouble. In the Steel Rails case34 in 1908, they were required to decide whether this doctrine entitled a state to import rails for use on its railways without paying the Commonwealth custom duty. They decided unanimously that it did not. The power to collect such duties, they said, was conferred upon the Parliament in express terms in the power to make laws with respect to trade and commerce with other countries and with respect to taxation. To the contention that the collection of the duties was a violation of section 114 of the Constitution, which forbade the Commonwealth to lay taxes on the property of a state, a majority of the Court answered that the customs duty was imposed, not on the goods themselves, but on the act of importation. One may wonder, of course, why the "express terms" of section 98 with respect

33 It was in this case that the court expressed its underlying principle of interpretation: that the constitution must be conceived, not as an ordinary statute, but as a contract between the parties to the federal agreement. The Constitution Act, said the Chief Justice, is ""not only an act of the Imperial Legislature but it embodies a compact between the six Australian colonies which formed the Commonwealth." "The rules, therefore, that in construing the statute regard must be had to the existing laws which are modified by it, and that in construing a contract, regard must be had to the facts and circumstances existing at the date of the contract are applicable in a special degree to the construction of such a constitution." N. 0, at 534. For a good discussion of this rule of interpretation, see Kennedy, op. cit. supra n. 17.

to state railways had been regarded differently, especially in the absence of any limiting clause, such as section 114; but the Court did not deal with this apparent inconsistency.

In 1911, the Court was asked by the President of the Arbitration Court to decide a hypothetical question as to whether the Board of Water Supply of Sydney and the Mayor and Corporation of Melbourne, so far as they were supplying electric light to consumers, were subject to the awards of the Arbitration Court.35 The various members of the Court (each emphasizing that his opinion must not be considered as a judicial decision) agreed, with the exception of Mr. Justice Higgins who declined to express an opinion, that the Board of Water Supply of Sydney was an instrumentality of the state and, therefore, by the Railway Servants' decision, was immune from federal interference. But they also agreed that the Melbourne Corporation was not immune, because its electric supply enterprise was a "trading activity." The ground for this distinction is certainly not clear, and the hesitancy of the judges in expressing any convictions on the matter is very evident in their opinions. The case is important because it shows that the judges had begun to recognize a value in the distinction between governmental and trading enterprises. They displayed a willingness, not apparent in the Railway Servants' case, to accept the correctness of the decision in South Carolina v. United States.36 Mr. Justice O'Connor said that

"the implication [of non-interference] is not to be carried beyond the limits of necessity. Having regard to the very great difference between the public services undertaken by municipalities in the United States and those undertaken by municipalities in Australia, this Court might well hesitate to adopt the principles laid down in those [earlier American] cases in their entirety. . . . "

Mr. Justice Higgins, with somewhat more boldness, declared:

"The whole doctrine of exemption of instrumentalities rests on inference; and the inference becomes more and more difficult as the activities of the state increase. How can anyone say that business undertakings of the State were meant to be exempted by a Constitution framed in 1789, at a time when no one dreamed of such undertakings?"38

35 Ibid. n. 35, at 443.
36 Ibid. at 460.
The question as to the Melbourne Corporation was raised again in 1913, although, as in the former case, it did not call for a final judicial decision. The Court merely confirmed its dictum in the case of 1911.

The difficulties finally came to a head when the Engineers' case came before the High Court in 1920. The state of Western Australia owned and controlled certain trading concerns, in the form of engineering works, sawmills and steamships, and claimed immunity for them from the jurisdiction of the Commonwealth Arbitration Court. Obviously it was difficult to differentiate between state trading activities and state railways. The High Court apparently began to realize that to grant immunity to state trading concerns would be to enable the states to encroach extensively upon Commonwealth powers by simply making each trading activity a state government instrumentality. This dilemma involved in applying the doctrine of immunity had been clearly seen by the majority in South Carolina v. United States. If the power to tax was the power to destroy, it was equally true that the power to create tax-exempt (or award-exempt?) trading enterprizes was a power to destroy.

Confronted with these alternatives and with its own confusing precedents, the High Court treated the Engineers' case (which it did not need to do) as though the issue before it was whether to grant the immunity or to resort to the rather drastic expedient of renouncing completely the doctrine of non-interference. It chose the latter course.

The personnel of the Bench had changed considerably since the doctrine of implied prohibitions and the doctrine of immunity were first elaborated. Chief Justice Griffith and Justices Barton

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41 Supra n. 27.
42 Mr. Justice Brewer said: 'Obviously if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the national government would be largely crippled in its revenues ... In other words, in this indirect way, it would be within the competency of the States to practically destroy the efficiency of the national government.' Ibid., at 465.
43 The Court could have decided the case in the same way without overruling the Railway Servants' case, because it had never held, except in the hypothetical cases already mentioned, that state trading concerns other than railways were immune from federal interference. By settling the larger issue in this case, it saved itself the embarrassment of confirming a none too plausible distinction and avoided further inconvenience and confusion.
and O’Connor, who had constituted a majority on the Bench in the early days, were now all removed by death and retirement. Mr. Justice Isaacs (who delivered and, no doubt, wrote, the opinion in the Engineers’ case) and Mr. Justice Higgins remained; and four others appointed between 1912 and 1920 completed the Court. Naturally, they were dissatisfied with the application of the doctrine of the immunity of state instrumentalities. They therefore swept away entirely the conception of implied prohibitions. In declaring that the government of a state, as an employer, might be a party to an industrial dispute and, therefore, bound by an award of the Commonwealth Arbitration Court, the High Court said:

"... it is beyond any doubt that the doctrine of ‘implied prohibition’ can no longer be permitted to sustain a contention, and so far as any recorded decision rests upon it, that decision must be regarded as unsound.”

Speaking of its past decisions on this doctrine, the Court made the rather startling admission that

"The more these decisions are examined and compared with each other and with the Constitution itself, the more evident it becomes that no clear principle can account for them....""... some are.... rested on implication drawn from what is called the principle of ‘necessity,’ that being itself referable to no more definite standard than the personal opinion of the Judge who declares it. The attempt to deduce any consistent rule from them has not only failed, but has disclosed an increasing entanglement and uncertainty, and a conflict with the text of the Constitution and with distinct and clear declarations of law by the Privy Council.”

The Court announced that, henceforth, the Constitution, being a legislative act, would be interpreted by applying the well-known rules for interpreting statutes. It would be permitted

"to speak with its own voice, clear of any qualifications which the people of the Commonwealth, or at their request, the Imperial Parliament, have not thought fit to express, and clear of any questions of expediency or political exigency which this Court is neither intended to consider nor equipped with the means of determining.”

The High Court took this occasion to discuss the future use in Australia of the decisions of the United States Supreme Court. Those

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44 Supra n. 40, at 160.
45 Ibid. at 141-2.
46 Ibid. at 160.
decisions might be recognized as useful for guidance in cases of ambiguity, but in no sense finally authoritative.\textsuperscript{47} In other words, the Court reverted to the principles enunciated by the Judicial Committee of the Privy Council in Canadian cases and in certain early Australian cases. These principles were based on several fundamental differences between the United States Constitution and the Constitutions of Canada and Australia. One form of constitution was organic, the other statutory. Moreover, the Australian and Canadian systems were distinguished from the American by the indivisibility of the Crown. The Crown, in right of New South Wales, for example, might be bound by what the Crown, in right of the Commonwealth, had enacted.\textsuperscript{48} Another difference lay in the existence of the royal veto,\textsuperscript{49} which served as a safeguard, non-existent in the American system except in the Supreme Court itself, against any extreme usurpation of power by state or central government.\textsuperscript{50}

The High Court proclaimed boldly in this case that it was not concerned with the possible abuse by the Commonwealth of the extensive powers which the Constitution entrusted to it. The narrower legal view of the federal system, so common among both lawyers and laymen, and so often useful to vested interests, was disposed of in a gently satirical manner.

"If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done."\textsuperscript{51}

In summary, one is tempted to say that the High Court "muddled through" to a workable formula of interpretation. The old formula, imported from the United States, against the well-established precedents of the Privy Council, to support the "state-rights" viewpoint of the elder judges, was found to be utterly

\textsuperscript{47} Ibid. at 146.
\textsuperscript{48} Ibid. at 146-7, 152 et seq.
\textsuperscript{49} This point had been urged by counsel in the Railway Servants' case, but ignored by the Court. Supra n. 9, at 501.
\textsuperscript{50} The Judicial Committee had rejected the principle of McCulloch v. Maryland as not in accordance with the British conception of parliamentary sovereignty. Bank of Toronto v. Lambe, 12 A. C. 575 (1887). See Haines, op. cit. and Kennedy, op. cit., supra, n. 17; and Abbott v. City of St. John, 40 S. C. R. 597 (1908); Caron v. The King, A. C. 999 (1924). For early Australian cases, see supra n. 17.
\textsuperscript{51} Supra n. 40, at 151-152.
ente. The two junior judges, Isaacs and Higgins, as well as (with more hesitancy) O’Connor, had demonstrated this by emphasizing the different conditions of Australian life, where governments were so extensively engaged in industrial concerns. The United States Supreme Court itself had limited the doctrine in 1905, just before the Australian court, in the Railway Servants’ case, was entering upon its long period of vacillation and confusion. Faced with the urgent necessity for abandoning the formula, technical legal arguments were found in the indivisibility of the Crown and in the character of the Constitution as a statute.

State government enterprises, such as railways and a variety of other public activities, if involved in interstate disputes, are all liable now to the jurisdiction of the Arbitration Court, just as private enterprises are liable. This far-reaching authority of the federal tribunal has given rise to one of the major problems of federalism in Australia. By doing away with the inconveniences and confusion caused by the old doctrine, the High Court, in the Engineers’ case, gave an added stimulus to the controversy over the question of state subordination to the Commonwealth.

Varying degrees of dissatisfaction are expressed by the state governments and their agencies. The state of Western Australia, in her recently-published “Case for Secession,” bitterly denounces the recent tendencies in constitutional interpretation. The effect of the Engineers’ decision, she claims, has been to make the Commonwealth Parliament

“.... a supreme authority, whose word .... can effectively rule the Government of the State itself, and lay commands upon it which may actually threaten the existence of the state as an organization.”

As these words suggest, the complaining attitude of the state governments is based in part on the sense of proprietorship which state officers so often assume in defending “the existence of the state as an organization.” Nevertheless, there is a more substantial ground for complaint. It is shown clearly by the Royal Commission which reported in 1929 on “The Finances of South Australia as Affected by Federation.” The Commission found that wage increases on the South Australia railways in recent years had been due mainly to awards of the federal Arbitration Court. It drew attention to the fact that, whereas the state parliament was

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53 "The Case of the People of Western Australia . . . ." (Government Printer, Perth, 1934) § 135.
able to approve or disapprove increases in wages proposed in state awards, it had no check or veto on federal awards. The federal award had to be obeyed no matter what the consequences might be to the financial position of the state.\(^{53}\) States bound by federal awards with respect to their railway employees claim that they have been obliged to lay off employees, to avoid a higher expenditure than they could afford.\(^ {54}\)

It may matter little whether "the existence of the state as an organization" is preserved. The problem as to whether the states should be sovereign entities or whether they should be parts of an administrative hierarchy is merely one of adapting means to ends. Yet their present position is anomalous. They are expected to be responsible, in the main, for their own financial stability; but the Commonwealth, by wage-fixing and other means, may drastically affect their finances. The states complain that, while the Commonwealth determines many of the amounts which must be spent, as on wages, the states are left to find most of their own funds.

The problem is, of course, also bound up with general questions of industrial policy, especially with the question, too complex to be discussed here, as to whether the federal tribunal should have full power to declare basic wage rates and to determine working hours on a Commonwealth basis.

Even as early as 1911 and 1913, on account of the obstacles resulting from the Railway Servants' decision, the labor movement was able to secure the submission of referenda for a constitutional amendment to enable the Parliament to authorize the Arbitration Court to fix wages and hours for state railway employees. Both of these proposals were rejected, the second by a very slight majority.\(^ {55}\) In 1923, a Ministers' Conference passed resolutions favoring an enactment by the Parliament to provide that state employees should be denied access to the Commonwealth Court, and proposing that the constitution should be amended with the same object.\(^ {56}\) This resolution was never acted upon.

\(^{53}\) COMM. PARL. PAPERS, 1929, No. 44, p. 27.


\(^{55}\) REPORT OF THE ROYAL COMMISSION ON THE CONSTITUTION (1929) 232 et seq.

Evidence was presented before the Royal Commission on the Constitution to show that, on account of federal arbitration awards, it was impossible for state treasurers to estimate their expenditures and that a central court could not handle wage disputes as well as courts familiar with local conditions. On the other hand, there were powerful unions of railway and other state employees who urged the inclusion of all state employees under the jurisdiction of the federal court.67

In addition to the difficulties of finance and general wage policy, there is inconvenience and confusion resulting from the overlapping of state and federal awards. The Premier of New South Wales stated recently in a Ministers' Conference that about one-half of the railway servants in his state were on federal awards, while the others were under awards of the state tribunal. He confessed, however, that his government could see no way out except to transfer all authority in the matter to the Commonwealth.58

When a recent conference of state Ministers of Transport drew up a resolution favoring the exclusion of state railway servants from the jurisdiction of the Commonwealth Arbitration Court, the Commonwealth government declined to submit such a policy to Parliament.59

The Royal Commission, in its Report in 1929, was divided in opinion. While three members recommended that all state employees should be specifically excluded from Commonwealth jurisdiction, two members went to the other extreme and recommended that all state employees should be brought under the federal court.60

The issue is, therefore, far from settled. It will not be surprising, however, if most of the states ultimately yield to Commonwealth supremacy, in this as in so many other functions. Assuming that the system of arbitration will remain, one ventures to predict that state employment will ultimately, along with all private employment, be subject to standards fixed by a Commonwealth tribunal.

67 Supra n. 55, at 165.
58 Conference on Constitutional Matters, supra n. 54, at p. 17.
60 Conference of Commonwealth and State Ministers, Melbourne, June, 1933, COMM. PAP. PAPERS (1933) No. F. 2184, p. 9.
60 Supra n. 55, at 276, 303.