Before the High Court

Industrial Disputes and the Prevention Power: The World Square Case

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Since the *Social Welfare*[1] decision in 1983, the High Court has been progressively re-examining the constitutional and legislative underpinnings of the federal industrial arbitration system. Section 51(xxxv) of the Constitution empowers the Commonwealth to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". Advantage was taken of this power soon after federation to enact the *Conciliation and Arbitration Act* 1904, which has now been replaced by the *Industrial Relations Act* 1988. Under these statutes, a succession of tribunals have been empowered to take compulsory jurisdiction over interstate industrial disputes. However the restrictive terms in which section 51(xxxv) is drafted, combined with the High Court's failure at times to adopt simple and uncomplicated interpretations of those terms, have ensured that the scope of each tribunal's jurisdiction has been a matter of great controversy.[2]

The problems that can arise are well illustrated by the recent decision of the Australian Industrial Relations Commission in *World Square Pty Ltd v Federated Engine Drivers' and Firemen's Association of Australasia*.[3] The question there was whether a dispute over the sacking of union delegates from a major construction site in Sydney was within the Commission's jurisdiction. A Full Bench of the Commission ruled that since the dispute was confined to the State of New South Wales, the constitutional requirement of interstateness was not satisfied. The unions involved have challenged this finding, seeking an order for judicial review from the High Court to compel the Commission to exercise its powers of conciliation and arbitration.

In reviewing the Commission's decision, the High Court has the opportunity to rule on the capacity of the Commission to deal with disputes over the dismissal of individual workers. More generally, it will be faced with the vexed issue of the power of the Commission to take action for the *prevention* (as distinct from the settlement) of disputes. Recent comments made by

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1 *R v Coldham; ex parte Australian Social Welfare Union* (1983) 153 CLR 297.

2 See generally Creighton, B and Stewart, A, *Labour Law: An Introduction* (1990) at 29-32, 72-87; McCallum, R C, Pittard, M J and Smith, G F, *Australian Labour Law: Cases and Materials* (2nd edn, 1990) chs 5-8; Maher, L W and Sexton, M G, "The High Court and Industrial Relations" (1972) 46 *ALJ* 109.

3 Australian Industrial Relations Commission (AIRC), Print no J6099, 20 December 1990.

Mason CJ and Deane J in *Re Federated Storemen and Packers Union of Australia; ex parte Wooldumpers (Victoria) Ltd*[4] have revived speculation about a power that has lain dormant for much of this century.[5] Accordingly this note commences by examining the range of meanings that can be accorded to the term "prevention", before looking at its particular relevance to unfair dismissal disputes and, finally, the issues facing the Court in *World Square* itself.

The Concept of Prevention

The problem with the concept of "prevention" has always been the tension between that term and the words "conciliation and arbitration" in section 51(xxxv). On the face of it, almost any regulation of industry or industrial relations could be justified on the basis of pre-empting future disputation. Giving "prevention" its fullest possible scope, the Commonwealth could exert direct legislative control over employment conditions and other aspects of labour relations, provided only that its regulatory scheme contained some element of "conciliation and arbitration". It may be that this is a desirable interpretation. In its 1988 report, the Constitutional Commission reflected the view of many commentators when it concluded that circumstances have changed since the 1890s and that the Commonwealth should today have unfettered authority to determine the nature and extent of any regulation of the labour market and its attendant relationships.[6]

However the difficulty with pursuing this goal by adopting such a broad construction of section 51(xxxv) is that it flies in the face of the actual wording. In particular, it would make nonsense of the inclusion of the terms "conciliation and arbitration". As the High Court pointed out in *Australian Boot Trade Employees' Federation v Whybrow & Co*,[7] the essence of those terms is that they connote a process or processes for resolving disputes between ascertained or at least ascertainable parties. The Court therefore held that section 51(xxxv) did not authorise "common rule" provisions which would have allowed an award made in settlement of a particular dispute to be extended to bind all other employers in the same industry, whether or not they were parties to the original dispute. While this decision is undoubtedly inconvenient both for the Commonwealth and more especially unions, who must go out of their way to find and dispute with all the employers whom they wish to see bound by federal awards, it seems correct as a matter of simple interpretation. Given the prominence of "conciliation and arbitrat- ion" in section 51(xxxv) and the circumstances which led to its enactment, it seems absurd to suppose that the Commonwealth could on the basis of that power institute a system where a hearing was used merely as a trigger for the operation of a much broader regulation.

But even if extreme views of the power to prevent disputes are to be rejected, this does not mean that the term "prevention" adds nothing to the concept of "settlement" of existing disputes. The desire to give the term some

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4 (1989) 166 CLR 311.

5 See Ford, W J, "The Federal Industrial Disputes Power: Comments on Some Constitutional Considerations" in Rawson, D and Fisher, C (eds), *Changing Industrial Law* (1984) 46 at 65-78.

6 *Final Report* (1988), vol 2, at 794-803.

7 (1910) 11 CLR 311. See also *R v Kelly; ex parte Victoria* (1950) 81 CLR 64.

meaning was evidently felt by some of the early High Court justices. Griffith CJ and Barton J thought that section 51(xxxv) should be read disjunctively, so that "conciliation" would apply both to the prevention and settlement of disputes, while "arbitration" would be confined to settlement only.[8] However this reading is awkward and unconvincing, as O'Connor, Isaacs and Higgins JJ noted in stressing that there is nothing inherently wrong with the concept of preventive arbitration,[9] a view also propounded in more recent times by Murphy J.[10] Discarding that approach then, that leaves three ways of giving "prevention" some meaning without having to overrule *Whybrow*. None of these suggestions, it should be noted, are mutually exclusive.

The first possibility would allow the Commission, where an interstate dispute is already in existence, to anticipate future disputes between the same parties and thus impose award obligations on them with respect to matters not otherwise in contention. The only obstacle to this use of the preventive power would appear to be the ambit doctrine, which holds that the Commission may only make an order or award concerning matters which have been in dispute between the parties or which are reasonably incidental to such matters.[11] One argument would be that the doctrine is only appropriate to the settlement power, emphasising merely that the Commission cannot settle matters not actually in dispute between the parties. However the force of the ambit doctrine lies in the notion that the Commission's authority to act must always be traced to a "dispute", and this jurisdictional prerequisite seems equally applicable to the preventive power, though there the dispute is notional rather than actual. The doctrine can therefore be modified by requiring that any award made by the Commission by way of prevention must fall within the ambit of the dispute that it believes might come into existence but for its intervention. Since such a predictive exercise could hardly be a matter for precision, the doctrine would apply with much less rigour in such cases: indeed Mason CJ has suggested as much.[12]

A second possible use of the preventive power would be for the Commission to intervene in an industrial relationship "before the threshold of actual dispute is reached", as Deane J put it in *Wooldumpers*.[13] This assumes

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8 *Jumbunna Coal Mine No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 332-334, 341; *Whybrow* (1910) 11 CLR 311 at 317.

9 *Whybrow* (1910) 11 CLR 311 at 327-328, 331-332, 340-1; *Merchant Service Guild of Australia v Newcastle and Hunter River Steamship Co Ltd* (1913) 16 CLR 591 at 633-634, 643-644.

10 See eg *R v Heagney; ex parte ACT Employers Federation* (1976) 137 CLR 86 at 105; *R v Turbet; ex parte Australian Building Construction Employees and Builders' Labourers Federation* (1980) 144 CLR 335 at 353-356.

11 *R v Commonwealth Court of Conciliation and Arbitration; ex parte Kirsch* (1938) 60 CLR 507 at 538; *R v Galvin; ex parte Amalagamated Engineering Union, Australian Section* (1952) 86 CLR 34 at 40.

12 *R v Gaudron; ex parte Uniroyal Pty Ltd* (1978) 141 CLR 204 at 211; *Re Federated Storemen and Packers Union of Australia; ex parte Wooldumpers (Victoria) Ltd* (1989) 166 CLR 311 at 318. As the Chief Justice pointed out in the latter case, this helps to explain how an award may be varied to include a "bans clause" (a prohibition on work bans), even though the parties were not originally in dispute over such a provision: see eg *R v Spicer; ex parte Seamen's Union of Australia* (1957) 96 CLR 341.

13 *Re Federated Storemen and Packers Union of Australia; ex parte Wooldumpers (Victoria) Ltd* (1989) 166 CLR 311 at 327.

that in some instances at least it will be possible to identify a pre-dispute situation and act by way of conciliation to prevent any possible interstate dispute emerging. As Isaacs J explained in *Whybrow*:[14]

> A want of agreement in respect of some industrial matter may be unmistakeably manifested, although in circumstances of time, manner and subject matter which evoke no present conflict nor any fear of immediate rupture.

What must be remembered though is that in the years since *Whybrow* the High Court has defined "dispute" very broadly indeed. It has been said that "the essential quality of an industrial dispute is not the suspension of industrial relations but disagreement, difference or dissidence".[15] In practice it is hard to envisage a situation in which parties could come before the Commission without being in a state of "disagreement" about something or other. After all, if the parties do want to attract the Commission's jurisdiction they will presumably know enough to make it appear that such disagreement exists, even if their only goal is to secure the certification of a pre-arranged agreement; while if one of them does not consent to the Commission's involvement, the necessary disagreement is bound to follow. Accordingly comments such as those made by Deane and Isaacs JJ should be seen as more readily applicable to the situation already discussed, where the Commission moves to deal with particular matters not currently in contention between parties who are nevertheless in dispute over other issues.

A third possibility is that the Commission may wish to act to prevent an existing intrastate dispute from spreading interstate. It is indeed this form of prevention which has generated most of the recent debate and which the High Court will be called upon to address in the *World Square* case. Since the legislation enacted under section 51(xxxv) has for most of this century defined "industrial dispute" to include a "threatened, impending or probable [interstate] dispute" or a "situation that is likely to give rise" to such a dispute,[16] the potential for the Commission to act in that way appears to have a sound statutory basis. It is true that section 101 of the 1988 Act requires the Commission to record a finding as to the parties and matters in dispute. However, as Rosemary Owens has pointed out, this finding need only relate to the parties and matter actually before the Commission, not the interstate dispute that the Commission is seeking to prevent.[17]

For some reason though, the notion of intervening in a local dispute before

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14 (1910) 11 CLR 311 at 335. Cf *Merchant Service Guild of Australia v Newcastle and Hunter River Steamship Co Ltd* (1913) 16 CLR 591 at 616; *R v Heagney; ex parte ACT Employers Federation* (1976) 137 CLR 86 at 90.

15 *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387 at 429.

16 The terms "threatened, impending or probable" were added to the definition of "industrial dispute" in s4(1) of what was then the *Commonwealth Conciliation and Arbitration Act* 1904 by s2(b) of the *Commonwealth Conciliation and Arbitration Act* 1910. The additional reference to a "situation [etc]" first appeared in the definition substituted by the *Commonwealth Conciliation and Arbitration Act* 1947 s6(b).

17 "Federal Jurisdiction: The Interstate Character of Disputes Over the Reinstatement of a Dismissed Employee" (1989) 17 *Melb ULR* 318 at 323. Cf the comments made by Deane J in *Wooldumpers* (1989) 166 CLR 311 at 331 as to the predecessor of s101, s24 of the 1904 Act.

it acquires an interstate dimension has lain dormant. It was employed by the Commission in one instance in 1979 to justify dealing with a demarcation dispute which appeared to be confined to a single construction site in Victoria. However the majority of the High Court preferred to uphold the Commission's jurisdiction in that case on the basis that a larger interstate dispute already existed between the parties and that the Commission was merely settling that dispute by focusing upon one of its particular and current manifestations.[18] With respect, this reasoning seems unnecessarily complicated; common sense suggests that if the dispute is presently being fought out in one locality, but may be expected to re-emerge elsewhere, the Commission's role in becoming immediately involved is essentially proactive.

There is another explanation for the Commission being able to deal with a dispute over an issue presently confined to one State, apart from the "local manifestation" theory or the more straightforward notion of prevention. This is that an interstate dispute may come into existence merely because one or both of the parties operate outside the State concerned. In *Turbet*, the case just described, Murphy J considered that it was sufficient that the union involved have this characteristic.[19] Mason J (as he then was) disagreed, but suggested that the presence of an interstate element on *both* sides would be enough, as where the employer had workplaces in more than one State.[20] He repeated this view in *Wooldumpers*,[21] where Deane J also observed that it would suffice that a national employer association was involved together with a national union.[22] If this approach is accepted, there would be much less need for prevention in the sense presently being discussed. On the other hand, there was little sign in *Wooldumpers* that the rest of the Court was receptive to this broad view of interstateness and it would be surprising if it were adopted in the *World Square* decision. If it does fail to find favour, the presence of national organisations will simply be an important evidentiary matter in the context of a preventive intervention, as discussed below, rather than creating the necessary interstate element automatically.

If then the Commission is to be recognised as having the power to act prior to the extension of a dispute interstate, what would this mean in practice for the scope of the Commission's jurisdiction? In *Wooldumpers* both Mason CJ and Deane J were critical of the emphasis placed on the creation of "paper disputes" by the service of written demands, carefully prepared and often exaggerated beyond any reasonable anticipation of success. As the former commented:

> The paradox is that an Act whose object is to promote and preserve industrial peace encourages the creation of an industrial dispute as a means of conferring jurisdiction on the Commission to make a general industry award, the effect of the award being to settle the dispute which has been artificially created ... Recognition of the importance of *preventing* industrial disputes, so long as it is by conciliation and

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18 *R v Turbet; ex parte Australian Building Construction Employees and Builders' Labourers Federation* (1980) 144 CLR 335.
19 Id at 352-353.
20 Id at 349-350.
21 (1989) 166 CLR 311 at 320.
22 Id at 331-332.

> arbitration, would enable the Commission to look to the realities, instead of the artificialities, of industrial relations.[23]

However it is unlikely that a more expansive view of the prevention power would ever obviate the need for paper disputes. So long as the *Whybrow* principle remains, it will be necessary even in preventive cases to show the potential for an interstate dispute between ascertainable parties. The fact is that very few interstate disputes (as traditionally defined) occur spontaneously. Even in companies or industries which cross State boundaries, most disputation which has not been planned in advance tends to occur at the local workplace level. By contrast, where there is a chance to do so, unions will always prefer to make things simple by serving logs of claims on interstate employers, so as to remove any doubt about the interstateness requirement. The phenomenon of the paper dispute simply reflects the fact that the federal conciliation and arbitration system has evolved into a mechanism for the widespread regulation of employment conditions in those industries and/or occupations which for one reason or another have not chosen to remain within the State systems.

Things may have been different had the High Court held the line against paper disputes at the time of the *G P Jones*[24] decision in 1914, by insisting on the need for actual dislocation or overt conflict. It is possible (though unlikely) that the federal system might thereby have been restricted to the function originally envisaged by the drafters of section 51(xxxv), as a mechanism of last resort for large scale disputes, coming into play only where collective bargaining and/or the State systems had failed to prevent widespread dislocation. However the creation of paper disputes has long become standard industrial practice. Although the High Court has always insisted on the need for a dispute to possess a "real and genuine" interstate element, in practice it has only been in the rarest of cases that the paper dispute strategy has failed to confer jurisdiction upon the federal tribunal.[25] If the Court were to now rule paper disputes to be "unreal", that would not reduce the pressure for access to the federal system. Unions would simply be forced to organise token industrial action on an interstate basis in order to satisfy the constitutional requirement. This was conceded by Deane J when he acknowledged that paper disputes performed a "useful function" and that it was "obviously desirable that there be some procedure for satisfying the condition of jurisdiction short of actual industrial warfare".[26]

Nevertheless, while it is difficult to see the need for paper disputes diminishing, the concept of preventing intrastate disputes from extending interstate still has an important supplementary role to play. There are many issues which arise in the context of federal award coverage, but which cannot readily be regarded as the subject of a fully-blown interstate dispute, for example because they involve the treatment of individual employees. The

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23 Id at 321 (emphasis in original). See also *R v Graziers' Association of NSW; ex parte Australian Workers Union* (1956) 96 CLR 317 at 333.

24 *R v Commonwealth Court of Conciliation and Arbitration; ex parte G P Jones* (1914) 18 CLR 224.

25 See *R v Ludeke; ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 181-182. Cf cases cited below n61.

26 *Wooldumpers* (1989) 166 CLR 311 at 330.

preventive power would allow the Commission to deal with some at least of these matters, provided a potential interstate dispute could thereby be averted. At the moment many spontaneous disputes come before the Commission for conciliation without much attempt being made to satisfy the jurisdictional requirement of interstateness. Conscious of the need for speed and flexibility, Commission members often agree to offer their services in what is technically a private capacity (though at the public expense), making recommendations rather than binding orders. This is all very well, but it breaks down when one side insists on pressing the jurisdictional issues, or when an award would be the appropriate outcome. Recognition of the prevention function would permit many of these disputes to be handled with proper legal authority: the Commission would still need to record a formal finding as to the parties and matters in dispute, but there would at least be no need to wait either for a paper dispute to be created or for industrial action to occur interstate.

Unfair Dismissal and the Commission's Jurisdiction

The prevention power has particular potential with respect to complaints that workers have been unfairly dismissed.[27] Traditionally these claims have been very hard to bring before the federal tribunal on an official basis, although there has long been a practice of parties agreeing to refer claims to the Commission for it to exercise the sort of informal jurisdiction just described. Since the Commission's decision in 1984 in the *Termination Change and Redundancy Case*[28] to accede to the ACTU's job security claims, most federal awards have come to contain a provision prohibiting unfair dismissal. However most workers who are dismissed in breach of these provisions lack any effective means of redress. While awards which deal with unfair dismissal also tend to contain a grievance procedure which stipulates that a dispute over an alleged breach may be referred to the Commission for conciliation if the parties themselves cannot resolve the matter,[29] no legal order may be made in the worker's favour. The only statutory remedy available is an action to have a penalty of up to $1000 imposed;[30] no power is conferred upon the Federal Court or indeed any other court to order that an unfairly dismissed employee be reinstated and/or compensated.

One possibility is to sue for breach of contract, on the theory that the award prohibition has become incorporated into the worker's contract of employment.[31] However the reluctance of the general courts to order specific performance in the context of employment means that most plaintiffs would be thrown back on damages as their only remedy. Moreover while employees working under contracts which cannot be terminated unfairly should have a greater prima facie entitlement to compensation than those whose engage-

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27 See Creighton and Stewart, above n2 at 165-169; Punch, P and Irving, M, "Federal Dismissal/Reinstatement Jurisdiction" in CCH Australia, *Australian Labour Law Reporter*, ¶60-011.

28 (1984) 8 IR 34; 9 IR 115.

29 As to the validity of such a provision, see *Appeal by Metal Trades Industry Association of Australia* AIRC, Print no J7227, 28 March 1991.

30 See eg *Australian Bank Employees Union v Westpac Banking Corp* (1988) 30 AILR ¶425.

31 See *Gregory v Philip Morris Ltd* (1988) 80 ALR 455; *Wheeler v Philip Morris Ltd* (1989) 97 ALR 282; Mitchell, R and Naughton, R, "Collective Agreements, Industrial Awards and the Contract of Employment" (1989) 2 *Aust J of Labour L* 252.

ment can be ended without cause, the reality is that the doctrine of mitigation will usually ensure that for all but a handful of highly paid and/or highly skilled employees the amounts recoverable will not warrant the time and expense involved in going to court.[32]

In fact the union movement has shown little enthusiasm for the introduction into the federal system of a mechanism for the enforcement of award provisions prohibiting unfair dismissal. Thus although Part VI of Division 8 of the *Industrial Relations Bill* 1987 contained provisions allowing for such actions to be brought in the proposed new Labour Court, the ACTU made little fuss about their omission from the Bill when it was reintroduced the following year and ultimately enacted as the *Industrial Relations Act*. One of the "problems" with the 1987 proposals, it appeared, was that individual employees would have access to the complaints mechanism rather than unions having control of the process of notifying and settling such disputes (and thus being able to "screen out" unwanted actions).[33] As far as the State systems are concerned, the tide has now decisively turned in this respect; even in New South Wales, formerly the bastion of union-controlled access, provision has now been made for individual complaints.[34]

However another, perhaps stronger, reason for the stance taken by the ACTU retains its force. This is the perception that unfair dismissal claims are much better dealt with in the informal atmosphere of the Commission, where the industrial relations expertise of the Commission members can be brought to bear, rather than in the Federal Court. It may be that the Labour Court would have provided an acceptable compromise, especially since the 1987 Bill proposed that all disputes be referred to the Commission for conciliation, a process which in the more developed of the State systems ensures that more than 90 per cent of all claims are either discontinued or settled prior to any formal hearing. It is possible that the 1987 proposals may be resuscitated in the near future. For the time being though, it seems that pressure will continue to be mounted to find a practicable and convenient way for the Commission to be given jurisdiction to review the fairness of individual dismissals.

What caused renewed optimism on the part of the ACTU in its drive to give the Commission (rather than any judicial body) jurisdiction over unfair dismissal complaints, and what therefore led in part to the demise of the 1987 proposals, was the High Court's decision in *Re Ranger Uranium Mines Pty Ltd; ex parte Federated Miscellaneous Workers Union of Australia*.[35] The unanimous judgment in this case confirmed what the Court had earlier indicated in relation to the Victorian legislation in *Slonim v Fellows*,[36] that employees collectively have a legitimate interest in decisions taken to dismiss any of their number, so that claims for reinstatement of a dismissed worker made by employees and their unions constitute an "industrial matter" and thus potentially fall within the jurisdiction of the Commission.[37] (The same should

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32 See Stewart, A, "New Directions in the Law of Employment Termination" (1989) 1 *Bond LR* 233 at 245-252.

33 For criticism of this stance, see Stewart, A, "Employment Protection in Australia" (1989) 11 *Comparative Labor LJ* 1 at 43-44.

34 *Industrial Arbitration (Unfair Dismissal) Amendment Act* 1991 (NSW).

35 (1987) 163 CLR 656.

36 (1984) 154 CLR 505.

be true of a claim for compensation for a worker where reinstatement proves impracticable.[38]) It also made it clear that no forbidden use of judicial power under the *Boilermakers*[39] doctrine will be involved, provided the Commission is asked to create a right to reinstatement (or, presumably, compensation) rather than to enforce or recognise an existing right.[40]

However there remains the need to satisfy the constitutional and statutory requirement of an interstate element in any dispute brought before the Commission. On the face of it, a dispute about the dismissal of a single worker is inherently a local dispute.[41] This problem did not arise in *Ranger*, but only because the dismissals in question occurred in the Northern Territory where, under section 122 of the Constitution, the Commission has been given general jurisdiction.[42] This is true in other instances. For example, matters involving waterside or maritime workers, flight crew officers, public sector employees or members of the Federal Police may all come before the Commission without the need for interstateness or indeed even a "dispute".[43]

But what of other workers covered by federal awards? The ACTU believed that it had found the right strategy for its member unions when, in the aftermath of *Ranger*, it advocated a two-stage process of creating a paper dispute on an interstate basis as to the general issue of unfair dismissal, and then asking the Commission to settle that dispute on a piecemeal basis by dealing with each and every individual complaint put forward from time to time by the relevant union.[44] This theory seemed to have been scotched by the decision in *Wooldumpers*,[45] where it was ruled that the issue of the fairness of one employee's dismissal in 1988 did not fall within the ambit of a paper dispute created in 1986 by a demand that no employee be dismissed without prior union consent. It is in fact arguable that if the log of claims originally served in 1986 had been drafted more carefully, the result might have been different; certainly there are hints to this effect in the judgments of both Mason CJ and Gaudron J.[46] In particular, it would seem possible to notify an interstate dispute over a claim to set up a body akin to a board of reference. This body would then have the function of resolving disputes over individual dismissals as and when they arose.[47]

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37 Cf *R v Portus; ex parte City of Perth* (1973) 129 CLR 312 at 329.

38 See eg *Australian Institute of Marine and Power Engineers v Cape Lambert Services Pty Ltd* AIRC, Print no H8528, 6 June 1989. Cf *Administrative and Clerical Officers Association v Public Service Commissioner (NT)* (1989) 30 IR 165.

39 *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; (1957) 95 CLR 529.

40 Cf *R v Gough; ex parte Meat and Allied Trades Federation* (1969) 122 CLR 237; *Hatchett v Bowater Tutt Industries Pty Ltd* (1990) 33 AILR ¶2.

41 See eg *R v Gough; ex parte Cairns Meat Export Co* (1962) 108 CLR 343.

42 *Northern Territory (Self Government) Act* 1978 s53.

43 *Industrial Relations Act* 1988 s5, Sched 1. See eg *Australian Institute of Marine and Power Engineers v Cape Lambert Services Pty Ltd* AIRC, Print no H8528, 6 June 1989.

44 While there must normally be an interstate element to any dispute before the Commission, awards made in settlement of that dispute need not themselves operate beyond the confines of a single State: *R v Isaac; ex parte State Electricity Commission of Victoria* (1978) 140 CLR 615.

45 (1989) 166 CLR 311. See Owens, above n17.

46 (1989) 166 CLR 311 at 318, 336.

47 As to the Commission's power to establish boards of reference, see *Industrial Relations Act* 1988 s131; *R v Hegarty; ex parte Corporation of the City of Salisbury* (1981) 147

Be that as it may, in the aftermath of *Wooldumpers* most attention has been directed to those portions of the judgments of Mason CJ, Gaudron and Deane JJ which discuss the use of the prevention power. Each of them suggested with varying degrees of confidence that jurisdiction might have been upheld had the Commission been asked to order reinstatement to prevent the existing dispute over the employee's dismissal from acquiring an interstate dimension.[48]

As indicated earlier, it seems difficult to disagree with the proposition that both the Constitution and the present legislation permit the Commission to intervene in a local dispute over the dismissal of a worker or a group of workers in order to prevent that dispute from spreading interstate. The crucial question is how likely an interstate extension must be before the Commission is authorised to act. Must it be almost certain? Highly probable? More probable than not? Merely a possibility? And on what sort of evidence must the Commission be expected to base its finding as to the necessity for intervention? In *Wooldumpers* both Mason CJ and Deane J seemed prepared to concede to the Commission considerable latitude in making the necessary finding,[49] while at the same time suggesting that the existing legislation might not fully exploit the constitutional power of prevention.[50]

It is not clear that the legislation really does fetter the Commission, given that it is empowered to take jurisdiction over a "threatened, impending or probable" dispute or "a situation that is likely to give rise to" such a dispute.[51] Realistically, these terms do give sufficient scope to the Commission to intervene wherever it considers it appropriate to do so. In the first significant case after *Wooldumpers*, *Australian Social Welfare Union v Stones Corner Training Association*,[52] MacBean DP took the view that it was simply up to the Commission to assess the evidence presented to it and to form a conclusion as to whether the likelihood of any extension justified intervention (and thus a finding of jurisdiction). The case arose out of the Commonwealth's decision to integrate a number of labour market programs, including the Community Youth Support Scheme (CYSS), to form a new program, Skillshare. After the announcement of new funding arrangements, the subsequent rationalisation at two CYSS organisations in Queensland saw the dismissal of two project officers. Their union notified a dispute over the matter to the Commission and MacBean DP found that he had jurisdiction on a preventive basis. The key evidence came from the union's national secretary, who stressed the "grave concern" felt by union members at other Skillshare branches around the country at what was seen as a threat to their security of employment.

The same "factual" approach is evident in the decision of a Full Bench of

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CLR 617. Note that *Hegarty* was referred to by the Commission in upholding the validity of award provisions requiring dismissal disputes to be submitted to the Commission for conciliation: above n29.

48 (1989) 166 CLR 311 at 320-321, 332, 336.

49 Id at 318, 332.

50 Id at 320-321, 327-328.

51 *Industrial Relations Act* 1988 ss89(a), 4(1).

52 AIRC, Print no H8403, 2 June 1989. See also *Australian Salaried Medical Officers' Federation v Royal Flying Doctor Service of Australia (NSW Section)* AIRC, Print no J7849, 21 May 1991.

the Commission in *Australian Social Welfare Union v Salvation Army.*[53] Again, the Full Bench (Ludeke J, Riordan DP and Palmer C) relied on evidence that a single dismissal in Queensland had caused the union's federal executive to express concern over its implications for job security generally. This was sufficient, in the Full Bench's opinion, to warrant a finding that there was in existence a situation likely to give rise to a dispute extending beyond Queensland and that accordingly the union's claim for the worker's reinstatement could be considered.

The approach that appears to emerge from these cases is that so long as the union in question is prepared to certify that an element of "concern" over the dismissal or dismissals is entertained by workers in a different State, and provided the Commission is prepared to accept that evidence, jurisdiction can be established. However the *Stones Corner* and *Salvation Army* approach has not been universally adopted. A rather different view has emerged on the part of other members of the Commission and is reflected in at least two Full Bench decisions. Despite the assertion in *Salvation Army* that each of these cases was determined on its particular facts,[54] the most notable feature of these other decisions is their far more legalistic approach to the question of establishing the requisite likelihood of an interstate dispute.

In *Southern Cross Beverages Pty Ltd v Federated Engine Drivers' and Firemen's Association of Australasia*[55] a dispute had been notified as to the dismissal of fifteen forklift drivers at a single site in New South Wales. According to their union, the dismissals had arisen out of negotiations concerning work practices and award restructuring; again, evidence was given as to concern amongst union members interstate. Over a vigorous dissent by MacBean DP, Peterson J and Peterson C refused to accept that enough had been done to establish jurisdiction. In so far as the dispute related to manning levels and work practices at the original site, or to the reinstatement of the drivers, no interstate element was apparent. Any question of disputation arising elsewhere over similar issues was purely "speculative". Furthermore:

> Where employees in two States express the view that dismissed employees in one State should be reinstated for reasons which concern nothing more than the reinstatement itself, circumstances are not necessarily created where it may be said that an interstate industrial dispute exists. The mere expression of concern in one place in relation to conduct in another place is not sufficient. Nor indeed would strike action taken to indicate concern and support assist necessarily to alter the position.[56]

These propositions were said by the majority to flow from the High Court's decision in *Caledonian Collieries Ltd v Australasian Coal and Shale Employees' Federation (No 1).*[57] As will be seen, that case and the principles it embodies were also prominent in the Commission's subsequent decision in *World Square.*

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53 AIRC, Print no J6987, 11 March 1991.
54 Id at 3.
55 AIRC, Print no J5075, 13 November 1990.
56 Id at 8.
57 (1930) 42 CLR 527.

World Square and the Issues Before the High Court

The dispute in *World Square* arose out of the ill-fated project to redevelop the site of that name in Sydney. One of the reasons for the eventual collapse of the project was the disputation that followed the sacking of four "project delegates", one each for the major unions represented at the site. Unlike ordinary site delegates, these project delegates were hired to act as full-time representatives for workers employed on the project, doing little or no other work. The unions notified a dispute over the dismissals, deposing under the by now standard formula that discussions had gone on at a national level over the delegates' treatment and that concern existed as to the possibility of similar episodes at other construction sites around the country. This led Simmonds C to find the existence an interstate dispute.[58]

On appeal, a Full Bench composed of Peterson J, Polites DP and Griffin C overturned this finding.[59] As they pointed out, the issues involved here were strictly confined to the World Square site, particularly given the unusual nature of the delegates' position. They went on:

> In these circumstances we take the view that the mere possibility of strike action interstate does not direct to the conclusion that the intrastate dispute is likely to develop interstate qualities of a relevant kind. In this regard we apply the principles in [*Caledonian Collieries*] in regard to the need that the dispute exists (or be likely to exist — our addition) in at least two States and that industrial action in sympathy therewith does not necessarily alter the character of the dispute.[60]

The task facing the High Court when it reviews this decision is an important one. Besides resolving the question of whether on the evidence before it the Commission should have exercised its jurisdiction to prevent a wider dispute arising from the dismissal of the delegates, two points of principle need to be clarified. The first is whether the dicta of Mason CJ and Deane J in *Wooldumpers* represent the thinking of the Court as a whole. The prevention power has for too long remained an obscure and uncertain aspect of the federal industrial system, recognised only in isolated judgments and at no stage put on a sound footing. The Court has the opportunity in this case to make it clear that, whatever else it might mean, the prevention power does at least allow the Commission to deal with an intrastate dispute on the footing that its actions may prevent an interstate dispute from arising between the same or at least ascertainable parties. Since such a principle appears to conflict neither with the *Whybrow* decision, nor with any other established constitutional doctrine (assuming that the ambit principle is qualified in the terms discussed earlier), this would scarcely be a radical step; but it would be a welcome one nonetheless.

Secondly, if the High Court is prepared to do that much, it is important that it go on to address the issue which has effectively split the Commission:

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58 *Federated Engine Drivers' and Firemen's Association of Australasia v World Square Pty Ltd* AIRC, Print no J3537, 19 July 1990.

59 *World Square Pty Ltd v Federated Engine Drivers' and Firemen's Association of Australasia* AIRC, Print no J6099, 20 December 1990.

60 Id at 12. See also *Australian Journalists Association v General Television Corp Pty Ltd* AIRC, Print no J6270, 8 January 1991.

whether evidence of concern and possible sympathy action outside the State in which the dismissal or other situation has occurred is a sufficient basis for the Commission to conclude that an interstate dispute is "threatened, impending or probable". The key here is *Caledonian Collieries*. In that case it was held that the mere fact that miners in Queensland and Victoria were engaging in sympathy action in support of their counterparts in New South Wales did not mean that an interstate dispute existed. Although it was plain that the matters in dispute in New South Wales held considerable significance for the interstate workers and that it was likely that a similar dispute would in turn occur over the same issue in those other States, the Court insisted that it was dealing with separate disputes. In many instances, of course, the thrust of the decision can be overcome by the simultaneous service of a log of claims on a number of interstate employers. But where a dispute spontaneously originates in one State, it is difficult to use the paper dispute mechanism as a means of safely "converting" it into an interstate dispute without appearing too blatant and thus falling foul of the requirement that the extension be "real and genuine".[61]

If *Caledonian Collieries* remains good law, it must severely restrict any preventive jurisdiction. In most instances where the Commission might seek to deal with a local dispute over the treatment of particular employees, evidence of potential interstateness will relate to the possibility of sympathy action. If such sympathy action must be regarded as creating a separate dispute, then by definition the Commission cannot claim, in dealing with the existing local dispute, to be acting in order to prevent a wider interstate dispute from arising. This does not mean that the preventive power could never come into operation. Where the local dispute concerns a general issue as to employment conditions, it is perfectly possible to envisage that dispute spreading from State to State until the relevant demands made in different localities crystalise into a single interstate dispute.[62] In practice though these general issues are likely to be dealt with by means of paper disputes anyway. By contrast, where the local dispute is about the treatment of particular workers in particular circumstances the interstate element can only be generated on a sympathy basis, since by definition workers interstate can make no demands of their own employers which those employers can be expected to meet as far as the particular circumstances of the original workers are concerned: unless of course the interstate workers are employed by the same company. This is the nub of the *Caledonian Collieries* principle, that sympathy strikers have no present dispute with their own managers over the issues that have excited their action. As the extracts quoted above reveal, it is that principle which has been central to the reasoning of those Commission members who have denied the existence of preventive jurisdiction.

The High Court must decide then whether to uphold or overrule *Caledonian Collieries*: what it cannot do is ignore it. While the matter is not

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61 As indeed subsequently happened in that case itself: *Caledonian Collieries Ltd v Australasian Coal and Shale Employees' Federation (No 2)* (1930) 42 CLR 558. See also *R v Gough; ex parte BP Refinery (Westernport) Pty Ltd* (1966) 114 CLR 384. Cf *Printing and Kindred Industries Union v Vista Paper Products Pty Ltd* AIRC, Print no J7651, 2 May 1991.

62 See *R v Commonwealth Court of Conciliation and Arbitration; ex parte G P Jones* (1914) 18 CLR 224 at 242-243.

an easy one, it makes more sense to reject the principle it embodies. Where a dispute commencing in one locality provokes sympathy action in others, common sense suggests the presence of an interstate dispute. In *Social Welfare* the Court spoke of the need to give the terms used in section 51(xxxv) their "popular" meaning, what they convey to the person in the street.[63] It also emphasised the "high object for which [the section] 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".[64] Put simply, the *Caledonian Collieries* principle obstructs the federal tribunal from pursuing its constitutional and statutory role. The key in the "sympathy" situation is that whether or not the other employers who have been dragged into the dispute have any way of satisfying the demands being made by their workforce, industrial dislocation has undoubtedly occurred on a widespread basis over a single issue. As MacBean DP put it in *Southern Cross*:

> If the founding fathers of the Constitution, in framing s 51(xxxv), provided the Federal Parliament with the power to settle and *prevent interstate disputes*, "artificially" generated through the use of the so called "paper dispute", then surely a dispute of this nature involving employees under the same award in different States making common cause was also intended to be within the terms of the Constitution ... It is difficult to accept that a proper interpretation of the Constitution would translate to the necessity for industrial disputation and dislocation to take place before this Commission is able to scan the industrial ashes to find the jurisdictional ember which will bring life to the Commission to act after chaos and economic hardship has been visited upon all concerned. This surely was not intended by the framers of the Constitution when they inserted the word "prevention" in s 51(xxxv).[65]

If *Caledonian Collieries* is overturned, the way would lie open for the approach taken in *Salvation Army* and *Stones Corner* to be approved. It would be sufficient, in other words, for the Commission to believe on the evidence presented to it that if it did not act, sympathy action by ascertainable persons in another State would be likely to ensue. This would not necessarily mean overruling the Commission's finding in any case where preventive jurisdiction has been denied. Mere assertions from union officials cannot suffice: it is up to the Commission to bring its experience and expertise to bear in examining the whole of the evidence. As far as the *World Square* case itself is concerned, for instance, it would not be surprising if the High Court concluded that the project was sufficiently unique and the position of the delegates sufficiently unusual as to make any interstate extension of the local dispute unlikely, despite the union evidence. Cases like *Southern Cross*, on the other hand, would seem far more susceptible to a finding in favour of jurisdiction if *Caledonian Collieries* no longer stood.

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63 *R v Coldham; ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 312.

64 Id at 314.

65 *Southern Cross Beverages Pty Ltd v Federated Engine Drivers' and Firemen's Association of Australasia* AIRC, Print no J5075, 13 November 1990 at 14 (emphasis in original).