

# CONSTITUTIONAL CHOICES IN THE *WORK CHOICES* CASE, OR WHAT *EXACTLY* IS WRONG WITH THE RESERVED POWERS DOCTRINE?

NICHOLAS ARONEY\*

*[The decision of the High Court in the Work Choices Case presents a paradox. It is possible on one hand to read it as a revolutionary decision which has up-ended our conventional understanding of the scope and nature of the Commonwealth's power over industrial relations, with significant long-term implications for the balance of power between Commonwealth and state governments. On the other hand, it is possible to read the outcome as entirely predictable in terms of established principles and methods of constitutional interpretation, themselves the culmination of a long line of cases dealing with federal legislative power generally and the corporations power in particular.*

*In this article, it is contended that the paradoxical nature of the Work Choices Case is best understood by reference to a series of interpretive choices that have been made by the High Court over the course of its history and which are recapitulated in the joint judgment. Reading the case in this way, it is argued, enables us to understand both the significance of the outcome and the predictability of the reasoning. It also helps us to understand the conundrum faced by the dissenting justices, who wished to resist a decision that would radically overhaul the balance of power between the Commonwealth and the states. Such resistance required the repudiation of a series of established conventions of constitutional interpretation, as well as entailing a return to the idea that in determining the scope of Commonwealth powers it is both legitimate and desirable to take into consideration the scope of power retained by the states. This latter aspect, however, presents us with the question: what exactly is wrong with the reserved powers doctrine? It is argued that, when the doctrine is understood and applied in its most sophisticated, interpretive form, the answer is: not much at all.]*

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\* BA (UNSW), LLB (Hons), LLM (UQ), PhD (Monash); Parsons Visitor, Sydney Law School, The University of Sydney; Associate Professor, Reader in Law and Fellow, Centre for Public, International and Comparative Law, TC Beirne School of Law, The University of Queensland. This article is based on a seminar paper first presented at the Sydney Law School on 24 May 2007 and subsequently at the Queensland Supreme Court Judges' Seminar, Customs House, 13 August 2007. My thanks in particular to George Winterton, Helen Irving and Peter Gerangelos for their comments on the article.

GLEESON CJ: Yes, Mr Solicitor for New South Wales.

MR SEXTON: If the Court pleases. This is a case about the division of legislative power under the *Constitution* between the Commonwealth Parliament and the Parliament of the States. It raises the question ...

KIRBY J: Is that quite right? Is it not about the extent of the power of the Federal Parliament?

MR SEXTON: Combined with section 109, your Honour, it is a question about division, we would say.

KIRBY J: It sounds to have the ghosts of the reserve powers clanking ...

MR SEXTON: No, there is no suggestion of that, your Honour.<sup>1</sup>

...

KIRBY J: You are not trying under the guise of this history to revive the reserve powers notion, are you?

MR SOFRONOFF: Absolutely not, your Honour. Absolutely not.

HAYNE J: Wash your mouth out with soap.

KIRBY J: I am just looking a bit suspiciously at you.<sup>2</sup>

## I INTRODUCTION

In *New South Wales v Commonwealth*<sup>3</sup> — the well-known ‘*Work Choices Case*’ — a 5:2 majority of the High Court of Australia upheld the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (‘*Work Choices Act*’)<sup>4</sup> as validly enacted under the Commonwealth’s corporations power.<sup>5</sup> This Act effected a far-reaching transformation of Australian industrial relations law, displacing the existing federal system of compulsory conciliation and arbitration based on the industrial arbitration power<sup>6</sup> and excluding the operation of a range of state and territory workplace regimes.

The case presents a paradox. On one hand, it is possible to read it as a revolutionary decision which has up-ended our conventional understanding of the

<sup>1</sup> *New South Wales v Commonwealth* [2006] HCATrans 215 (Gleeson CJ, M G Sexton SC and Kirby J, 4 May 2006).

<sup>2</sup> *New South Wales v Commonwealth* [2006] HCATrans 217 (Kirby J, W Sofronoff QC and Hayne J, 8 May 2006).

<sup>3</sup> (2006) 229 CLR 1 (‘*Work Choices Case*’).

<sup>4</sup> The *Work Choices Act* amended the *Workplace Relations Act 1996* (Cth) (‘*Workplace Relations Act*’).

<sup>5</sup> The corporations power is contained in s 51(xx) of the *Constitution*:

The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

<sup>6</sup> The industrial arbitration power is contained in s 51(xxxv) of the *Constitution*:

The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

extent of the Commonwealth's power over industrial relations and corporations, with far-reaching implications for the balance of power between the Commonwealth and the states. Describing the decision as 'a shipwreck of Titanic proportions', Greg Craven has stated that '[n]ot since the 1920's [sic] has the Court struck such a devastating blow against Australian federalism.'<sup>7</sup> Focusing upon its implications for the regulation of workplace relations, Ron McCallum similarly described the case as the most significant change in the 'constitutional contours' of federal-state relations delivered since 1920.<sup>8</sup> On the other hand, it is also possible to read the decision as the entirely predictable application of long established methods of interpreting federal legislative power. As George Williams has remarked, in spite of the 'extraordinary policy and political consequences' of the outcome,<sup>9</sup> the *Work Choices Case* was 'a very orthodox decision' which came as no surprise to informed commentators.<sup>10</sup>

Thus, there are two very different assessments of the significance of the case. How is it best understood? Is the decision revolutionary? Is it entirely conventional? Or is it somehow both?

In this article, I argue that the decision is best understood — that its paradoxical character is best explained — by reference to a series of interpretive choices that have been made by the High Court over the course of its history and which are recapitulated in the *Work Choices Case*. These choices are of utmost significance — they are indeed revolutionary — when critically assessed in light of the text, structure and underlying principles and purposes of the *Constitution*. And yet, they are well-established choices that have become the conventional

<sup>7</sup> ABC Radio National, 'Work Choices Shipwreck', *Perspective*, 6 December 2006 <<http://www.abc.net.au/rn/perspective/stories/2006/1803817.htm>>. Craven continued: 'How a Court can weigh every tiny word of a *Constitution* without grasping the central premise that it was meant to create a genuine federation must baffle historians and psychoanalysts alike.' As Craven elsewhere put it, 'at the stroke of a pen' the High Court has made 'one of the greatest unauthorised amendments to the *Constitution* in its entire history': Greg Craven, 'How the High Court Failed Us', *Australian Financial Review* (Melbourne), 24 November 2006, 82. For a measured criticism, see Simon Evans et al, *Work Choices: The High Court Challenge* (2007) 19–21.

<sup>8</sup> Ron McCallum, 'The *Work Choices Case*: Some Reflections' (2007) 19 *Judicial Officers' Bulletin* 29, 29. Professor McCallum argues that the *Work Choices Act* entirely revolutionised the federal regulation of workplace relations in Australia, transforming the field from one structured under a system of compulsory conciliation and arbitration to one in which industrial relations are conceptualised and regulated as a particular aspect of the law relating to trading corporations. Not all pro-market commentators wholeheartedly support the Work Choices' combination of constitutional centralism and economic liberalism. For example, the president of the H R Nicholls Society, Ray Evans, stated that his organisation would favour the Commonwealth withdrawing entirely from the field and allowing the states to compete with one another in providing labour market regulation: see Ray Evans, Letter to the Editor, *Australian Financial Review* (Melbourne), 1 August 2005, 59.

<sup>9</sup> ABC Radio National, 'The *Workchoices Case*', *The Law Report*, 21 November 2006 <<http://www.abc.net.au/rn/lawreport/stories/2006/1791213.htm>>. In this program, Williams describes the *Work Choices Case* as a 'landmark' decision principally because it affirms that the Commonwealth can use the corporations power to regulate just about any field in which s 51(xx) corporations operate in our world today. In other words, the case opens up the potential for the Commonwealth to enter a number of diverse fields such as education, hospitals, town planning, water management, uranium mining and many others besides — essentially any area in which services are provided or goods and materials exchanged, so long as a trading or financial corporation is somehow involved.

<sup>10</sup> *Ibid.* See also George Williams, 'Goodbye to States' Rights', *The Age* (Melbourne), 15 November 2006, 17.

rudiments of the High Court's constitutional jurisprudence. To get to the heart of the *Work Choices Case*, therefore, it is necessary to recount these choices, to show what they are and why they are significant, and to show how they are fundamental to the Court's reasoning. Moreover, because they are *choices*, it is also necessary to show how the course of Australian constitutional interpretation might have been different by explaining the forks in the road and indicating the alternative paths that might have been taken.

At a pivotal point in its history, the High Court deliberately chose between two fundamentally different approaches to the interpretation of the legislative powers of the Commonwealth and the states. The first approach was one commonly known as the 'reserved powers doctrine' and associated with the judgments of the Court under its first Chief Justice, Sir Samuel Griffith. The other is generally associated with the Court's famous decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('*Engineers' Case*'), delivered under the intellectual leadership of Sir Isaac Isaacs.<sup>11</sup> In the fateful *Engineers' Case*, the Court anathematised the conceptual foundations of the reserved powers doctrine and substituted an alternative approach that has become the Court's conventional stance ever since.

In this article, I argue that the reserved powers and *Engineers'* doctrines cannot properly be understood or evaluated without first unscrambling the two doctrines into their constituent elements and then identifying the different versions in which each doctrine has been presented. As to this second task, I contend that three versions of both doctrines are to be distinguished. These I label respectively, and for reasons that will become apparent, the *abridged*, *absolute* and *interpretive* versions of the reserved powers doctrine and the *abridged*, *testamentary* and *methodological* versions of the *Engineers'* doctrine. Moreover, because the reserved powers doctrine has long been regarded as heresy, its influence in constitutional interpretation has been camouflaged: only particular elements of the doctrine have been (at times) utilised in various configurations, including the idea of 'federal balance', a concept which has also been advanced in *abridged*, *absolute* and *interpretive* forms.

When the various elements and different versions of the reserved powers, federal balance and *Engineers'* doctrines are clearly distinguished, it becomes possible to identify their respective roles in the many cases in which the High Court has interpreted the scope of the Commonwealth's legislative powers. Analysing the *Work Choices Case* in these terms enables us not only to understand the paradoxical character of the decision, but also to expose the underlying constitutional jurisprudence to critical analysis. When the *Work Choices Case* is understood as presenting a series of interpretive choices, the apparent inevitability of the outcome, as presented by the majority of the Court, begins to dissolve before our eyes. Furthermore, when we understand the issues presented by the case as involving elements of reserved powers reasoning, it becomes easier to comprehend the conundrum in which the plaintiffs and the two dissenting justices, Kirby and Callinan JJ, found themselves. This dilemma was one of wishing to resist an outcome that would radically overhaul the balance of power

<sup>11</sup> (1920) 28 CLR 129.

between the Commonwealth and the states, but where the only truly effective path of resistance involved repudiating a whole line of established conventions of constitutional interpretation. The crucial strategic question was whether to challenge those conventions head-on through an openly acknowledged resuscitation of the reserved powers doctrine, or whether to try and show that the *Work Choices Act* could not be supported by the corporations power when that power was read according to orthodox methods of interpretation. Such was the technical cleverness of the legislation, however, that a conventional attack was unlikely to succeed, and so a radical path beckoned. And yet, constitutional law remains a highly traditional and conservative discipline — in what other body of Australian law are labels such as ‘orthodoxy’ and ‘heresy’ so commonly and forcefully used?<sup>12</sup> Thus, the path proposed by the dissenters had to be couched in conventional terms.

In the majority’s joint judgment in the *Work Choices Case*, the plaintiffs’ arguments were rejected on the basis of a caricature of the reserved powers and federal balance doctrines which presented them almost entirely in their *absolute* forms, without ever seriously addressing the much more sophisticated and persuasive *interpretive* versions of both doctrines. While there are indeed problems with the absolute versions of these doctrines, I argue that the more subtle interpretive versions avoid these problems and, indeed, chart an approach to the interpretation of federal legislative powers much more in line with the text, structure, underlying principles and overarching purposes of the *Constitution*.<sup>13</sup>

The article proceeds as follows. Part II summarises the legislation, issues and arguments in the *Work Choices Case*. Part III deals with the reserved powers doctrine. It explains the way in which the doctrine was formulated by the Griffith Court and it identifies three different versions in which the doctrine has at times been presented. In so doing, Part III also touches upon the subversive path that the reserved powers doctrine had to take after the *Engineers’ Case*, noting in particular the part played by the notion of federal balance. Part IV discusses the *Engineers’* doctrine — particularly spelling out its abridged, testamentary and methodological dimensions — and explaining its influence upon the interpretation of federal legislative power in the decided cases. Part V then seeks to show how *Engineers’* orthodoxy was fundamental to the majority’s joint judgment in the *Work Choices Case*, as well as how various aspects and elements of reserved powers and federal balance reasoning were utilised in the case’s dissenting judgments. Finally, Part VI concludes by asking: what *exactly* is wrong with the reserved powers doctrine? Not quite as much as is often thought, it is concluded.

<sup>12</sup> See, eg, *A-G (Vic) v Commonwealth* (1962) 107 CLR 529, 582 (Windeyer J); *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J) (*‘Payroll Tax Case’*); *R v Lambert; Ex parte Plummer* (1980) 146 CLR 447, 470 (Murphy J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 147–8 (Mason J) (*‘Tasmanian Dam Case’*); *Gould v Brown* (1998) 193 CLR 346, 427 (McHugh J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 589 (McHugh J).

<sup>13</sup> In so arguing, I harbour no illusions about the likelihood of my contentions having much of an impact on the Court as it is currently constituted. The reserved powers doctrine has long been anathematised as heresy, and even the federal balance theory seems now to have been placed under interdiction. Moreover, all the indications are that they are not about to be readmitted to full communion.

## II WORK CHOICES

The *Work Choices Act* effected a far-reaching transformation of Australian workplace relations law.<sup>14</sup> Among other things, it encouraged an expanded role for Australian Workplace Agreements in substitution for Industrial Relations Commission awards, it reduced the number of mandatory employee entitlements, and it established the Australian Fair Pay Commission, which was made responsible for setting and adjusting statutory minimum wage levels. The *Work Choices Act* also provided that it is to apply to the exclusion of a range of state and territory workplace laws.<sup>15</sup> Previously, the *Workplace Relations Act 1996* (Cth) (*'Workplace Relations Act'*) had principally rested upon the industrial arbitration power and only marginally upon the corporations and external affairs powers.<sup>16</sup> However, the primary constitutional foundation for the amendments introduced by the *Work Choices Act* was, and remains, the corporations power.<sup>17</sup>

This connection to the corporations power is achieved through the definitions sections of the *Workplace Relations Act*, as substantially amended by the *Work Choices Act*. As a result of the amendments, s 5(1) of the *Workplace Relations Act* now defines an 'employee' as an individual insofar as they are employed, or usually employed, by an employer as defined in s 6(1). Section 6(1) in turn defines an 'employer' as, inter alia, 'a constitutional corporation, so far as it employs, or usually employs, an individual'. Section 4 defines 'constitutional corporation' as a corporation to which s 51(xx) of the *Constitution* applies. The substantive provisions of the *Workplace Relations Act* then confer and impose a range of powers, rights and duties upon the employees and employers thus defined. In this way, the basic objective of the amendments to the *Workplace*

<sup>14</sup> Note that since the judgment in the *Work Choices Case* was handed down, the newly elected Labor Government — under the leadership of Kevin Rudd — introduced its Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 (Cth) on 13 February 2008 as part of fulfilling its election mandate to abolish the current Work Choices scheme. It was passed by the federal Parliament on 19 March 2008, received royal assent on 20 March 2008 and will come into force six months from this date — see *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth) s 2. Under the Act, existing Australian Workplace Agreements will continue to operate until their expiration or termination. This effectively proposes a complete phase out by 2013: Samantha Maiden, *Libs Move Signals Fresh AWA Signup* (2008) *The Australian* <<http://www.theaustralian.news.com.au/story/0,,23174805-2702,00.html>>. See also Australian Government, *Transition to Forward with Fairness Bill Passes the Australian Parliament* (19 March 2008) *Australian Workplace* <<http://www.workplace.gov.au/workplace/Publications/News/TransitiontoForwardwithFairnessBill2008passesTheAustralianParliament.htm>>.

<sup>15</sup> For an analysis, see Joellen Riley and Kathryn Peterson, *Work Choices: A Guide to the 2005 Changes* (2006).

<sup>16</sup> Section 51(xxix) of the *Constitution* provides:

The Parliament shall, subject to this *Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to ... external affairs.

In *Victoria v Commonwealth* (1996) 187 CLR 416 (*'Industrial Relations Act Case'*), Victoria, Western Australia and South Australia had challenged a substantial number of the provisions of the *Workplace Relations Act*. However, they had conceded that s 51(xx) empowered the Commonwealth to make laws concerning the workplace affairs of constitutional corporations: at 540 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

<sup>17</sup> See *Work Choices Case* (2006) 229 CLR 1, 68–74 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). However, the Commonwealth also invoked the industrial arbitration and territories powers to support particular aspects of the legislation: at 74.

*Relations Act* was to introduce a national workplace relations system which applies to the majority of employees throughout Australia.

Several actions were commenced by five Australian states<sup>18</sup> and a number of trade union organisations challenging the validity of the *Work Choices Act*, principally on the ground that the corporations power did not support an entire industrial relations regime of this kind. A number of interrelated lines of argument were available.<sup>19</sup>

First, it was generally acknowledged that the case raised questions about the scope of the corporations power that had not specifically arisen in previous decisions,<sup>20</sup> and so submissions were made concerning the meaning and reach of the decided cases. Argument in this respect particularly concerned the problem of identifying the proper scope of the corporations power. Specifically, it was submitted by the plaintiffs that the power under s 51(xx) of the *Constitution* extends only to the ‘external’ relationships of constitutional corporations and not to ‘internal’ matters, such as the relationship between a corporation and its employees. The plaintiffs pointed out that the corporations power assumes that the corporations to which it applies already exist and engage in certain kinds of activities,<sup>21</sup> with the relationship between a corporation and its officers and employees being a matter essentially incidental to the *formation* of corporations, and thus outside the scope of s 51(xx). It was alternatively submitted that, if a general test was required, the nature of the corporation must be a significant element in the nature or character of the law, and that the corporations power is therefore directed to the regulation of characteristics which distinguish corporations from other legal persons, or the regulation of their interaction with the public in relation to those characteristics (an approach which came to be called the ‘distinctive character’ test).<sup>22</sup> This entailed a rejection of the view that the corporations power extends to any law in which constitutional corporations are an object of command (the ‘object of command’ test).<sup>23</sup> While the argument was based primarily on the language of s 51(xx) and secondarily on the case law, it was also submitted that the framers of the *Constitution* and early text writers saw

<sup>18</sup> New South Wales, Victoria, Queensland, South Australia and Western Australia. The Attorneys-General of Tasmania, the Northern Territory and the Australian Capital Territory also intervened in support of the plaintiffs.

<sup>19</sup> I rely here on the summary of argument prepared by Chris Horan, ‘Summary of Counsels’ Arguments’ in Simon Evans et al, *Work Choices: The High Court Challenge* (2007) 99. See also the summary in the majority’s joint judgment: *Work Choices Case* (2006) 229 CLR 1, 74–7 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) and the record of argument: at 8–54.

<sup>20</sup> See *Work Choices Case* (2006) 229 CLR 1, 102 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>21</sup> Section 51(xx) of the *Constitution* refers to corporations ‘formed’, and it was held in *New South Wales v Commonwealth* (1990) 169 CLR 482 (*‘Incorporation Case’*) that the power does not therefore extend to the incorporation of companies.

<sup>22</sup> *Work Choices Case* (2006) 229 CLR 1, 16 (argument of Pamela Tate SC, Solicitor-General of Victoria). Cases cited on this point included *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 182–3 (Gibbs CJ), 215 (Wilson J) (*‘Fontana Films’*); *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 337 (Brennan J), 349 (Dawson J) (*‘Re Dingjan’*).

<sup>23</sup> This was proposed in *Fontana Films* (1982) 150 CLR 169, 212 (Murphy J); *Tasmanian Dam Case* (1983) 158 CLR 1, 179 (Murphy J); *Re Dingjan* (1995) 183 CLR 323, 334 (Mason CJ), 364–5 (Gaudron J), 368–9 (McHugh J); *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 375 (Gaudron J) (*‘Re Pacific Coal’*).

the objective of the power as enabling provision to be made in relation to the status and recognition of corporations. This later developed, it was submitted, into a concern to enable regulation of the particular characteristics of corporations qua corporations, and their interaction with the public, such as by defining conditions under which companies may carry on business throughout the Commonwealth.<sup>24</sup>

Secondly, wider arguments were made concerning the *Constitution's* underlying federal structures, principles and purposes. The object of command test would, it was said, enable the Commonwealth to legislate on a whole range of subjects, such as employment, defamation, negligence, contracts, succession, trusts and crime, provided that one of the persons involved was a constitutional corporation. However, it was submitted that the corporations power needs to be interpreted in the context of the *Constitution* as a whole, which includes the conferral of specifically defined heads of legislative power upon the Commonwealth and, in particular, a power to legislate with respect to the prevention and settlement of interstate industrial disputes by conciliation and arbitration in s 51(xxxv). It was argued that the question of whether the corporations power can support the enactment of a national industrial relations regime under s 51(xx) has to be considered in light of the specific and limited power conferred by s 51(xxxv). Here, the plaintiffs relied upon structural-based arguments about the overall configuration of federal and state powers for which the *Constitution* as a whole provides, upon inter-provisional arguments about the relationship between ss 51(xx) and (xxxv), and upon cases in which ss 51(xx) and (xxxv) had been interpreted.<sup>25</sup> The plaintiffs claimed that judges, lawyers and politicians had uniformly assumed since federation that s 51(xxxv) places certain limits on the Commonwealth's power over industrial relations, and that attempts to overcome those limitations through formal amendment of the *Constitution* have consistently been rejected in referenda. In the absence of formal amendment, it was said, these limits should not be circumvented via an expansive interpretation of the corporations power.

The principal problem for the plaintiffs was that this last line of reasoning smacked of the discredited reserved powers doctrine, widely said to have been 'exploded' by the *Engineers' Case*.<sup>26</sup> The reason for this is that one of the

<sup>24</sup> Sources cited included *Federal Council of Australasia Act 1885* (Imp) 48 & 49 Vict, c 60, s 15(1); *Official Report of the National Australasian Convention Debates*, Sydney, 3 April 1891, 686 (James Munro, Sir Samuel Griffith, Sir John Bray) ('*Sydney National Debates*'); *Official Record of the National Australasian Convention Debates*, Adelaide, 12 April 1897, 439 (Edmund Barton) ('*Adelaide Debates*'); *Adelaide Debates*, 17 April 1897, 793 (Sir George Turner, Edmund Barton, Isaac Isaacs, Alfred Deakin, William McMillan, Josiah Symon, Sir Joseph Abbott); John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 604–7; W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2<sup>nd</sup> ed, 1910) 470; E Hilton Young, 'The Status of Foreign Corporations and the Legislature' (Pt I) (1907) 23 *Law Quarterly Review* 151; E Hilton Young, 'The Status of Foreign Corporations and the Legislature' (Pt II) (1907) 23 *Law Quarterly Review* 290.

<sup>25</sup> On these and other types of argument in constitutional adjudication, see Philip Bobbitt, *Constitutional Interpretation* (1991); Akhil Reed Amar, 'Intratextualism' (1999) 112 *Harvard Law Review* 747.

<sup>26</sup> See *Airlines of New South Wales Pty Ltd v New South Wales* [No 2] (1965) 113 CLR 54, 79 (Barwick CJ); cf *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 66 (Rich J) ('*Melbourne Corporation*').



hallmarks of the doctrine is the idea that the limited terms in which a particular head of power is conferred upon the Commonwealth imply limitations on the scope of other heads of power. In other words, what is not granted under one head of power is treated as significant when determining the scope of what is granted under another. The proposition that what is not conferred under s 51(xxxv) suggests a limit on the scope of s 51(xx) is an argument of this type. However, since the plaintiffs disclaimed any reliance upon the opprobrious reserved powers doctrine, their problem was to identify some other ground upon which the scope of the corporations power might be defined and interpreted, referable both to the language of the corporations power itself and to previous cases. The plaintiffs' strategy, in effect, was to break the argument down into a number of discrete elements and to argue those elements without acknowledging their relationship to reserved powers reasoning.

The two dissenting justices, Kirby and Callinan JJ, found the arguments of the plaintiffs sufficiently compelling, with each judge in his own way formulating limits upon the scope of the corporations power by reference to the language of the power, the existence of the industrial arbitration power and the federal nature of the *Constitution*. However, a majority of the Court rejected these arguments in a joint judgment which focused almost entirely upon the language of s 51(xx) alone, discounted the force of the arguments based in federalism and the limited terms of the industrial arbitration power, and relied instead upon the line of previous decisions in which the scope of the corporations power had progressively expanded. In a critical passage early in the joint judgment, the majority of the Court pointed out that the *Engineers' Case* had overturned the reserved powers doctrine, that previously restrictive interpretations of the corporations power founded upon reserved powers reasoning had been overruled, and that subsequent well-established principles of constitutional interpretation made it improper to seek to 'read down' the scope of one head of power by reference to limits written into another.<sup>27</sup> The majority thus upheld the entirety of the *Work Choices Act*, principally on the basis of the Commonwealth's submissions that the corporations power extends to any law which alters the rights, powers or duties of a constitutional corporation, as well as to laws which have a less direct but nonetheless sufficiently substantial connection to constitutional corporations.<sup>28</sup>

### III CONSTITUTIONAL HERESY

The reserved powers doctrine is often misunderstood. The *abridged* version of the doctrine presents itself simply as the idea that there is some rather vaguely defined body of legislative powers that have been reserved to the states and into

<sup>27</sup> *Work Choices Case* (2006) 229 CLR 1, 70–3 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). However, for a discussion of instances where limits on one head of power have been held to limit the scope of powers in another, see Part IV below, especially nn 129–35 and accompanying text.

<sup>28</sup> For the majority's summary of the Commonwealth's submissions, see *Work Choices Case* (2006) 229 CLR 1, 76.

which federal legislative power cannot extend.<sup>29</sup> If the content of this mysterious sphere of power reserved to the states is given any definition at all, it is described as relating to the domestic or internal affairs of the states,<sup>30</sup> to their traditional areas of law-making power<sup>31</sup> or — without explaining why — it is sometimes referred to as particularly relating to state regulation of domestic trade.<sup>32</sup> If there is any foundation for the doctrine in the text of the *Constitution*, reference is at best made to s 107,<sup>33</sup> which under the reserved powers doctrine was somehow thought to reserve to the states control over their domestic affairs without federal interference.<sup>34</sup>

When presented in this way, the reserved powers doctrine is easily subjected to at least three powerful lines of criticism. The first is that the doctrine seems to lack any real foundation in the text of the *Constitution*. Section 107 says that state powers shall ‘continue’ but it provides no positive guidance as to what those powers might be. Rather, it directs attention to powers conferred upon the Commonwealth or explicitly withdrawn from the states, and suggests that only once these have been ascertained is it possible to identify those state powers which are to continue. Thus, secondly, the reserved powers doctrine seems to reverse the proper order of inquiry required by s 107, for it suggests that the first question is one of identifying the powers reserved to the states and only after that is there a question of identifying the powers conferred upon the Commonwealth (with the proviso that this must be done in a way that prevents federal power from entering fields reserved to the states). However, s 107 appears to provide that the continuing powers of the states lying beyond the reach of the Commonwealth are only those that are found to be left over after the positive powers conferred upon the Commonwealth have first been ascertained. Thirdly, and relatedly, the reserved powers doctrine appears to be a recipe for uncertainty and subjectivity. The absence of any clear guidance in the *Constitution* regarding the specific content of the powers reserved to the states suggests that judges will have to rely on any one of a number of ideas about the content of the properly ‘domestic’ affairs of the states, ideas that have no basis in the text of the *Constitution*. Recourse to unavoidably extra-constitutional notions such as these appears to be a recipe for arbitrary and unpredictable judicial decision-making.<sup>35</sup>

<sup>29</sup> Katherine Lindsay, *The Australian Constitution in Context* (1999) 67; Patrick Keyzer, *Constitutional Law* (2<sup>nd</sup> ed, 2005) 26.

<sup>30</sup> *R v Barger* (1908) 6 CLR 41, 69 (Griffith CJ for Griffith CJ, Barton and O’Connor JJ). See also Melissa Castan and Sarah Joseph, *Federal Constitutional Law: A Contemporary View* (1<sup>st</sup> ed, 2001) 44; Peter Hanks, *Constitutional Law in Australia* (2<sup>nd</sup> ed, 1996) 235–6, 294.

<sup>31</sup> Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3<sup>rd</sup> ed, 2002) 296.

<sup>32</sup> *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 354 (Griffith CJ); Hanks, above n 30, 236.

<sup>33</sup> Section 107 of the *Constitution* provides:

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this *Constitution* exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

<sup>34</sup> Keven Booker, Arthur Glass and Robert Watt, *Federal Constitutional Law: An Introduction* (2<sup>nd</sup> ed, 1998) 40–1, cf 39–40.

<sup>35</sup> See, eg, *Engineers’ Case* (1920) 28 CLR 129, 145 (Knox CJ, Isaacs, Rich and Starke JJ).

However, this is to conjure with a mere caricature of the doctrine. In its strongest form, as enunciated by the Griffith Court, the reserved powers doctrine rested upon much firmer foundations than this account would suggest. These foundations included: (1) a clear and defensible account of the political origins, underlying ideas, structural features and intended purposes of the *Constitution*; (2) a careful articulation of the grounds upon which the specific content of the powers reserved to the states can be identified — one that requires very close attention to be given to the precise terms in which federal heads of power are defined, such that what is *not* granted to the Commonwealth may be as significant as what *is* granted; and (3) a sophisticated recognition that constitutional interpretation inevitably requires choices to be made and that these choices can be guided by a general orientation either to expand federal power as far as possible or to read federal power with an eye to the resulting impact on the remaining legislative powers of the states. The considerations raised in terms of the arguments (1) and (2) (some of which are discussed below) suggest that the latter, rather than the former, ought to be the Court's preferred orientation.

It is only with these three elements in view that the *absolute* and *interpretive* versions of the reserved powers doctrine can be understood. The absolute form of the doctrine asserts that there is a definite content to the powers reserved to the states and suggests that this creates a clear-cut and unqualified prohibition upon federal laws entering the reserved field. The interpretive version emphasises the interpretive choices that have to be made and gives the courts reason to consider the consequences for the states when deciding which interpretation of federal power is to be preferred. Both versions present the reserved powers doctrine in a form much stronger and more persuasive than the mere caricature that is the abridged version of the doctrine.

The reserved powers doctrine in these stronger forms was articulated in a series of High Court decisions, beginning with *Peterswald v Bartley*<sup>36</sup> in 1904 and culminating in *Huddart, Parker & Co Pty Ltd v Moorehead* ('*Huddart Parker*')<sup>37</sup> in 1909. To understand these cases, they need also to be read with the immunity of instrumentalities cases,<sup>38</sup> beginning with *D'Emden v Pedder*<sup>39</sup> in 1904 and ending with *Federated Municipal and Shire Council Employees' Union of Australia v Melbourne Corporation* ('*Municipalities Case*')<sup>40</sup> in 1919.

<sup>36</sup> (1904) 1 CLR 497.

<sup>37</sup> (1909) 8 CLR 330. The intermediate cases in the series were *R v Barger* (1908) 6 CLR 41; *A-G (NSW) v Brewery Employes Union of New South Wales* (1908) 6 CLR 469 ('*Union Label Case*').

<sup>38</sup> Under the immunity of instrumentalities doctrine (also known as the doctrine of intergovernmental immunities), the Commonwealth and its instrumentalities were declared to be immune from any law passed by a state — and, conversely, the states and their instrumentalities were immune from laws passed by the Commonwealth — wherever such laws would in some way 'fetter, control, or interfere with, the free exercise of the legislative or executive power' of the Commonwealth or the states, respectively: *D'Emden v Pedder* (1904) 1 CLR 91, 111 (Griffith CJ).

<sup>39</sup> *Ibid.*

<sup>40</sup> (1919) 26 CLR 508. Some of the intermediate immunity of instrumentalities cases were: *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208 ('*Municipal Rates Case*'); *Deakin v Webb* (1904) 1 CLR 585; *Commonwealth v New South Wales* (1906) 3 CLR 807; *Federated Amalgamated Governmental Railway and Tramway Service Association v New South Wales Railway Traffic Employes Association* (1906) 4 CLR 488 ('*Railway Servants' Case*'); *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 ('*Baxter*'); *A-G*

The reserved powers doctrine rested on a conception of the *Australian Constitution* in which it received its political legitimacy and essential federal structure from a federating compact negotiated between elected representatives of the several constituent states and ratified by their respective voters.<sup>41</sup> The framers of the *Constitution* derived this idea of a federating compact from their reading of a range of contemporary writers on the subject of federalism, the most influential of whom were James Madison, James Bryce, Edward Freeman and Albert Venn Dicey.<sup>42</sup> All of these writers characterised federal systems as being authentically founded upon treaty-like agreements between constituent states.<sup>43</sup> Madison in particular — whose analysis of the *United States Constitution* was of strategic importance at a number of points in the debate over Australian federation<sup>44</sup> — pointed to a systematic relationship between the formative basis of federal systems and the representative structures, the configurations of legislative and executive power, and the amendment processes adopted therein.<sup>45</sup> Partly because the Australians were influenced by Madison, and partly because Madison's analysis provided a general insight into the essential dynamics of federal constitution-making, the debate over the drafting of the *Australian Constitution*, as well as the structure of the *Constitution* that emerged from that process, reflected this relationship between formation, representation, configuration of power and amendment.<sup>46</sup>

In line with this conception, virtually all of the framers of the *Constitution* had to admit — and most of them were positively supportive of the fact — that the Australian colonies came into the federation as equal contracting parties possessing mutually independent self-governing powers, including a capacity to determine their own constitutional destinies in a manner substantially free from Imperial interference.<sup>47</sup> In the view of the framers, although the legal force of the *Constitution* would have to depend upon the Imperial Parliament, the political legitimacy, as well as the underlying ideas, general structures and specific

*(NSW) v Collector of Customs (NSW)* (1908) 5 CLR 818; *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1912) 16 CLR 245.

<sup>41</sup> *Railway Servants' Case* (1906) 4 CLR 488, 534 (Griffith CJ for Griffith CJ, Barton and O'Connor JJ); *Baxter* (1907) 4 CLR 1087, 1104, 1121, 1126 (Griffith CJ for Griffith CJ, Barton and O'Connor JJ).

<sup>42</sup> For a fuller discussion, see Nicholas Aroney, "'A Commonwealth of Commonwealths': Late Nineteenth-Century Conceptions of Federalism and Their Impact on Australian Federation, 1890–1901" (2002) 23 *Journal of Legal History* 253.

<sup>43</sup> See, eg, James Bryce, *The American Commonwealth* (2<sup>nd</sup> ed, 1889) 12–15, 17–22; A V Dicey, *Introduction to the Study of the Law of the Constitution* (5<sup>th</sup> ed, 1897) 137–8, 139.

<sup>44</sup> See Nicholas Aroney, 'Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890–1901' (2002) 30 *Federal Law Review* 265.

<sup>45</sup> For a fuller discussion, see Nicholas Aroney, 'Formation, Representation and Amendment in Federal Constitutions' (2006) 54 *American Journal of Comparative Law* 277.

<sup>46</sup> See Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (2008, forthcoming).

<sup>47</sup> *Official Report of the National Australasian Convention Debates*, Melbourne, 10 February 1890, 10 (Sir Samuel Griffith) ('we have become practically almost sovereign states, a great deal more sovereign states, though not in name, than the separate states of America'). For attempts by Henry Bourne Higgins to deny this premise or avoid its implications, see *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 9 September 1897, 259–60 (Henry Bourne Higgins); *Adelaide Debates*, 15 April 1897, above n 24, 665–6 (Henry Bourne Higgins).

language of the *Constitution*, all owed their inspiration to local Australian sources.<sup>48</sup> In this context, when it came to the configuration of legislative power between the Commonwealth and the states, the states were seen as possessing original powers of local self-government, which they specifically insisted would continue under the *Constitution* subject only to the carefully defined and limited powers specifically conferred upon the Commonwealth.<sup>49</sup> The Commonwealth was, in other words, a creature of the *Constitution*, and its powers were strictly enumerated and limited.<sup>50</sup> Thus, while the *Canadian Constitution* suggested a model in which the legislative powers of the states might be explicitly defined,<sup>51</sup> the Australians understood this to be a result of the much more centralised model adopted in that country and out of tune with the genuinely federal origin and structure of the *Australian Constitution*, modelled as it was upon the American and Swiss examples.<sup>52</sup>

The Griffith Court deliberately sought to apply this general conception of the *Constitution* in its decisions.<sup>53</sup> Although the Court rejected the admissibility of opinions expressed by individual delegates at the Federal Conventions of the 1890s, references to the successive drafts of the Constitution Bill were not prohibited,<sup>54</sup> and nor was there a bar to drawing inferences from the text and structure of the *Constitution*, a document that appeared so clearly to the Court to reflect this overarching conception.<sup>55</sup> Moreover, where the meaning and intention were not clear from the text, the Court thought that it would be appropriate to consider the ‘contemporaneous circumstances’ and the historical facts surrounding the process of bringing the *Constitution* into existence.<sup>56</sup> After all,

<sup>48</sup> A point especially emphasised by Griffith CJ in *Baxter* (1907) 4 CLR 1087, 1111–12. See also *Peterswald v Bartley* (1904) 1 CLR 497, 509 (Griffith CJ).

<sup>49</sup> *Constitution* ss 106–7, 109. Great care was taken in defining the legislative powers of the Commonwealth, even though with the benefit of hindsight it is possible to observe that the High Court, following a method of interpretation quite out of tune with the understandings and expectations of the framers, has construed those powers in ways that the framers could not have anticipated and most would not have endorsed.

<sup>50</sup> See *R v Barger* (1908) 6 CLR 41, 67 (Griffith CJ, Barton and O’Connor JJ).

<sup>51</sup> See *Constitution Act 1867* (Imp) 30 & 31 Vict, c 3, ss 91–2, reprinted in RSC 1985, App II, No 5.

<sup>52</sup> *Deakin v Webb* (1904) 1 CLR 585, 605–6 (Griffith CJ). In George Winterton, ‘The High Court and Federalism: A Centenary Evaluation’ in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (2004) 197, 204 (citations omitted), Winterton argues that the decision not to follow the Canadian model in this respect ‘has turned out to be a serious misjudgement for which the High Court can scarcely be blamed.’ Cf Christopher D Gilbert, *Australian and Canadian Federalism 1867–1984: A Study of Judicial Techniques* (1986) for the view that Canadian doctrine has also been shaped by the unique social and political conditions of that country.

<sup>53</sup> Griffith CJ emphasised that the Court should look to the general scheme of the *Constitution* as a whole in determining what powers and capacities were intended to be conferred upon the Commonwealth and withdrawn from the states: see *Peterswald v Bartley* (1904) 1 CLR 497, 507. For Griffith’s own view of federalism, see Nicholas Aroney, ‘Sir Samuel Griffith’s Vision of Australian Federalism’ in Michael White and Aladin Rahemtula (eds), *Sir Samuel Walker Griffith: The Law and the Constitution* (2002) 179.

<sup>54</sup> *Tasmania v Commonwealth* (1904) 1 CLR 329, 333 (Griffith CJ, during argument).

<sup>55</sup> See, eg, *ibid* 345–58 (Barton J).

<sup>56</sup> *Ibid* 359 (O’Connor J). See also at 350–5 (Barton J). See further *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 17 (Barwick CJ). For relatively more recent examples of admitting evidence concerning the contemporary meaning of language used in the *Constitution*, see *Cole v Whitfield* (1988) 165 CLR 360, 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Re Federated Storemen and Packers Union of Australia*

the then Chief Justice, Sir Samuel Griffith, had himself been the acknowledged leader of the Convention of 1891, Sir Edmund Barton had been the acknowledged leader of the Convention of 1897–98, and Richard O'Connor had been one of Barton's closest associates.<sup>57</sup> There were few in existence who could have better understood the process by which the *Constitution* had been brought into being, including its animating ideas and the pattern of debate, than these three judges.

To be sure, Isaacs and Higgins JJ understood the process perhaps equally well, but during the debates they had very consistently found themselves in the minority on the key issues concerning the design of the federation and the balance of power between the Commonwealth and the states<sup>58</sup> and they had no formal role in the drafting committees.<sup>59</sup> There is, accordingly, substantial reason to question the reliability of their views about the underlying ideas, the consensus of opinion and the general objectives of federation. As it turned out, though Higgins J had been the more radical of the two and was more likely to be in the minority at the Federal Conventions, in his judgments he seems to have been more forthright about the respects in which the *Constitution* did not in fact conform to his preferred model of federalism. Isaacs J, however, tended more often to read the *Constitution* in terms of his own preconceptions.<sup>60</sup> By contrast, because Griffith CJ, Barton and O'Connor JJ took a leading role in the actual drafting and progressive refinement of the various versions of the Constitution Bill as it passed through the Federal Conventions, they were acutely conscious of two things: that the powers conferred on the Commonwealth had been drafted carefully so as to restrict the Commonwealth to particular fields of operation; and, furthermore, that the general understanding had been that each head of power served not only to define the powers of the Commonwealth but also to mark out that which was *not* granted and was therefore to be reserved to the states.<sup>61</sup> After all, on the conception of the *Constitution* which they entertained, the powers of the states were original and primary, while the powers of the Commonwealth were derivative and secondary.

*lia*; *Ex parte Wooldumpers (Victoria) Ltd* (1989) 166 CLR 311, 329–30 (Deane J). The High Court has also accepted that the history of a provision of the *Constitution* may be referred to when determining 'the nature and objectives of the movement towards federation from which the compact of the *Constitution* finally emerged': *Cole v Whitfield* (1988) 165 CLR 360, 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). For a discussion of historical evidence, see Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 13–15; James A Thomson, 'Constitutional Interpretation: History and the High Court — A Bibliographical Survey' (1982) 5 *University of New South Wales Law Journal* 309, 310.

<sup>57</sup> See Aroney, above n 46, chs 7–11.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid* ch 6.

<sup>60</sup> The respective judgments of Isaacs and Higgins JJ in *Huddart Parker* (1909) 8 CLR 330, 381–408 (Isaacs J), 408–19 (Higgins J) amply illustrate this difference between the two judges.

<sup>61</sup> See, eg, *Sydney National Debates*, 3 April 1891, above n 24, 699 (Andrew Inglis Clark); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 February 1898, 502–4 (Edmund Barton), 504–5 (Josiah Symon) ('*Melbourne National Debates*'); *Melbourne National Debates*, 7 February 1898, 596–7, 600 (Edmund Barton and Isaac Isaacs); *Melbourne National Debates*, 16 February 1898, 1008–10 (Edmund Barton and Richard O'Connor).

In the particular cases that came before the Griffith Court, this outlook had to be put into operation. There can be no doubt that the cases often raised issues that had not been contemplated by any of the framers, at least not in public debate. Nor can there be any doubt that specific opinions held by the framers concerning the precise meaning to be attributed to each head of power sometimes differed, occasionally in significant respects. Indeed, members of the Court recognised the range of interpretive choices that the text of the *Constitution* left open to them as judges.<sup>62</sup> However, in this context, the Court sought to interpret the legislative powers conferred upon the Commonwealth so as to give due weight to the notion that decisions about what would *not* be granted to the Commonwealth were as significant as decisions about what *would* be granted. This approach was made specific in two ways. First, not only did limitations suggested by the closely defined language of particular heads of power mean that the scope of Commonwealth legislative power under that head had to be duly limited, but it was also taken to mean that those definitions had implications for how other heads of power ought to be interpreted. At the time, particular attention was given to the Commonwealth's power to legislate with respect to interstate trade and commerce under s 51(i) of the *Constitution*. The Griffith Court seems to have understood this as perhaps the most significant head of power: drafted in language very similar to the vastly important commerce power in the United States, it was deliberately placed first in the list of Australian federal powers because it was seen by the framers to be of prime importance.<sup>63</sup> Certainly, it conferred power on the Commonwealth to legislate with respect to *interstate* trade and commerce, but just as important was the fact that the Commonwealth was not granted power to regulate *intrastate* trade and commerce. Now, the Court recognised that some heads of power might unavoidably allow the Commonwealth to make laws that would in certain ways regulate trade and commerce of an entirely intrastate character. However, the Court considered that this situation should only be found to be the case where the head of power made this unquestionably clear. If a power was reasonably capable of having two or more meanings, one of which would not justify such an intrusion, then the Court tended to conclude that the less intrusive construction was to be preferred.<sup>64</sup>

As a consequence, the implied prohibition on Commonwealth legislative power suggested by the reserved powers doctrine — though sometimes expressed as if it were absolute — was more in the nature of a rebuttable presump-

<sup>62</sup> In relation to the corporations power in particular, see *Huddart Parker* (1909) 8 CLR 330, 354 (Griffith CJ), 363 (Barton J), 369 (O'Connor J).

<sup>63</sup> On the significance and meaning of the power, see *Sydney National Debates*, 31 March 1891, above n 24, 524 (Sir Samuel Griffith); *Sydney National Debates*, 1 April 1891, above n 24, 541 (Henry Wrixon); *Sydney National Debates*, 3 April 1891, above n 24, 662–70 (Sir Samuel Griffith, Andrew Inglis Clark, Sir John Downer, Henry Wrixon, Thomas Playford, Sir Harry Atkinson); *Adelaide Debates*, 31 March 1897, above n 24, 371 (Edmund Barton); *Adelaide Debates*, 17 April 1897, above n 24, 830 (Alfred Deakin); *Adelaide Debates*, 21 April 1897, above n 24, 1108 (Edmund Barton); *Adelaide Debates*, 22 April 1897, above n 24, 1142 (Isaac Isaacs).

<sup>64</sup> Perhaps the clearest statement of this reasoning appears in the *Union Label Case* (1908) 6 CLR 469, 502–3 (Griffith CJ).

tion.<sup>65</sup> A restrictive interpretation of a federal power was not to be adopted unless it was capable of being supported by a defensible interpretation of the actual language used in the head of power in question. The Griffith Court was thus conscious of the interpretive choices available to it, and the reserved powers doctrine gave the Court a persuasive reason to choose the most narrow, and yet defensible, interpretation of Commonwealth power possible. In this way, the Commonwealth's legislative powers were interpreted with a view to maintaining a kind of balance of power between the Commonwealth and the states.<sup>66</sup> However, this did not necessarily entail a belief that there was some clearly defined federal balance easily accessible to the Court, like some brooding omnipresence in the sky. Interpretive choices had to be made, and the reserved powers method provided guidance for how this was to be done.

*Huddart Parker* is as good an example of reserved powers reasoning as any, and it is also the first case in which the Court had to consider the scope of the corporations power. The question the Court had to determine was whether the corporations power supported the *Australian Industries Preservation Act 1906* (Cth). Section 5 of the Act was enacted to prohibit combinations of corporations that had an intent to 'restrain trade or commerce within the Commonwealth to the detriment of the public' or 'destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth'. Section 8 further prohibited activity that:

[monopolised] ... any part of the trade or commerce within the Commonwealth, with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity ...

Griffith CJ, Barton, O'Connor and Higgins JJ (Isaacs J dissenting) held that the provisions were invalid. Griffith CJ and Barton J considered that the corporations power extended only to determining which corporations may engage in trade and commerce within a state, prohibiting some, allowing others, and doing

<sup>65</sup> While there are a number of rather categorical statements which, read out of context, seem to suggest an absolute prohibition on federal legislation regulating intrastate trade and commerce, the qualifying language of O'Connor J in *Huddart Parker* (1909) 8 CLR 330, 370 is typical: 'The grant of power to the Parliament must thus be so construed as to be consistent *as far as possible* with the exclusive control over its internal trade and commerce vested in the State' (emphasis added). See also Barton J, who thought the critical question was whether the corporations power constituted an exception to what he called the '*otherwise* exclusive reservation to the States of the power [to regulate domestic trade]', but required that any such exception be established 'in clear and unambiguous terms': at 363 (emphasis added). See also *R v Barger* (1908) 6 CLR 41, 69 (Griffith CJ, Barton and O'Connor JJ); *Union Label Case* (1908) 6 CLR 469, 502-3 (Griffith CJ). The latter case contains a strongly absolutist statement, followed by an interpretive qualification at 503 (citations omitted):

the power to legislate as to internal trade and commerce is reserved to the State by the operation of sec 107, to the exclusion of the Commonwealth, and this as fully and effectively as if sec 51(i) had contained negative words prohibiting the exercise of such powers by the Commonwealth Parliament, except only ... 'as a necessary and proper means for carrying into execution some other power expressly granted.'

<sup>66</sup> This is a point that is particularly clear in *R v Barger* (1908) 6 CLR 41, 77 (Griffith CJ, Barton and O'Connor JJ), where the Court was concerned to prevent the taxation power being used by the Commonwealth to 'assume and exercise complete control over every act of every person in the Commonwealth by the simple method of imposing a pecuniary liability on every one who did not conform to specified rules of action, and calling that obligation a tax'.



this by imposing conditions regulating such engagement.<sup>67</sup> The power did not, therefore, extend to regulating activities of corporations once they were authorised to engage in trade and commerce. Sections 5 and 8 regulated matters relating to trade and commerce generally, and thus the question was whether those provisions were ‘truly ancillary to the power to make laws with respect to certain corporations, whatever that may extend to, or [were] an invasion of the field of domestic trade, a matter which is reserved to the States.’<sup>68</sup>

In Griffith CJ’s reasoning, the words in s 51(xx) of the *Constitution*, when read alone, are capable of bearing a very wide construction, but these ‘indefinite’ words are subject to what he called the ‘definite and distinct’ stipulation arising from s 51(i) that the regulation of intrastate trade and commerce be reserved to the states.<sup>69</sup> While putting it this way might suggest an absolute conception of the reserved powers doctrine, Griffith CJ seemed to understand it in interpretive terms for he accepted that the reservation of state power could be rebutted, provided that any such exception to the reservation was ‘clearly and unequivocally expressed’.<sup>70</sup> Thus, as the Chief Justice later explained, while the words in s 51(xx) are open to two different constructions, the narrower should be adopted for the power ‘ought not to be construed as authorizing the Commonwealth to invade the field of State law as to domestic trade’.<sup>71</sup> There is again some absolutism in this statement,<sup>72</sup> but it is placed in an interpretive context.

While rejecting the reserved powers reasoning adopted by the other justices of the majority, Higgins J agreed with the result, adding that if the power in s 51(xx) was given a wide meaning the results would be ‘certainly extraordinary, big with confusion.’<sup>73</sup> He also catalogued a whole series of ways in which the federal Parliament would be enabled to legislate in spheres not specifically delegated to it.<sup>74</sup> On Higgins J’s list of what were later dubbed ‘horribles’<sup>75</sup> was the possibility that the corporations power might be used to regulate such diverse matters as libel laws, liquor licensing, interest rates, religious practices, alcohol consumption and, most significantly for the *Work Choices Case*, the wages and salaries of employees.<sup>76</sup> Griffith CJ expanded on this last example, noting the possibility of federal legislation that prescribed the persons whom a corporation

<sup>67</sup> *Huddart Parker* (1909) 8 CLR 330, 353–4 (Griffith CJ), 364 (Barton J).

<sup>68</sup> *Ibid* 350 (Griffith CJ).

<sup>69</sup> *Ibid*, citing the majority’s judgment in *R v Barger* (1908) 6 CLR 41, 72 (Griffith CJ, Barton and O’Connor JJ). See further *ibid* 350–2 (Griffith CJ). In fact, when read against ss 4 and 7, ss 5 and 8 attempted to avoid the limitation of power in s 51 (xx) — ss 4 and 7, relying on s 51(i), applied only to interstate and international trade, whereas ss 5 and 8 acknowledged the limits on the power in s 51(i) and relied on s 51(xx) to avoid that limitation: *ibid* 360–1 (Barton J).

<sup>70</sup> *Huddart Parker* (1909) 8 CLR 330, 352.

<sup>71</sup> *Ibid* 354.

<sup>72</sup> See also *ibid* 365–6 (Barton J): ‘Such an expedient will not avail to pierce the shield which the *Constitution* throws round the internal trade of the States ... [for] the dog can wag the tail, but it by no means follows that the tail can wag the dog.’

<sup>73</sup> *Ibid* 409.

<sup>74</sup> *Ibid* 409–10.

<sup>75</sup> P H Lane, *The Australian Federal System* (1979) 160.

<sup>76</sup> *Huddart Parker* (1909) 8 CLR 330, 409–10.

could employ, their hours and conditions, and what remuneration would be paid to them.<sup>77</sup>

The significance of Higgins J's concurring judgment in *Huddart Parker* particularly lies in the fact that he was no friend of the reserved powers doctrine in its technical sense.<sup>78</sup> In his judgment, however, he was able to carve out a limited scope of the corporations power which was defensible on the language of the section and the nature of the subject matter. For Higgins J, the long list of horrors provided a strong reason to adopt a restrictive interpretation. For the other members of the majority, these possible consequences were also important, but the reserved powers logic provided an additional set of reasons to adopt a restrictive interpretation and provided some specific (although not conclusive) guidance on what that interpretation might be.

#### IV CONSTITUTIONAL ORTHODOXY

The reign of the reserved powers doctrine came to an end when it was effectively deposed by the *Engineers' Case* in 1920.<sup>79</sup> The *Engineers' Case* is widely, and accurately, thought to be strategically the most important constitutional decision ever handed down by the High Court of Australia.<sup>80</sup> Notwithstanding chinks in its armour and doubts about its standing that have emerged in recent years,<sup>81</sup> a resilient core of the decision remains and was invoked repeatedly in the *Work Choices Case*, not only in the majority's joint judgment, but also in the dissenting judgments of Kirby and Callinan JJ.<sup>82</sup>

<sup>77</sup> Ibid 348.

<sup>78</sup> Nor did he favour, as a matter of constitutional design, the limited terms in which the Commonwealth's power over industrial matters had been defined in s 51(xxxv) of the *Constitution*: see Commonwealth, *Parliamentary Debates*, House of Representatives, 12 August 1903, 3467 (Henry Bourne Higgins).

<sup>79</sup> The matter arose out of an industrial dispute between the Amalgamated Society of Engineers, a trade union, and some 844 employers throughout Australia, including three state government instrumentalities of Western Australia. The question was whether the Commonwealth under its industrial arbitration power (*Constitution* s 51(xxxv)) has the ability to make laws that are binding on state instrumentalities. The Court decided that the Commonwealth did have that legislative power, overturning the immunity of state instrumentalities from federal laws and, by implication, radically undermining the approach to interpreting the *Constitution* that the High Court had followed for 17 years previously.

<sup>80</sup> Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (1967) 30 ('a landmark in Australian constitutional interpretation'); Leslie Zines, *The High Court and the Constitution* (4<sup>th</sup> ed, 1997) 8 ('it probably remains the most important case in Australian constitutional law, at any rate, from the point of view of principles of general interpretation'). Cf *Melbourne Corporation* (1947) 74 CLR 31, 78 (Dixon J) ('stripped of embellishment and reduced to the form of a legal proposition', the proposition established by the *Engineers' Case* is simply to assert the 'prima-facie rule ... that a power to legislate with respect to a given subject enables the Parliament to make laws which, upon that subject, affect the operations of the States and their agencies'). See also Leslie Zines, 'Changing Attitudes to Federalism and Its Purpose' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 86, 88.

<sup>81</sup> See, eg, George Williams, 'Engineers Is Dead, Long Live the Engineers!' (1995) 17 *Sydney Law Review* 62; Michael Coper and George Williams (eds), *How Many Cheers for Engineers?* (1997).

<sup>82</sup> See the references in Part V below.

The *Engineers' Case* elaborated a particular method of interpretation premised on a certain view of the *Constitution's* fundamental nature and purpose.<sup>83</sup> Prior to the case, the High Court had interpreted the *Constitution* with regard to its character as a federal compact between the peoples of the separate colonies of Australia, a conception that the judges no doubt considered to be in line with the consensus of opinion among the framers of the *Constitution*. However, in the *Engineers' Case*, the High Court under the intellectual leadership of Isaacs J insisted that the *Constitution* was rather to be understood as a statute of the Imperial Parliament and was to be interpreted as such, according to ordinary principles of statutory interpretation.<sup>84</sup> The Court thus rejected the American theories and precedents with which federalism was associated and insisted that specifically British political ideas and exegetical methods should inform and guide the Court. In substitution for the American idea of federalism, the Court asserted that the British system of parliamentary responsible government was especially fundamental to the system.<sup>85</sup> Interpreting the *Constitution* in accordance with the received principles of statutory interpretation meant that its fundamental objectives had to be discerned in the intentions of the enacting body insofar as those intentions could be ascertained from the actual words used in the text of the *Constitution*, understood in their ordinary and natural sense.<sup>86</sup> More importantly, interpreting the *Constitution* as an Act of the Imperial Parliament suggested that the grants of power conferred upon the Commonwealth ought to be interpreted with as much liberality as possible.<sup>87</sup> The *Constitution* should not be interpreted in light of what the Court disparaged as 'no more [a] definite standard than the personal opinion of the Judge who declares it.'<sup>88</sup> While the

<sup>83</sup> *Engineers' Case* (1920) 28 CLR 129, 148–50 (Knox CJ, Isaacs, Rich and Starke JJ). Delivered by Isaacs J, the *Engineers'* joint judgment set out an approach to interpretation that Isaacs J had developed in a series of dissenting judgments in previous cases. In relation to Isaacs J's earlier rejection of the reserved powers doctrine, see *R v Barger* (1908) 6 CLR 41, 81–111; *Huddart Parker* (1909) 8 CLR 330, 381–408.

<sup>84</sup> *Engineers' Case* (1920) 28 CLR 129, 148–54 (Knox CJ, Isaacs, Rich and Starke JJ), 161–2 (Higgins J). See also *Deakin v Webb* (1904) 1 CLR 585, 596–7 (Isaacs KC, during argument); *Webb v Outtrim* (1906) 4 CLR 356. The contrast between the pre- and post-*Engineers'* approaches can be overstated. Before the *Engineers' Case*, the High Court had also stated that the *Constitution* is to be interpreted according to the received principles of statutory interpretation. The difference between the two approaches lay rather in the way that these principles were applied and, more importantly, in different opinions concerning the fundamental nature and purposes of the *Constitution*.

<sup>85</sup> *Engineers' Case* (1920) 28 CLR 129, 146–8 (Knox CJ, Isaacs, Rich and Starke JJ). What exactly this amounted to, and how responsible government was precisely relevant to the question at hand, was not made clear in the joint judgment. For discussion of this, see Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 181–95.

<sup>86</sup> *Engineers' Case* (1920) 28 CLR 129, 142, 148–9 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>87</sup> The Court maintained that the grant of legislative power to the Commonwealth within its jurisdiction is 'as plenary and as ample' as the powers of the British Parliament in its sovereignty could bestow: *ibid* 153, citing *Hodge v The Queen* (1883) 9 App Cas 117, 132. The Court also pointed out that the 'possible abuse of powers is no reason in British law for limiting the natural force of the language creating them': at 151.

<sup>88</sup> *Engineers' Case* (1920) 28 CLR 129, 142 (Knox CJ, Isaacs, Rich and Starke JJ). In *Huddart Parker* (1909) 8 CLR 330, 388, Isaacs J had affirmed that the Court ought to be guided solely by the language of the *Constitution*, rather than 'wander[ing] at large upon a sea of speculation searching for a suitable intent by the misty and uncertain light of what is sometimes called the spirit of the document' based on the subjective 'preconceptions of the individual observer.' In

Court might be entitled to discern and apply certain implied doctrines and principles in its interpretation, such inferences must be based upon the words used and their ‘necessarily implied meaning.’<sup>89</sup>

Applying these conceptual and interpretive principles to the issues raised in the *Engineers’ Case*, the Court next concluded that the received doctrine of the immunity of state instrumentalities from federal interference had to be entirely rejected and that the immunity of federal instrumentalities from state interference had to be reinterpreted. This was not to be done (as it had been) on the basis of a kind of dual sovereignty of both the Commonwealth and the states, but on the basis of the putative supremacy of the Commonwealth over and against the states.<sup>90</sup> Although on the facts of the case it was strictly unnecessary for the Court to express any view on the reserved powers doctrine, the reasoning adopted in the *Engineers’ Case* meant that this doctrine could not stand.<sup>91</sup> The Court thus observed that s 51(xxxv) of the *Constitution* grants legislative power in general terms — with no exception for industrial disputes where states are parties — and that there is no provision elsewhere in the *Constitution* explicitly cutting down the scope of the power.<sup>92</sup> It followed that full effect must be given to this grant of power, without considering any sphere of powers supposedly reserved to the states.<sup>93</sup> As Higgins and Isaacs JJ had previously maintained, the competencies left to the states are merely the ‘residue’ of powers that remain after full effect is given to all of the powers positively conferred upon the Commonwealth.<sup>94</sup> Isaacs J had said that ‘[i]t is contrary to reason to shorten the expressly granted powers by the undefined residuum. As well might the precedent gift in a will be limited by first assuming the extent of the ultimate residue.’<sup>95</sup> Or, as he more tersely and directly put it elsewhere: ‘It is always a question of *grant*, not of prohibition, unless that is express.’<sup>96</sup>

order to secure ‘certainty’ or ‘stability’ in the *Constitution*, he continued, the Court must adhere to the language of the *Constitution* and ensure that ‘fair and full effect [is] given to the words employed, construed according to the recognized British rules of interpretation’.

<sup>89</sup> *Engineers’ Case* (1920) 28 CLR 129, 155 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>90</sup> *Ibid* 156–60 (Knox CJ, Isaacs, Rich and Starke JJ). While fundamental to the High Court’s later decision in *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 (*‘Cigamatic’*), this was a dubious inference quite inconsistent with the *Engineers’ Case*’s supposed ‘textual literalism’ because the nearest reference to anything resembling federal ‘supremacy’ in the *Constitution* is s 109, which provides that in the case of inconsistency between federal and state laws the federal law will ‘prevail’. Even then, s 109 is concerned only with the ‘supremacy’ of validly enacted federal laws over validly enacted state laws. By contrast, the immunity of instrumentalities doctrine is concerned with the prior and distinct question of whether federal laws are validly enacted or can have a valid operation in respect of the executive governments of the states.

<sup>91</sup> See *Engineers’ Case* (1920) 28 CLR 129, 155 (Knox CJ, Isaacs, Rich and Starke JJ), where the implied prohibition doctrine (another name for the reserved powers doctrine) was explicitly rejected.

<sup>92</sup> *Ibid* 154.

<sup>93</sup> As Higgins J had put it in *Huddart Parker* (1909) 8 CLR 330, 415: the powers left to the states cannot be determined ‘until the utmost limits of all the powers conferred on [the Commonwealth] Parliament by sec 51 have been ascertained.’

<sup>94</sup> *R v Barger* (1908) 6 CLR 41, 83–5 (Isaacs J), 113 (Higgins J).

<sup>95</sup> *Ibid* 84.

<sup>96</sup> *Huddart Parker* (1909) 8 CLR 330, 391 (emphasis in original).

Now it is true that the *Engineers' Case* has been severely criticised,<sup>97</sup> and many of its fundamental propositions have been subverted. The idea that the *Constitution* is to be interpreted as a statute of the Imperial Parliament has been seriously undermined recently by the suggestion that the *Constitution* really derives its force from the Australian people.<sup>98</sup> Several of the Court's most adventurous constitutional decisions of the 1990s — particularly those relating to the implied freedom of political communication — have drawn on the idea that the *Constitution* is thus founded on popular, rather than Imperial, sovereignty.<sup>99</sup> However, as important (albeit indeterminate) as this development might be,<sup>100</sup> it is not one that has much potential to undermine the resilient core of the *Engineers' Case*. This is because, for a start, it was in the *Engineers' Case* itself that the Court first deliberately articulated the idea that, politically conceived, the *Constitution* rested upon the consent of the people of Australia as a whole.<sup>101</sup> Likewise, it was in the *Engineers' Case* that the Court first emphasised the doctrine of responsible government over and against the idea of federalism,<sup>102</sup> and it was a conception of responsible government and representative democracy that subsequently lay at the foundation of the implied freedom of political communication.<sup>103</sup>

It is also important to acknowledge that the assault in the *Engineers' Case* upon the immunity of instrumentalities doctrine has been repelled in certain respects. Less than 30 years after the *Engineers' Case* was decided, the High Court, under the influence of Sir Owen Dixon, insisted that federalism is indeed

<sup>97</sup> T C Brennan, *Interpreting the Constitution: A Politico-Legal Essay* (1935); John Latham, 'Interpretation of the Constitution' in R Else-Mitchell (ed), *Essays on the Australian Constitution* (1952) 1, 33; Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 197–201; Andrew W Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (1990) 244–51; Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (1995) 188; David Meale, 'The History of the Federal Idea in Australian Constitutional Jurisprudence: A Reappraisal' (1992) 8 *Australian Journal of Law and Society* 25, 53–4; Zines, *The High Court and the Constitution*, above n 80, 10–14; Geoffrey de Q Walker, 'The Seven Pillars of Centralism: *Engineers' Case* and Federalism' (2002) 76 *Australian Law Journal* 678.

<sup>98</sup> G J Lindell, 'Why Is Australia's Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29; Justice Michael D Kirby, 'Deakin: Popular Sovereignty and the True Foundation of the *Australian Constitution*' (1996) 3 *Deakin Law Review* 129; Simon Evans, 'Why Is the Constitution Binding? Authority, Obligation and the Role of the People' (2004) 25 *Adelaide Law Review* 103.

<sup>99</sup> See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ), 210–11 (Gaudron J), 228 (McHugh J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 69–74 (Deane and Toohey JJ); *Leeth v Commonwealth* (1992) 174 CLR 455, 475 (Brennan J), 483–4, 486 (Deane and Toohey JJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171 (Deane J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>100</sup> See George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1; Nicholas Aroney, 'A Public Choice? Federalism and the Prospects of a Republican Preamble' (1999) 20 *University of Queensland Law Journal* 262.

<sup>101</sup> *Engineers' Case* (1920) 28 CLR 129, 153 (Knox CJ, Isaacs, Rich and Starke JJ). I say this was deliberate because Isaacs J's account of the *Constitution* as deriving from the Australian people directly contradicted the proposition that the *Constitution* derived its political force from the consent of the several peoples of the separate colonies.

<sup>102</sup> *Ibid* 146–8 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>103</sup> See generally Nicholas Aroney, *Freedom of Speech in the Constitution* (1998); Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505.

an integral part of the *Constitution*. This had important implications for its interpretation. Dixon CJ seems never to have been particularly fond of the *Engineers' Case*,<sup>104</sup> and he capitalised on some of the qualifications expressed in the judgment to formulate a modified Commonwealth and state immunity doctrine.<sup>105</sup> Thus, while the *Engineers'* Court certainly abandoned the immunity of instrumentalities doctrine in its strong form, it was not too long before a qualified, two-track instrumentalities immunity re-emerged in *Melbourne Corporation v Commonwealth* ('*Melbourne Corporation*')<sup>106</sup> and in *Commonwealth v Cigamatic Pty Ltd (in liq)* ('*Cigamatic*').<sup>107</sup> This latter version of the doctrine has recently been reaffirmed (although recast) in *Re Residential Tenancies Tribunal of New South Wales; Ex parte Defence Housing Authority*<sup>108</sup> and in *Austin v Commonwealth*.<sup>109</sup>

However, despite the points at which the underlying assumptions of the *Engineers' Case* have been undermined and its specific holdings qualified, as the judgments in the *Work Choices Case* demonstrate, the authority of the *Engineers' Case* in relation to the interpretation of federal legislative power continues undiminished. A resilient core remains, namely, the proposition that federal legislative powers are to be interpreted in priority to, and without substantial consideration of, the remaining legislative capacities of the states.<sup>110</sup> The proposition rests on the premise that the *Constitution* is to be construed by reference to the actual words used, understood in their ordinary and natural sense, without regard to the political or policy implications of the resulting interpretation.<sup>111</sup> This proposition was a direct challenge to the reserved powers doctrine for it implied that each head of federal power should be interpreted as widely as the language used allows, without regard to the impact that interpretation has upon the residual legislative powers of the states.

As such, there is more to the *Engineers'* decision than the proposition that state legislative powers are merely residual in nature. The theory is not merely a recapitulation of the language of ss 51 and 107 of the *Constitution*. The doctrine

<sup>104</sup> Sawyer, above n 97, 133.

<sup>105</sup> See, eg, *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681–3 (Dixon J); *Re Richard Foreman & Sons Pty Ltd v Federal Commissioner of Taxation* (1947) 74 CLR 508, 528–32 (Dixon J).

<sup>106</sup> (1947) 74 CLR 31, 78–82 (Dixon J).

<sup>107</sup> (1962) 108 CLR 372, 376–8 (Dixon CJ). For a critique of *Cigamatic*, see R P Meagher and W M C Gummow, 'Sir Owen Dixon's Heresy' (1980) 54 *Australian Law Journal* 25; cf Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221.

<sup>108</sup> (1997) 190 CLR 410.

<sup>109</sup> (2003) 215 CLR 185. In this case, a majority recast the account of the immunity of instrumentalities doctrine as it had come to be formulated in cases such as *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 and *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188. For a recent discussion, see Anne Twomey, 'Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind One Another' (2003) 31 *Federal Law Review* 507.

<sup>110</sup> Cf R D Lumb, 'Problems of Characterization of Federal Powers in the High Court' (1982) *Australian Current Law Digest* AT-45, suggesting that a doctrine of 'federal balance' was still discernible in the cases. However, this was written before the decision in the *Tasmanian Dam Case* (1983) 158 CLR 1. See also R D Lumb, 'The *Franklin Dam* Decision and the External Affairs Power: A Comment' (1984) 13 *University of Queensland Law Journal* 138.

<sup>111</sup> *Engineers' Case* (1920) 28 CLR 129, 142, 148–9 (Knox CJ, Isaacs, Rich and Starke JJ).

is not exhausted by the methodological observation that the powers left to the states under s 107 cannot be identified until the powers positively conferred upon the Commonwealth under s 51 are first fully identified. Indeed, this much can be accepted, in a sense, even by proponents of the reserved powers theory.<sup>112</sup> Rather, the objective of the *testamentary* analogy, as first developed by Isaacs J, was to adopt a particular theory of the original nature of the Australian federal system as a whole. According to Isaacs J's metaphor, the testator is the Imperial Parliament, the primary and positive beneficiary is the Commonwealth, and the secondary and residual beneficiaries are the states. On this analogy, the distribution of power is entirely determined by the testator (the Imperial Parliament), not the beneficiaries (the Commonwealth and the states), and certainly not the secondary beneficiaries (the states). On this view, the decision to confer positive grants upon the Commonwealth was to accord primacy to federal power and to treat state powers as secondary and indefinite.<sup>113</sup>

Ironically, while the *Engineers' Case* was not directly concerned with the reserved powers doctrine or with the residuary theory of state power, it is this aspect of the judgment that has proved the most resilient.<sup>114</sup> Indeed, the priority to be given to the interpretation of federal legislative power became so well entrenched that it was fundamental even in those cases, such as *Melbourne Corporation*,<sup>115</sup> that challenged other aspects of received *Engineers' doctrine*.<sup>116</sup> The principle has been invoked in virtually every major case in which the scope of the Commonwealth's legislative powers has been at issue, including the relatively modest number of cases that have considered the scope of the corporations power.<sup>117</sup> Time and again, the Court has turned to the *Engineers' Case* for the requisite inspiration on questions such as these.<sup>118</sup> When understood merely as a *methodological* proposition, the residuary theory can be consistent with reading federal heads of power in *either narrow or liberal terms*. But when understood by reference to the *testamentary* analogy, it means that federal heads of legislative power are to be interpreted 'with all the generality which the words used admit.'<sup>119</sup> The result has been a gradual, but seemingly inevitable, expan-

<sup>112</sup> Thus, even Griffith CJ himself referred to the powers of the states as being residual in nature: see *Deakin v Webb* (1904) 1 CLR 585, 605–6.

<sup>113</sup> For a critique of the *testamentary* analogy that emphasises the interpretive problems with it, see Sawyer, above n 97, 199–200.

<sup>114</sup> Zines in *The High Court and the Constitution*, above n 80, 12, observes: 'On the question of the reserved powers doctrine, there has been general agreement that it is wrong to interpret Commonwealth powers on the basis that s 107 has left domestic matters to the States.'

<sup>115</sup> (1947) 74 CLR 31.

<sup>116</sup> *Ibid* 78–9 (Dixon J). The *Engineers' Case* was similarly relied upon in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 133–4 (Mason CJ).

<sup>117</sup> See, eg, *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 485, 488–9 (Barwick CJ) ('*Concrete Pipes Case*'), a case that Zines compares to the *Engineers' Case* in significance, arguing that it was 'the first big breakthrough in federal power in 50 years': Zines, 'Changing Attitudes to Federalism', above n 80, 92.

<sup>118</sup> See, eg, *Payroll Tax Case* (1971) 122 CLR 353, 396 (Windeyer J); *Concrete Pipes Case* (1971) 124 CLR 468, 485, 488–9 (Barwick CJ); *Tasmanian Dam Case* (1983) 158 CLR 1, 128 (Mason J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 44–5 (Brennan J).

<sup>119</sup> *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), citing and adopting *R v Public Vehicles Licensing Appeal Tribunal of Tasmania*; *Ex parte Australian National Airways Pty Ltd* (1964)

sion in the recognised scope of Commonwealth legislative power.<sup>120</sup> The *Work Choices Case* is, in this sense, only the most recent of a long line of cases in which the potential of the *Engineers'* principle has gradually unfolded.

However, the progressive unfolding of the implications of the residuary theory of state power has not been without its discontents. While all judges since the *Engineers' Case* have had to avoid any explicit reliance upon reserved powers reasoning, elements of the doctrine have surfaced from time to time. There have been two principal ways in which this has occurred. The first has been mainly *interpretive* in orientation, where, in certain cases, it has been observed that multiple interpretations of federal heads of power are possible, some tending to favour the Commonwealth, others tending to favour the states. In this context, it has sometimes been emphasised that the *Constitution* very evidently provides for a federal system and anticipates that the states will not only continue to exist, but will continue to function as independent governments possessing significant powers.<sup>121</sup> As Latham CJ put it, 'no single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament.'<sup>122</sup> In these cases, it has then been concluded that a 'balance' needs to be maintained between the powers of the Commonwealth and the states, and that the Court should prefer the narrower interpretation of federal power where available.<sup>123</sup> Sometimes this argument has been proposed in absolute

113 CLR 207, 225 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ). Cf *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 367–8 (O'Connor J) (*'Jumbunna Coal Mine'*); *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81 (Dixon J) (*'ANA Case'*); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 298 (Starke J), 332 (Dixon J) (*'Bank Nationalisation Case'*).

<sup>120</sup> Winterton, 'The High Court and Federalism', above n 52, 204. Virtually all commentators agree — whether they like it or not — that the general trend of constitutional interpretation over the last eight decades has been one of gradual expansion of Commonwealth power at the expense of that of the states. Moreover, they agree that what has driven this trend, so far as constitutional jurisprudence is concerned, has been a combination of particular interpretive methodologies and, in at least some instances, an underlying sympathy for the exercise of national power: see, eg, Lumb, 'Problems of Characterization', above n 110; Lumb, 'The *Franklin Dam Decision*', above n 110; Sir Daryl Dawson, 'Southey Memorial Lecture 1983: The Constitution — Major Overhaul or Simple Tune-Up?' (1984) 14 *Melbourne University Law Review* 353; Leslie Zines, 'Characterisation of Commonwealth Laws' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 33; Gregory Craven, 'The States — Decline, Fall or What?' in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (1992) 49; Harry Gibbs, 'The Decline of Federalism?' (1994) 18 *University of Queensland Law Journal* 1; Leslie Zines, 'Engineers and the "Federal Balance"' in Michael Coper and George Williams (eds), *How Many Cheers for Engineers?* (1997) 81; Walker, above n 97; Zines, 'Changing Attitudes to Federalism', above n 80.

<sup>121</sup> See, eg, *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54, 113–5 (Kitto J).

<sup>122</sup> *Bank Nationalisation Case* (1948) 76 CLR 1, 184–5 (Latham CJ). See also *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43, 83 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ).

<sup>123</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 198–9 (Gibbs CJ) (citations omitted):  
Of course it has been established, since the *Engineers' Case*, that it is an error to read s 107 of the *Constitution*, which continues the powers of the Parliaments of the States, 'as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec 51, as that grant is reasonably construed, unless that reservation is as explicitly stated.' However, in determining the meaning and scope of a power conferred by s 51 it is necessary to have regard to the federal nature of the *Constitution*.



terms and a definite content to the federal balance has been invoked.<sup>124</sup> At other times it has been posed in more interpretive terms.<sup>125</sup> A number of High Court justices have been attracted to arguments of this general kind, notwithstanding the affinity of these arguments with certain aspects of the reserved powers doctrine. Over the long term, however, the residuary theory of state power has tended to prevail, and federal balance arguments have often been castigated as ‘ritual invocations’<sup>126</sup> that would resuscitate the ‘ghosts’<sup>127</sup> of the reserved powers doctrine. Heads of power that have been interpreted in relatively narrow terms are the exception, not the rule.<sup>128</sup>

The second route through which elements of reserved powers reasoning have entered judgments of the Court is where limitations written into a particular head of power have been read as implying limitations on the scope of other heads of power. The most orthodox version of this approach is where the limitations in view are expressed in explicit, negative terms. Sections 51(xiii), (xiv) and (xxxi) of the *Constitution* provide the clearest examples here.<sup>129</sup> The power in s 51(xiii) to legislate with respect to ‘banking, other than State banking’<sup>130</sup> contains an explicit negative prohibition that is capable of two different interpretations: one in which the prohibition is read as limiting only the paragraph in which it is found; and another in which it is read as limiting the scope of other heads of power. Against the general trend in interpretation following the *Engineers’ Case*, s 51(xiii) has been interpreted to mean that the Commonwealth is not able to legislate on the subject of state banking, not only under s 51(xiii), but also under any other heads of power.<sup>131</sup> Similarly, the power in s 51(xxix) to legislate with respect to ‘the acquisition of property on just terms’ has been interpreted to mean that other heads of power cannot support legislation that involves an acquisition of property not on just terms,<sup>132</sup> unless such an acquisition is an essential aspect of the very subject matter of the power or is something closely incidental to it, such as the taxation of money, the payment of fines for breaches of law, the sequestration of the assets of someone declared bankrupt or the confiscation of

<sup>124</sup> Lumb, ‘Problems of Characterization’, above n 110, 48; Lumb, ‘The *Franklin Dam* Decision’, above n 110, 140.

<sup>125</sup> Winterton, ‘The High Court and Federalism’, above n 52, 206–10.

<sup>126</sup> *Tasmanian Dam Case* (1983) 158 CLR 1, 129 (Mason J).

<sup>127</sup> *A-G (WA) ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492, 530 (Murphy J).

<sup>128</sup> The best example of this is the power in s 51(i) of the *Constitution* with respect to interstate trade and commerce, which has received a relatively narrow interpretation compared with that given to the equivalent power under the *United States Constitution* — see the discussion in Zines, *The High Court and the Constitution*, above n 80, 55–79.

<sup>129</sup> See also *Constitution* ss 51(ii) (the taxation power), (xxiiiA) (the medical and dental services power).

<sup>130</sup> See also *Constitution* s 51(xiii) (the power to legislate with respect to ‘[i]nsurance, other than State insurance’).

<sup>131</sup> *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, 285–6 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>132</sup> *W H Blakeley & Co Pty Ltd v Commonwealth* (1953) 87 CLR 501, 521 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ); *Re Döhnert Müller Schmidt & Co; A-G (Cth) v Schmidt* (1961) 105 CLR 361, 371–2 (Dixon CJ) (‘*Schmidt*’); *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, 201–2 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

prohibited imports.<sup>133</sup> It is remarkable that, despite involving elements of reserved powers reasoning, there have been no allegations of heresy in relation to this particular interpretive strategy, especially when it is noted that s 51(xxxi) does not contain an *explicit* negative prohibition but merely stipulates that acquisitions under the placitum must be ‘on just terms’.

Nevertheless, it needs to be stressed that inter-provisional interpretations of this kind are the exception, not the rule. Thus, for example, a majority of the Court has refused to read down the marriage power in s 51(xxi) in light of the limited terms of the divorce and custody power in s 51(xxii),<sup>134</sup> and the Court has likewise refused to read down the defence power in s 51(vi) by reference to the industrial arbitration power in s 51(xxxv).<sup>135</sup>

## V CONSTITUTIONAL CHOICES

The specific conclusions arrived at by the majority and the minority in the *Work Choices Case* can be traced ultimately to different approaches to constitutional interpretation. The majority’s reasoning recapitulates the succession of fundamental constitutional choices which the High Court has made in the cases decided since the *Engineers’ Case*, while the reasoning in the dissenting judgments sets forth a series of alternative choices which hark back to the reserved powers doctrine, but without acknowledgement as such. By showing how the majority’s decision replicates the choices that have become the orthodox approach and how the minority proposes an alternative, heterodox set of interpretations and doctrines, it is possible to explain much of the paradoxical character of the case in both its revolutionary and conventional dimensions.

### A *The Majority*

Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ insisted very early in their joint judgment that the Court must adhere to ‘the accepted principles of constitutional interpretation’.<sup>136</sup> Invoking the *Engineers’ Case* on numerous occasions,<sup>137</sup> they affirmed that the ‘starting point’ in interpretation must be the ‘constitutional text’, rather than a view ‘formed independently of that text’.<sup>138</sup> This fundamental interpretive choice, to consider solely the text and not something independent of the text, entailed a number of things. First, it meant that the *Constitution* is not to be interpreted in light of the understandings or expectations of the framers. Denouncing attempts to divine the founders’ intentions as the

<sup>133</sup> *Commissioner of Taxation (Cth) v Clyne* (1958) 100 CLR 246; *Schmidt* (1961) 105 CLR 361; *Burton v Honan* (1952) 86 CLR 169; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155.

<sup>134</sup> See generally *Russell v Russell* (1976) 134 CLR 495.

<sup>135</sup> See generally *Pidoto v Victoria* (1943) 68 CLR 87, discussed in the *Work Choices Case* (2006) 229 CLR 1, 128–31 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>136</sup> *Work Choices Case* (2006) 229 CLR 1, 71. See also at 71–2, 97.

<sup>137</sup> *Ibid* 71, 73, 118, 119.

<sup>138</sup> *Ibid* 118–19. See also at 89, 119, 121.

pursuit of ‘a mirage’,<sup>139</sup> the majority maintained that even if such a ‘collective subjective intention’ could be ascertained it would divert attention from the real objective, which is to interpret the text ‘in accordance with accepted principles.’<sup>140</sup> Secondly, it meant that the *Constitution* is not to be interpreted by reference to ideas about ‘the place to be accorded to the States formed independently of the text of the *Constitution*.’<sup>141</sup> Here, in particular, the majority justices took clear aim at both the reserved powers doctrine and the idea of federal balance. They suggested that the plaintiffs erroneously took as their assumption a ‘particular division of governmental or legislative power’<sup>142</sup> — the idea that the *Constitution* preserves some kind of ‘static equilibrium’ captured in the phrase ‘federal balance’<sup>143</sup> — and that their submissions contained ‘[m]ore than faint echoes’ of reserved powers reasoning.<sup>144</sup> Conversely, the majority insisted that the Court construe the text ‘with all the generality which the words used admit’,<sup>145</sup> and when they said this (on several occasions) it seems quite clear that they had especially the text of s 51(xx) — and not the text of s 51(xxxv) or s 107 — in mind. In other words, this emphasis on the ‘text’ meant giving the particular words of s 51(xx) their widest possible meaning, without taking into consideration in any significant sense any other provisions contained within the *Constitution*. The language of s 51(xx), interpreted in isolation from other heads of power, was to be decisive.

Consistent with this approach, the majority addressed the issues raised in the *Work Choices Case* in a precise and narrowly-defined manner. In particular, the

<sup>139</sup> Ibid 97. The majority thought that the various approaches to the scope of the corporations power revealed in *Huddart Parker* showed that there was no settled understanding of the meaning of s 51(xx) of the *Constitution* among Griffith CJ, Barton, O’Connor, Isaacs and Higgins JJ, all of them framers of the *Constitution*: at 84–5. They also thought that the convention debates reveal very little, other than a deliberate intention to expand the scope of the power from one concerned narrowly with the status and recognition of corporations (in 1891) to one concerned also with ‘the general subject’ of the specified kinds of corporations, extending to the regulation of the mode in which they conduct their business (in 1897): at 94–7. They cited the *Sydney National Debates*, 3 April 1891, above n 24, 686 (Sir Samuel Griffith, James Munro, Sir John Bray); *Adelaide Debates*, 12 April 1897, above n 24, 439 (Edmund Barton).

<sup>140</sup> *Work Choices Case* (2006) 229 CLR 1, 97. See also at 71–2, 103–4. Appealing to the repeated failure of proposed amendments to the *Constitution* in order to give the Commonwealth a general power over industrial relations was said to suffer from insuperable difficulties. First, it assumed an analogy between the failed amendment proposals and the law under consideration in the current case. Secondly, it assumed that the failure of a referendum represents an intelligible choice made by properly informed electors between clearly identified constitutional alternatives. Thirdly, it failed to explain exactly what implications for the meaning of the *Constitution* are to be derived from the failure of a referendum proposal and it overlooks the fact that the *Constitution* makes it the responsibility of the High Court to determine the interpretation of the *Constitution*: at 100–1.

<sup>141</sup> Ibid 119. See generally at 118–20.

<sup>142</sup> Ibid 72.

<sup>143</sup> Ibid 73. See also at 116 (‘an implicit assertion about federal balance’), 118 (‘explicitly or implicitly invoked notions of federal balance’), 120 (‘appeals made to notions of federal balance, no matter whether the appeal was explicit or only implicit’) with respect to the plaintiffs’ arguments.

<sup>144</sup> Ibid 85. See also at 89, 97.

<sup>145</sup> Ibid 103–4, 117, citing *R v Public Vehicles Licensing Appeal Tribunal of Tasmania; Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225–6 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ); *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

criteria proposed by the plaintiffs for their preferred narrow reading of the corporations power were closely scrutinised. The implication — consistent with the thrust of the *Engineers' Case* — seems to be that to read federal heads of power narrowly is to introduce too many fine judgements about where the line is to be drawn, which in turn leads to subjectivity and uncertainty.<sup>146</sup> Thus, the proposed distinction between the internal affairs and external relations of corporations was criticised for its 'inherent instability',<sup>147</sup> and the suggestion that the Court should adopt the distinctive character test was said to produce 'awkward results'.<sup>148</sup>

But how devastating are these claims when closely scrutinised? Upon careful examination, the alleged instability and awkwardness of the tests actually tend to evaporate. What is left behind is not much more than the underlying premise of the entire judgment, namely, an outright rejection of reserved powers and federal balancing reasoning and a simple preference for reading federal heads of power as widely as their language can conceivably sustain.

Initially, the supposed instability of the internal–external distinction is said by the majority to flow from the practical difficulty in classifying certain kinds of corporate activities as either internal or external.<sup>149</sup> However, in the very next paragraph of the judgment the distinction is admitted to have at least some 'utility' in the resolution of issues relating to choice of law questions when corporations are involved.<sup>150</sup> If the distinction has utility in this context, then presumably it is a workable distinction. But if it is a workable distinction in the context of choice of law questions, why is it unstable in the context of questions relating to the distribution of power? The answer given to *this* question is revealing. It does not involve some careful explanation about how a particular distinction could be stable and workable in one context but not in another, but rather turns on the proposition that choice of law and distribution of power questions involve 'radically different' inquiries.<sup>151</sup> The former, it is said, assumes that the two potentially applicable bodies of law emanate from jurisdictions whose legal competence to enact the laws is undoubted, whereas in the latter context it is said that the competence of the jurisdictions to make the law is the very point in question.<sup>152</sup> Thus, in the first situation considerations of 'comity' between jurisdictions have a legitimate place, but not so — the joint judgment

<sup>146</sup> See *Engineers' Case* (1920) 28 CLR 129, 135 (arguments of Sir Edward Mitchell and John Latham for Victoria), 142 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>147</sup> *Work Choices Case* (2006) 229 CLR 1, 87. See further criticism at 121.

<sup>148</sup> *Ibid* 104, 112.

<sup>149</sup> *Ibid* 87, where the majority asked how activities such as an offer of shares to existing shareholders, raising capital through a public offering of shares and borrowing from a bank were to be classified. The first certainly appears to be internal, and the third external, but what of the second? The majority presented the difficulty inherent in classifying such an activity as a reason to reject the internal–external distinction.

<sup>150</sup> *Ibid* 87–8, where examples of its application to choice of law questions relating to corporations are discussed. The majority cited the following cases in its discussion: *Bateman v Service* (1881) 6 App Cas 386; *Chaff and Hay Acquisition Committee v J A Hemphill & Sons Pty Ltd* (1947) 74 CLR 375.

<sup>151</sup> *Work Choices Case* (2006) 229 CLR 1, 88.

<sup>152</sup> *Ibid* 89.

asserts — in the second.<sup>153</sup> But why? No answer to *this* question is given, except that it is illegitimate to apply considerations of comity as a ground for reading the corporations power narrowly because it invokes ‘presuppositions about allocation of legislative power between the integers of the federation that are not easily distinguished from the reserved powers doctrine.’<sup>154</sup> In this way, while the argument against the internal–external distinction begins as a claim about its inherent instability, the argument itself collapses when it is recognised that the distinction does have some utility in choice of law cases, leaving only a bare objection to reserved powers and federal balance reasoning in its stead.

Essentially, the same thing happens in the majority’s critique of the distinctive character test. Awkward results are said to transpire because the test requires the Court to focus upon ‘activities’ in relation to trading and financial corporations, but upon the question of ‘status’ in relation to foreign corporations.<sup>155</sup> The supposed awkwardness consists in the resulting ‘disconformity’ between the ambit of the Commonwealth’s power with respect to trading and financial corporations and its power with respect to foreign corporations.<sup>156</sup> But surely the *textual* answer to this criticism is obvious: the qualifying adjectives ‘trading’ and ‘financial’ actually refer to activities, while the adjective ‘foreign’ refers to the source or origin from which a corporation derives its corporate status. Taking these adjectives seriously requires us to focus upon activities in relation to two of the classes of corporation and status in respect of the third.<sup>157</sup> Why, then, is there any awkwardness in different kinds of considerations being applied if the language of s 51(xx), as interpreted, seems to require it? Surely it cannot be because we are concerned with but one placitum of s 51, and that the same kind of test must be applied in all instances? After all, we are certainly accustomed to this phenomenon arising in the interpretation of other provisions of the *Constitution*.<sup>158</sup> Rather, once again, the more fundamental reason for the resistance to the

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.* 104.

<sup>156</sup> *Ibid.* 112.

<sup>157</sup> This is the case whether the relevant activities are those described in the corporation’s constitution or those actually engaged in by the corporation. But compare the different approaches in *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190, 208–11 (Barwick CJ), 213 (Gibbs J), 217–21 (Stephen J), 232–7 (Mason J), 237 (Jacobs J), 238–40 (Murphy J), 240–1 (Aickin J); *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 294–6 (Gibbs CJ and Wilson J), 303–6 (Mason, Murphy and Deane JJ); *Fencott v Muller* (1983) 152 CLR 570, 586–90 (Gibbs CJ), 600–2 (Mason, Murphy, Brennan and Deane JJ). In applying the object of command test, these matters have to be considered for the purpose of identifying the classes of corporations to which the power relates. On the distinctive character test, they also have to be considered for the wider purpose of identifying the kinds of laws that can be enacted under the head of power.

<sup>158</sup> Thus, the present state of authority on s 92 seems to accept the application of different tests in relation to freedom of interstate trade and commerce on one hand, and freedom of interstate intercourse on the other. If different treatment produces no ‘awkwardness’ under s 92, why does it under s 51(xx)?: see *Cole v Whitfield* (1988) 165 CLR 360, 393–4 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 53–61 (Brennan J), 81–4 (Deane and Toohey JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 191–6 (Dawson J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 366–7 (Dawson J).

distinctive character test is that it imposes what is described as an ‘additional filter’<sup>159</sup> through which federal laws must pass, a requirement which — it is said — unavoidably invokes notions of federal balance.<sup>160</sup> What is particularly objectionable about the test, therefore, is that it delivers a ‘very narrow’ reading of the power with respect to foreign corporations,<sup>161</sup> together with a moderately limited reading of the power over trading and financial corporations. The underlying hermeneutical principle that ultimately shapes the majority’s joint judgment is not so much the text, therefore, but rather a commitment to reading the corporations power as widely as the words used can conceivably allow.<sup>162</sup>

The majority’s fundamental objection to the internal–external distinction and the distinctive character test is that they rely upon a preconceived ‘federal balance’,<sup>163</sup> and that it is incumbent upon the plaintiffs to articulate some means by which the precise contours of that balance can be clearly identified.<sup>164</sup> This line of reasoning, however, depends upon a characterisation of the plaintiffs’ argument as involving an absolute conception of the federal balance, if not also an absolute version of the reserved powers doctrine.<sup>165</sup> But it is possible, as has been seen, to construct federal balance and reserved powers arguments in interpretive, rather than absolute, terms. Indeed, the majority implicitly acknowledged that an interpretive version of reserved powers reasoning was at stake when recapping the plaintiffs’ submission that s 51(xxxv) provides a powerful reason for favouring a *relatively* narrow construction of s 51(xx).<sup>166</sup>

Despite the conclusions of the majority, the corporations power is capable of a number of different, plausible interpretations, including the view that the character of the corporation as a trading or financial corporation must be significant in the way in which the law relates to the corporation.<sup>167</sup> It is certainly true that the application of such a test would unavoidably require additional, difficult and debatable judgements to be made in specific cases. But the so-called ‘object of command’ test is no different in this respect. While it eliminates the particular interpretive choices that would have to be made in relation to the boundaries marked out by the distinctive character test, the object of command test substitutes its own boundary markers. These markers certainly carve out a wider territory for the scope of the power, but it is a territory which nonetheless has its own limits about which interpretive choices will still have to be made. However, the majority’s joint judgment proceeds as if this is not the

<sup>159</sup> *Work Choices Case* (2006) 229 CLR 1, 141 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>160</sup> *Ibid* 104, 115, 121, 139, 141.

<sup>161</sup> *Ibid* 112.

<sup>162</sup> As Zines in *The High Court and the Constitution*, above n 80, 93 suggests: ‘the language of the provision, in itself, provides no conclusive answer to these conflicting opinions.’

<sup>163</sup> At several points in its judgment the majority identifies the notion of ‘federal balance’ in the plaintiffs’ arguments: *Work Choices Case* (2006) 229 CLR 1, 73, 116, 118, 120.

<sup>164</sup> *Ibid* 120. The onus was upon the plaintiffs to answer that question but, according to the majority, they entirely failed to do so.

<sup>165</sup> See *ibid* 71–4.

<sup>166</sup> *Ibid* 122.

<sup>167</sup> See *ibid* 112–13.

case, and the object of command test is in this sense privileged.<sup>168</sup> A choice between these two general approaches to the scope of the power has to be made. It is not a choice necessitated by the text or by considerations of workability or stability of the different tests, but rather one driven ultimately by the question of whether a relatively narrow or wider interpretation is to be preferred.<sup>169</sup>

### B Interpretive Choices of the Majority

It was earlier suggested that the decision in the *Work Choices Case* was the predictable outcome of the recapitulation of fundamental constitutional choices that have been made since the *Engineers' Case*. However, this is not to say that the outcome was actually determined by the decided cases. What made the outcome predictable was the Court's longstanding commitment to interpreting federal heads of power as widely as their language can conceivably allow. However, as was admitted by the majority, there was no decided case which had authoritatively determined that the corporations power extended as widely as it needed to in order to uphold the *Work Choices Act*.<sup>170</sup> Indeed, the case law presented two difficulties for the Commonwealth. First, previous decisions on the corporations power left it open for the Court to choose between the distinctive character and object of command tests. Secondly, as has been seen, there were several lines of cases in relation to other heads of power which suggested that the Court's rejection of reserved powers reasoning has not been as unqualified as is sometimes thought.

As to the first point, there is no doubt that, in accordance with *Engineers'* methodology, the recognised scope of the corporations power has progressively expanded in case after case. Generally speaking, the sequence from *Huddart Parker*<sup>171</sup> to *Strickland v Rocla Concrete Pipes Ltd* ('*Concrete Pipes Case*'),<sup>172</sup> *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* ('*Fontana Films*')<sup>173</sup> and *Commonwealth v Tasmania* ('*Tasmanian Dam Case*')<sup>174</sup> presents a progressive ratcheting up of the recognised scope of the power by a majority of the Court. In this context, much of the majority's reasoning in the *Work Choices Case* was directed to a selective reading down of obiter dicta favouring various limited readings of s 51(xx);<sup>175</sup> to downplaying the

<sup>168</sup> Notice the absence of inverted commas around the words 'object of command' in the following passage from the joint judgment (ibid 117): 'Each of the arguments advanced by the plaintiffs proffered a form of limit on the reach of s 51(xx): only "external" relationships, "something more" than object of command, "distinctive character" or "discriminatory operation".'

<sup>169</sup> As the majority admitted, much depended upon the 'starting point' of the analysis: ibid 118–19. Notably, while the majority presented their position as one founded upon the text, they acknowledged at 119 the famous observation of Windeyer J in the *Payroll Tax Case* (1971) 122 CLR 353, 397 that the decision in the *Engineers' Case* was made not simply on the basis of some neutral reading of the text alone but 'in response to changing circumstances'. These changing circumstances included an emerging 'sense of national identity': ibid 119.

<sup>170</sup> *Work Choices Case* (2006) 229 CLR 1, 102.

<sup>171</sup> (1909) 8 CLR 330.

<sup>172</sup> (1971) 124 CLR 468.

<sup>173</sup> (1982) 150 CLR 169.

<sup>174</sup> (1983) 158 CLR 1.

<sup>175</sup> See *Work Choices Case* (2006) 229 CLR 1, 105, 106 (discussing the *Bank Nationalisation Case* (1948) 76 CLR 1), 107–8 (discussing the *Concrete Pipes Case* (1971) 124 CLR 468), 111 (dis-

slim majority decision to strike down the law in *Re Dingjan*,<sup>176</sup> and to emphasising certain dicta of Gaudron J in *Re Dingjan* and *Re Pacific Coal* in which her Honour set forth an exceptionally wide view of the scope of the corporations power.<sup>177</sup>

As to the second point, the problem for the Commonwealth concerned the decided cases on the banking, insurance and acquisition powers.<sup>178</sup> These cases involved reserved powers reasoning to the extent that the reserved powers doctrine entailed the proposition that the limited language of one head of power may support a limited reading of another. It must be asked why if the doctrine is permissible in these cases it is not allowed in relation to the industrial arbitration and corporations powers, as was argued by the plaintiffs. To this claim, the majority adopted three basic responses. First, they said that provisions such as the taxation, banking and insurance powers define the scope of power by reference to an unlimited class (for example, ‘banking’) which is then qualified by a proviso (for example, ‘other than State banking’) that operates as a ‘positive prohibition or restriction’ on federal legislative power generally.<sup>179</sup> In contrast, the industrial arbitration power is worded simply as a limited class expressed as a ‘compound conception’.<sup>180</sup> Secondly, and alternatively, provisions such as the acquisitions power, although expressed in the form of a compound conception, involve an express power that is ‘subject to a safeguard, restriction or qualification’ (that is, the just terms requirement in s 51(xxxi)).<sup>181</sup> Thirdly, when originally drafting the industrial arbitration power the framers were not concerned, it was said, with the general topic of ‘industrial relations’ but with the resolution by particular means of certain kinds of ‘industrial disputes’ and ‘industrial conflict’, and for this reason s 51(xxxv) does not necessarily exhaust the Commonwealth’s capacity to legislate with respect to industrial relations.<sup>182</sup> Arguments based upon the text, structure, history and authority of the *Constitution* were marshalled to support each of these three basic contentions.<sup>183</sup>

cussing *Fontana Films* (1982) 150 CLR 169), 111 (discussing the *Tasmanian Dam Case* (1983) 158 CLR 1).

<sup>176</sup> See *Work Choices Case* (2006) 229 CLR 1, 113 (discussing *Re Dingjan* (1995) 183 CLR 323).

<sup>177</sup> See *Work Choices Case* (2006) 229 CLR 1, 114–15, where the majority discusses Gaudron J’s reasoning in *Re Dingjan* (1995) 183 CLR 323, 365 and quotes Gaudron J in *Re Pacific Coal* (2000) 203 CLR 346, 375. Gaudron J’s reasoning in *Re Pacific Coal* is also quoted by the majority at 121–2. Cf *Work Choices Case* (2006) 229 CLR 1, 206–7 (Kirby J), 366 (Callinan J).

<sup>178</sup> See Part III above. The issue is discussed in the joint judgment: *Work Choices Case* (2006) 229 CLR 1, 123–4.

<sup>179</sup> *Work Choices Case* (2006) 229 CLR 1, 127, citing *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, 285 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>180</sup> *Work Choices Case* (2006) 229 CLR 1, 127–8. As the majority explained, s 51(xxxv) ‘contains within it, and not as an exception or reservation upon what otherwise would be its scope, the element of interstate dispute’. The somewhat ambiguous reference to the element of interstate dispute is possibly too terse, as it is not only the requirement of a dispute extending beyond the limits of any one state that is said to constitute an important restriction contained in s 51(xxxv) but also the requirement that the dispute be resolved by processes of conciliation and arbitration.

<sup>181</sup> *Work Choices Case* (2006) 229 CLR 1, 123–4, quoting *Schmidt* (1961) 105 CLR 361, 371–2 (Dixon CJ).

<sup>182</sup> *Work Choices Case* (2006) 229 CLR 1, 71–2.

<sup>183</sup> *Ibid* 124–34.



There are serious problems with each of these responses. As to the distinction between an unlimited class qualified by a proviso and a limited class expressed as a compound conception, there are two difficulties. First, as Julius Stone pointed out many years ago, to depend upon the difference between a limited class and an unlimited class qualified by a proviso is to depend upon a category of meaningless reference.<sup>184</sup> Stone acknowledged that in some instances a legislating body may intend that the different way of defining the field of operation is to have additional implications beyond simply defining the class, but the strictly logical import of the two drafting techniques is indistinguishable. To suggest that a difference is implied (in either direction) requires additional evidence and argument. An argument based upon the bare text alone is at best inconclusive, if not altogether illusory.

Secondly, based on the text alone, it is quite open to conclude that the limitations written into ss 51(ii), (iii), (xiii), (xiv) and (xxiiiA) apply only to each of those provisions individually and have no application beyond them. And yet, the High Court has held that those qualifications limit the scope of *other* heads of power. This was an interpretive choice that, again, needs to be supported by reasons either way. But if an exception could be made in respect of these heads of power, why not also in respect of s 51(xxxv)? In deciding that s 51(xxxv) does not imply a prohibition, an interpretive choice was being made, for the text leaves the question open. However, the majority's judgment treated the matter as if it was determinable by reference almost wholly to textual considerations and they did not canvass positive evidence that the framers of the *Constitution* may have intended the limiting words they used to have an implied prohibitive effect.<sup>185</sup>

As to the argument that the acquisition power of s 51(xxxi) is explicitly qualified by 'a safeguard, restriction or qualification', there are two further difficulties. First, the power is clearly expressed in the form of a compound conception.<sup>186</sup> Secondly, the idea that 'just terms' constitutes 'a safeguard, restriction or qualification' depends on considerations quite independent of the text alone, and which are hardly referable to anything explicitly said during the very brief discussion that the provision received during the convention debates.<sup>187</sup> To read the just terms requirement as a fundamental safeguard that limits not only the acquisition power but the scope of other powers is to draw on considerations of constitutional principle and theory quite extrinsic to the text of the *Constitution* itself. Even if such a conclusion can be drawn with respect to the just terms requirement of s 51(xxxi), why can it not also be drawn in respect to the refer-

<sup>184</sup> Julius Stone, *Human Law and Human Justice* (1965) 241–5.

<sup>185</sup> See below n 191 and accompanying text. In the *Work Choices Case* (2006) 229 CLR 1, 131–4, the joint judgment discussed certain limited aspects of the convention debates with a view to underscoring the undetermined nature of the idea of industrial conciliation and arbitration.

<sup>186</sup> *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290 (Dixon J); *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 219–20 (McHugh J). Both of these cases were cited with approval in *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133, 250, 252 (McHugh J), 295–6 (Gummow J), 304, 311 (Callinan J).

<sup>187</sup> See Rosalind Dixon, 'Overriding Guarantee of Just Terms or Supplementary Source of Power?: Rethinking s 51(xxxi) of the *Constitution*' (2005) 27 *Sydney Law Review* 639, 655–7.

ence in s 51(xxxv) to the resolution of interstate industrial disputes by processes of conciliation and arbitration, as Kirby J maintained?<sup>188</sup>

Finally, the majority's reasoning about the scope and relevance of the industrial arbitration power depends upon a selective reading of the context in which the provision was drafted. It is true enough, as the majority pointed out, that the provision was drafted in the context of pressing concerns about the problem of industrial disputation and conflict.<sup>189</sup> It may also be conceded that s 51(xxxv) does not represent the only place in the *Constitution* in which a capacity to deal with such conflict can be found.<sup>190</sup> However, the evidence also suggests that the power conferred in s 51(xxxv) was, in fact, the only power that the framers were prepared to grant to the Commonwealth in the *general field* of industrial relations.<sup>191</sup> While it is therefore possible to interpret the industrial arbitration power as concerned only with the narrow problem of industrial conflict, leaving open the possibility that other heads of power may be used to regulate industrial matters more generally, it is also possible to interpret it as exhausting that field. In other words, once again, the Court was faced with an interpretive choice. The text did not necessitate one interpretation over another.

This is not to suggest that it is clear that the limitations written into one head of power must always cut down the scope of other heads of power. To take this to its logical conclusion would lead to an absurd, lowest common denominator outcome — indeed, there have been important cases in which such outcomes have been consciously rejected. However, it does suggest that there are interpretative choices to be made. The weaknesses in the majority's responses to the plaintiffs' arguments demonstrate that it was a prior commitment to reading Commonwealth heads of power as widely as possible, rather than the force of the majority's responses, that was determinative.

### C Callinan J

It has been suggested that the result in the *Work Choices Case* was in a certain sense the predictable outcome of the application of well-established methods of constitutional interpretation and construction of federal legislative power. In this context, Callinan J's dissenting judgment could have pursued one of two

<sup>188</sup> See Part V(D) below.

<sup>189</sup> *Work Choices Case* (2006) 229 CLR 1, 124–5.

<sup>190</sup> See *ibid* 125–6, discussing ss 51(vi) (the defence power) and 119 (the protection of the states from invasion and violence).

<sup>191</sup> See *Sydney National Debates*, 3 April 1891, above n 24, 688–9 (Charles Cameron Kingston, Sir Samuel Griffith); *Sydney National Debates*, 6 April 1891, above n 24, 780–5 (Charles Cameron Kingston, Sir Samuel Griffith, Alfred Deakin, Duncan Gillies, Thomas Playford, George Dibbs); *Adelaide Debates*, 17 April 1897, above n 24, 782–93 (Graham Higgins, Charles Cameron Kingston, Sir George Turner, Edward McMillan, Sir John Downer, James Howe, Joseph Caruthers, Alfred Deakin, Simon Fraser, Josiah Symon, Bernhard Wise, Sir Edward Braddon, Edmund Barton); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25–7 January 1898, 180–215 (Graham Higgins, Edward McMillan, Sir John Downer, Charles Cameron Kingston, Patrick Glynn, Edmund Barton, John Quick, Sir William Zeal, Isaac Isaacs, William Lyne, John Cockburn, Alfred Deakin, Josiah Symon, Henry Dobson, Bernhard Wise, Sir Walter James, Sir Joseph Abbott, William Trenwith, Richard O'Connor, James Howe, Frederick Holder, Alexander Peacock, George Leake, George Reid, Sir John Forrest, Sir George Turner, Sir Edward Braddon).

strategies. The first was to criticise those methods of interpretation and to propose a set of alternatives. The second was to work within the established methods and to show how, in their application to the decided cases, it remained possible to come to the conclusion that the *Work Choices Act* was at least in part unconstitutional. In fact, Callinan J followed both paths.

Callinan J's judgment was composed on a large and ambitious canvas. Separate sections of the judgment dealt, in turn, with the intended operation and reach of the new Work Choices laws, the long-assumed limits of the Commonwealth's industrial powers (and attempts by constitutional amendment to overcome them), appropriate methods of constitutional interpretation, the constitutional imperative of maintaining a balance of power between the Commonwealth and the states, and the need to interpret the *Constitution* as an entire document. The judgment then turned to a close examination of the reach of the industrial arbitration and corporations powers and concluded by drawing out the implications for the specific provisions of the *Work Choices Act*.

Of strategic importance was Callinan J's denial that there is, in fact, any consistently applied method of constitutional interpretation evident in the judgments of the High Court through the course of its history.<sup>192</sup> Against the insistence by the majority that the *Constitution* ought to be interpreted in accordance with 'accepted principles',<sup>193</sup> Callinan J denied that any such principles exist.<sup>194</sup> Some judges, he pointed out, have said that the *Constitution* should be interpreted textually, others by reference to history, and yet others by reference to purpose, original intent, contemporary needs, context, structure, and so on, in all sorts of combinations.<sup>195</sup> Accordingly, despite 'unedifying accusations of "heresy"',<sup>196</sup> Callinan J flatly countered that 'no judge can claim to stride the high ground of exclusive interpretative orthodoxy.'<sup>197</sup> While he certainly acknowledged the importance and authority of the *Engineers' Case*,<sup>198</sup> he just as readily declared the decision to be 'an early instance of judicial activism,'<sup>199</sup> which 'does not deserve the reverence which has been accorded to it.'<sup>200</sup> Indeed, its reasoning, he said, is 'less than satisfactory':<sup>201</sup> in certain respects it is simply 'not convincing'<sup>202</sup> and in others it has been subjected to necessary revision<sup>203</sup> and certain qualifications.<sup>204</sup>

<sup>192</sup> *Work Choices Case* (2006) 229 CLR 1, 301–5.

<sup>193</sup> Ibid 71 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>194</sup> Ibid 308.

<sup>195</sup> Ibid 301–3.

<sup>196</sup> Ibid 303 (citations omitted).

<sup>197</sup> Ibid 304. Callinan J cited Gummow J in *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75:

Questions of construction of the *Constitution* are not to be answered by the adoption and application of any particular, all-embracing and revelatory theory or doctrine of interpretation. Nor are they answered by the resolution of a perceived conflict between rival theories, with the placing of the victorious theory upon a high ground occupied by the modern, the enlightened and the elect.

<sup>198</sup> *Work Choices Case* (2006) 229 CLR 1, 272, 350.

<sup>199</sup> Ibid 369.

<sup>200</sup> Ibid 308.

<sup>201</sup> Ibid 305.

<sup>202</sup> Ibid 307.

It was not enough, however, simply to criticise the *Engineers' Case* and to point to the disordered condition of Australian constitutional jurisprudence. It was also necessary for Callinan J to describe the method of interpretation that the Court ought to adopt. Against the textual literalism ostensibly adopted by the majority, Callinan J argued for a method that combined a type of objective intentionalism with an inter-provisional structuralism. According to his Honour, the Court's interpretation of the *Constitution* ought to be informed by an

objective ascertainment of the drafters' intentions by reference to the structure of the document, the interrelationship of the parts and sections of it with one another, in the setting in which it was drawn, on the basis of the assumptions underlying it, and the manifest purposes to which it was to give effect, relevantly here a new nation comprising a federation in which the States would not be deprived of powers they formerly possessed, except as identified.<sup>205</sup>

These principles in turn implied a particular approach to the interpretation of federal heads of legislative power.<sup>206</sup> Callinan J had to acknowledge the numerous times in previous cases when it had been said that federal powers are to be interpreted 'with all the generality which the words used admit',<sup>207</sup> rather than 'in any narrow or pedantic manner'.<sup>208</sup> However, he traced the principle to an oft-quoted dictum of O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* ('*Jumbunna Coal Mine*'), in which his Honour had stated:

where it becomes a question of construing words used in conferring a power of that kind on the Commonwealth Parliament, it must always be remembered that we are interpreting a *Constitution* broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.

For that reason, where the question is whether the *Constitution* has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the con-

<sup>203</sup> Ibid 307–8.

<sup>204</sup> Ibid 272. Among these qualifications, Callinan J pointed in particular to the reasoning in *Melbourne Corporation* and *Austin v Commonwealth*. One of the weakest aspects of Callinan J's judgment is the argument that these cases call for a narrow reading of the scope of federal heads of power: at 362–3, 369, 374. It is true that both cases are generally concerned with the balance of power between the Commonwealth and the states, and that they involve an important qualification on the reasoning in the *Engineers' Case*. However, the reasoning of Latham CJ aside, those cases are limited to the existence and continuing functioning of the states as independent governments and do not extend to any question about their essential legislative powers.

<sup>205</sup> *Work Choices Case* (2006) 229 CLR 1, 335.

<sup>206</sup> See ibid 318–19.

<sup>207</sup> Ibid 316, citing: *R v Public Vehicles Licensing Appeal Tribunal of Tasmania; Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225–6 (Dixon CJ, Kitto, Taylor, Menzies, Windeyer and Owen JJ); *New South Wales v Commonwealth* (1975) 135 CLR 337, 470–1 (Mason J) ('*Seas and Submerged Lands Case*'); *Tasmanian Dam Case* (1983) 158 CLR 1, 127–8 (Mason J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 528 (Mason CJ); *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

<sup>208</sup> *Work Choices Case* (2006) 229 CLR 1, 316, citing: *James v Commonwealth* (1936) 55 CLR 1, 43 (Lord Wright); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) ('*Boilermakers' Case*'); *Concrete Pipes Case* (1971) 124 CLR 468, 490 (Barwick CJ); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 223–4 (Mason J).

text or in the rest of the *Constitution* to indicate that the narrower interpretation will best carry out its object and purpose.<sup>209</sup>

O'Connor J here recognised the interpretive choices that the language of the *Constitution* unavoidably presents, and he appealed to the wider purposes and structural features of the *Constitution* for guidance in making those choices. Given that the *Constitution* contains language that is 'broad and general'<sup>210</sup> and intended to apply to changing conditions of the future, the rule of thumb is that the Court should lean to the broader interpretation. However, in certain respects the manifest purposes or overarching structures of the *Constitution* may indicate that the narrower interpretation is to be preferred.

According to Callinan J, the framers' central objective was to create a federal system that would maintain a kind of balance between the Commonwealth and the states, and to preserve this balance it is necessary to read the various heads of power in s 51 together, as a coordinated whole.<sup>211</sup> Prominent in his Honour's reasoning, therefore, was this idea of federal balance. Did this idea entail a preconceived, static equilibrium as the majority suggested,<sup>212</sup> or rather a general orientation to be adopted by the Court in the face of the interpretive choices with which it is confronted? There is much in Callinan J's judgment to suggest that his approach was interpretive, rather than absolutist. For example, when rebutting the proposition that some virulent strain of reserved powers thinking infected the entire reasoning of cases such as *Huddart Parker*, Callinan J cited the following passage from O'Connor J's judgment in that case:

Where [the *Constitution*] confers a power in terms equally capable of a wide and of a restricted meaning, that meaning will be adopted which will best give effect to the system of distribution of powers between State and Commonwealth which the *Constitution* has adopted, and which is most in harmony with the general scheme of its structure.<sup>213</sup>

In this passage, there is a clear recognition that the boundaries between Commonwealth and state power must ultimately be drawn by the Court and that interpretive choices cannot be avoided.<sup>214</sup> As O'Connor J put it, the task of the Court is to *adopt* that meaning that is *most* in harmony with and will *best* give effect to the *Constitution's* fundamental structures and underlying purposes. According to Callinan J, the nature of the relationship between the Commonwealth and the states is best understood as one of 'comity', by which is meant a certain 'mutual respect and deference in allocated areas.'<sup>215</sup> Mutual respect and deference here meant that the Court should be vigilant to ensure that the states are not reduced to mere 'facades of power'.<sup>216</sup>

<sup>209</sup> (1908) 6 CLR 309, 367–8 (O'Connor J), cited in *Work Choices Case* (2006) 229 CLR 1, 317.

<sup>210</sup> *Work Choices Case* (2006) 229 CLR 1, 317, citing *Jumbunna Coal Mine* (1908) 6 CLR 309, 367–8 (O'Connor J).

<sup>211</sup> *Work Choices Case* (2006) 229 CLR 1, 333.

<sup>212</sup> *Ibid* 73 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

<sup>213</sup> *Ibid* 317–8 (Callinan J), citing *Huddart Parker* (1909) 8 CLR 330, 369.

<sup>214</sup> See *Work Choices Case* (2006) 229 CLR 1, 321.

<sup>215</sup> *Ibid* 322.

<sup>216</sup> *Ibid* 328. Callinan J considered that one of the fundamental objectives of the *Constitution* is the preservation and maintenance not only of the states in their bare existence, but also of their

Having said this, at times Callinan J also appeared to propound an absolute conception of what he sometimes referred to as ‘the federal balance’.<sup>217</sup> Thus, his Honour considered that federal legislation would distort that balance if it were allowed to intrude into the ‘industrial and commercial affairs’<sup>218</sup> and other ‘essential functions’ of the states.<sup>219</sup> He discussed an ‘implied negative restriction imposed by s 51(xxxv)’,<sup>220</sup> and said that the industrial arbitration power not only ‘cast[s] a shadow over other placita of s 51 ... [but also] operates to *deny* their application to industrial affairs’.<sup>221</sup> This is nothing if it is not reserved powers reasoning, couched in apparently absolute terms.<sup>222</sup>

The critical point in his judgment came, however, when Callinan J turned to the proposition that the limited scope of the industrial arbitration power provides reason to construe the corporations power relatively narrowly. The point was critical because this line of reasoning served to give substance to the idea of federal balance and some specific guidance as to what the content of the exclusive powers of the states might be. Early in his judgment, his Honour had demonstrated that when turning their minds to the general question of federal legislative competence with respect to industrial matters, the framers adopted the deliberately limited language of the industrial arbitration power.<sup>223</sup> Callinan J then showed that this conception of a relatively limited power of the Commonwealth over industrial matters had been the prevailing view in the cases, among commentators and in political practice generally,<sup>224</sup> and that this had in turn led

powers. This contradicted the lesson the majority sought to derive from Dixon J’s observation in *Melbourne Corporation* (1947) 74 CLR 31, 82 that the existence of the states is conceptually separable from their powers: *ibid* 120 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also *ibid* 322–30 (Callinan J), citing *South Australia v Commonwealth* (1942) 65 CLR 373, 442 (Starke J); *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488, 515 (Starke J); *Melbourne Corporation* (1947) 74 CLR 31, 66 (Rich J), 70 (Starke J), 78–9, 82 (Dixon J), 99 (Williams J); *Payroll Tax Case* (1971) 122 CLR 353, 424–5 (Gibbs J); *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 205–6 (Gibbs CJ), 217 (Mason J), 222 (Wilson J), 248 (Deane J), 260 (Dawson J); *Austin v Commonwealth* (2003) 215 CLR 185, 217 (Gleeson CJ), 249 (Gaudron, Gummow and Hayne JJ), 281–2 (McHugh J), 301 (Kirby JJ); *Boilermakers’ Case* (1956) 94 CLR 254, 267, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

<sup>217</sup> *Work Choices Case* (2006) 229 CLR 1, 332. Callinan J explains his conception of this term at 332–3.

<sup>218</sup> *Ibid* 333.

<sup>219</sup> *Ibid* 385.

<sup>220</sup> *Ibid* 384.

<sup>221</sup> *Ibid* 344 (emphasis added).

<sup>222</sup> Callinan J also stated that there are three categories of power to be kept in mind — exclusive Commonwealth power, concurrent Commonwealth and state power and exclusive state power: *ibid* 326. The claim that there is such a thing as *exclusive* state power might suggest that the exclusive powers of the states have a definite content. However, his Honour just as clearly accepted the distinction articulated by Isaacs J in *Huddart Parker* between ‘residual powers beyond Commonwealth power’ and ‘reserved powers’: at 369–70, citing *Huddart Parker* (1909) 8 CLR 330, 394–6 (Isaacs J). To speak of residual powers beyond Commonwealth power is simply to draw an inference from the proposition that there are limits to the scope of federal power and that beyond those limits lie the residual powers of the states, a line of reasoning that is entirely consistent with an interpretive conception of federal balance and reserved powers.

<sup>223</sup> *Work Choices Case* (2006) 229 CLR 1, 275–9.

<sup>224</sup> *Ibid* 279–84.

to a number of failed attempts to amend the *Constitution* to grant the Commonwealth wider powers.<sup>225</sup>

Callinan J next pointed out that, while the joint judgment acknowledged the need to read the *Constitution* as a whole, it was a negation of that principle to read each placitum of s 51 as broadly as the words used made possible.<sup>226</sup> Noting the cases in which powers such as those over banking and acquisition had been read as limiting the scope of other powers,<sup>227</sup> Callinan J pointed out that these are structurally similar to the industrial arbitration power in that they are all limited to matters that have some interstate aspect.<sup>228</sup> If the banking and insurance powers limit the scope of the corporations power, the industrial arbitration power might give rise to a similar ‘negative implication’.<sup>229</sup> To speak of a negative implication is clearly reminiscent of reserved powers reasoning. However, the approach was ultimately interpretive, not absolutist — the negative implication was not treated as sufficient and had to be supported by a defensible interpretation of the language of the corporations power itself, read in light of its history, its context and the decided cases. In this respect, Callinan J read the convention debates and the opinions of early text writers as suggesting that the ‘real purpose’ of s 51(xx) was to ‘ensure uniformity of status of corporations throughout Australia, rather than to appropriate State control over them.’<sup>230</sup> Inter-provisionally viewed, the necessity for a specific power over corporate insolvency in s 51(xvii) supported a correspondingly limited reading of s 51(xx),<sup>231</sup> and an analysis of the decided cases showed that no majority of the Court had previously held s 51(xx) to extend ‘to each and every aspect of a corporation, its activities and its employees.’<sup>232</sup>

Like the other members of the Court,<sup>233</sup> Callinan J concluded that, despite the possibility that the territories power might support at least some aspects of the *Work Choices Act*, the Act must be considered ‘at face value’ and ‘as an integrated endeavour, intended to stand or fall in its entirety.’<sup>234</sup> This meant that the simple question was whether the Act could be supported by the corporations power, and Callinan J’s conclusion was that it could not be.<sup>235</sup>

<sup>225</sup> Ibid 284–300. See the contrary view of the majority: at 99–101.

<sup>226</sup> Ibid 333–4.

<sup>227</sup> Ibid 336–41, discussing *Constitution* ss 51(ii), (iii), (xiii), (xiv), (xxxiv).

<sup>228</sup> *Work Choices Case* (2006) 229 CLR 1, 338–41. At 339, Callinan J quotes Latham CJ in the *Bank Nationalisation Case* (1948) 76 CLR 1, 184–5:

no single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament. Each provision of the *Constitution* should be regarded, not as operating independently, but as intended to be construed and applied in the light of other provisions of the *Constitution*.

<sup>229</sup> *Work Choices Case* (2006) 229 CLR 1, 350. See also the discussion at 344.

<sup>230</sup> Ibid 353.

<sup>231</sup> Ibid 355–8.

<sup>232</sup> Ibid 358. Callinan J’s survey of cases follows: at 358–75.

<sup>233</sup> Ibid 155–9 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 196 (Kirby J).

<sup>234</sup> Ibid 238 (Kirby J). Callinan J agreed: at 383.

<sup>235</sup> Ibid 384–5.

## D Kirby J

Among the members of the Court, Kirby J was in temperament the most likely to acknowledge the constitutional choices facing the Court. Thus, his Honour very openly acknowledged that questions of constitutional characterisation ultimately involve an ‘opinionative assessment’ on which ‘reasonable minds can differ.’<sup>236</sup> Yet, like Callinan J, he found the entire *Work Choices Act* to be unconstitutional and he relied on much the same doctrinal propositions and reasoning strategy to do so. Kirby J also emphasised the conventional aspects of his position<sup>237</sup> and contrasted them with the radical or revolutionary character of the Work Choices legislative scheme.<sup>238</sup> Moreover, like Callinan J, he abjured all reliance upon the reserved powers doctrine.<sup>239</sup> However, as an opponent of originalism, Kirby J could not appeal to the intentions or understandings of the *Constitution*’s framers for decisive guidance as Callinan J had done.<sup>240</sup> Rather, he insisted that it is the ‘genius of our system’ that ‘perceptions of the meaning of the *Constitution* change over time’ and he rejected efforts to ‘confine the meaning of the constitutional text ... [to] the expectations of the founders’ or to the reasoning found in previous cases.<sup>241</sup> Indeed, on this point he cited the *Engineers’ Case*, not for its textual literalism but for the proposition that the *Constitution* needs to be interpreted in accordance with the needs of the present age.<sup>242</sup>

How, then, could Kirby J come to the same conclusion as Callinan J, while avoiding Callinan J’s originalism?<sup>243</sup> First, Kirby J affirmed in no uncertain terms the principle (which he traced back to the *Engineers’ Case*) that heads of federal legislative power are to be given ‘ample’ content without implied restrictions based on reserved powers reasoning.<sup>244</sup> Secondly, however, he also maintained that federal powers are subject to limitations derived from ‘safeguards, restrictions or qualifications’, as well as ‘guarantees protecting identifiable persons or groups’, written into other heads of legislative power.<sup>245</sup> And this last proposition, he said, was especially applicable in the *Work Choices Case*.

<sup>236</sup> Ibid 203.

<sup>237</sup> Ibid 198–9, 223, 226–7. The submissions of the plaintiffs were presented as being in accord with established precedents and approaches to interpretation as established in the *Engineers’ Case*, and certainly not premised on reserved powers reasoning.

<sup>238</sup> According to Kirby J, the ‘extremely wide’ reading of the corporations power proposed by the Commonwealth presented an ‘extraordinary zenith of the federal constitutional power’ and a ‘radical change in constitutional doctrine’, with ‘profound consequences’ for the ‘residual’ powers of the states and a ‘dysfunctional’ outcome: see ibid 183, 192–3, 225.

<sup>239</sup> Ibid 198–9, 201.

<sup>240</sup> Ibid 215 (Kirby J).

<sup>241</sup> Ibid 189.

<sup>242</sup> Ibid 229, citing Ron McCallum, ‘The Australian *Constitution* and the Shaping of Our Federal and State Labour Laws’ (2005) 10 *Deakin Law Review* 460, 467–9.

<sup>243</sup> Kirby J went to some trouble to recount the long line of cases on the industrial arbitration power in which it had been assumed that the limitations written into that power meant that the Commonwealth could not legislate at large in the field of industrial relations: see *Work Choices Case* (2006) 229 CLR 1, 183–9. However, on his own principles these considerations could not be decisive.

<sup>244</sup> Ibid 243.

<sup>245</sup> Ibid.



For Kirby J, the *Constitution* must be read as an entire document<sup>246</sup> and in light of its far-reaching federal character.<sup>247</sup>

Reserved powers reasoning was, in a sense, even more prominent in the reasoning of Kirby J than it was in that of Callinan J. For Kirby J, the central issue of the case was whether the corporations power is ‘completely unchecked and plenary, and disjoined from other powers’, or ‘subject to restrictions suggested by other paragraphs of s 51’.<sup>248</sup> While Callinan J placed a great deal of emphasis upon the idea of maintaining the federal balance, Kirby J spent a significant proportion of his judgment discussing the limitations written into s 51(xxxv) and the cases in which the scope of federal heads of power had been limited by safeguards, restrictions or qualifications expressed in other heads of power.<sup>249</sup>

Early in his judgment, Kirby J maintained that the language of s 51(xxxv) contained ‘two essential safeguards, restrictions or qualifications’ upon the exercise of federal power in the field of industrial relations. The first of these safeguards was the requirement of what he called ‘interstateness’: that the power depends upon the existence of a dispute that extends beyond the limits of any one state.<sup>250</sup> The second was the requirement of ‘independent resolution’, meaning that the Parliament cannot legislate ‘generically and directly’, but must provide for the resolution of the dispute by an ‘independent conciliator or arbitrator’.<sup>251</sup> According to Kirby J, the interstateness requirement preserves the federal character of the *Constitution* in the field of industrial relations in order to encourage diversity and experimentation in law-making and intergovernmental cooperation, while the independent resolution requirement encourages the resolution of disputes by agreement and the maintenance of principles of ‘economic fairness’ to both employers and employees.<sup>252</sup> However, a ‘national’ industrial relations regime founded predominantly upon the conception of corporations as employers would undo not only the prospects for jurisdictional experimentation and cooperation, but also for a balanced approach to the rights of both employers and employees.<sup>253</sup> Indeed, the idea of industrial fairness or ‘a fair go all round’<sup>254</sup> was effectively elevated in Kirby J’s judgment to the status of a constitutional imperative, comparable to other fundamental guarantees contained in the *Constitution*.<sup>255</sup> In other words, the ultimate ground of Kirby J’s decision appears to have been the desirability of this state of affairs. Considerations of what he called ‘legal principle and legal policy’,<sup>256</sup> rather than the

<sup>246</sup> Ibid 201.

<sup>247</sup> Ibid 244–5.

<sup>248</sup> Ibid 193–4. See also at 201–2, 205–8.

<sup>249</sup> Ibid 207–22.

<sup>250</sup> Ibid 184.

<sup>251</sup> Ibid 185. See also at 244.

<sup>252</sup> Ibid 190.

<sup>253</sup> Ibid, citing McCallum, above n 242.

<sup>254</sup> *Work Choices Case* (2006) 229 CLR 1, 244, quoting *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539, 549 (Kirby J).

<sup>255</sup> His Honour pointed out that just as the Court has been ‘rightly’ vigilant to defend the rights of property owners under s 51(xxxi) of the *Constitution*, it ought also to be vigilant in defending the rights of employees under s 51(xxxv): *Work Choices Case* (2006) 229 CLR 1, 222.

<sup>256</sup> *Work Choices Case* (2006) 229 CLR 1, 190.

requirements of the text or the expectations of the framers, appear to have been decisive.<sup>257</sup> However, in order to reach this conclusion it was necessary for him to suggest that s 51(xx) is subject to certain ‘restrictions or limitations’ contained in s 51(xxxv), even though such reasoning looked very much like reserved powers reasoning.

By focusing upon the industrial arbitration power as a kind of constitutional guarantee that provides exceptions to the scope of federal power, it was possible for Kirby J to strike down the *Work Choices Act* as unsupported by the corporations power, while affirming the otherwise extensive scope, not only of the corporations power, but also of other important federal powers such as the external affairs power.<sup>258</sup> That Kirby J, like Callinan J, understood this primarily in interpretive rather than absolute terms is evident in his observation that on his reasoning s 51(xx) ‘takes on a reduced scope from what it otherwise might have had if para (xxxv) had not appeared in the *Constitution* at all’.<sup>259</sup> This is reserved powers reasoning insofar as — like the reserved powers cases of the past — it cuts down the scope of one head of power by reference to the limited grant of power in another. Furthermore, it is an interpretive version of reserved powers reasoning insofar as it acknowledges that each head of power is capable of different constructions and that an interpretive choice has to be made.

## VI CONCLUSIONS

What *exactly* is wrong, then, with reserved powers reasoning? When presented in its abridged form, the doctrine seems at least obscure, if not also confused, illogical and illegitimate. And when cast in absolute terms, the doctrine appears to affirm the consequent by presupposing an extra-constitutional body of powers supposedly reserved to the states and then using this to limit the scope of the legislative powers explicitly conferred upon the Commonwealth. However, when understood and applied in interpretive terms, the reserved powers doctrine is founded upon a clear and defensible account of the political origins, underlying ideas, structural features and intended purposes of the *Constitution*; it entails a carefully articulated account of the grounds upon which the specific content of the powers reserved to the states can be identified; and it involves a sophisticated recognition that constitutional interpretation inevitably requires choices to be made. Indeed, when understood in interpretive terms, it might be doubted whether the label ‘reserved powers’ is entirely apposite. Behind the label is a method of reasoning that attends closely to the text and structure of the *Constitution*, reads the document as an integrated whole and pays close attention to its underlying principles and overarching purposes.

<sup>257</sup> But see *ibid* 194, where Kirby J refers to ‘history, experience and authority’, to ‘textual foundation[s]’, to the ‘structure’ and ‘federal character’ of the *Constitution* and to its ‘overall expression and design’.

<sup>258</sup> Kirby J made sure to acknowledge the expansive judicial interpretation that the corporations power had received over the years, beginning with the *Concrete Pipes Case*: see *Work Choices Case* (2006) 229 CLR 1, 205.

<sup>259</sup> *Work Choices Case* (2006) 229 CLR 1, 205.

In the *Work Choices Case*, the High Court was presented with a set of interpretive choices focusing upon the construction to be given to the corporations power, but also concerned with the construction to be given to many other aspects of the *Constitution*, including the limited terms in which the industrial arbitration power is framed. The majority presented their reasoning as if it rested entirely on the text of the *Constitution* and the decided cases, proceeding as if no significant interpretive choices were being made. On the other hand, the dissenting justices acknowledged those choices and appealed to the framers, to federalism and to various underlying values and principles for requisite guidance. However, the positions of the majority and the minority cannot simply be reduced to a textual literalism on one hand and an extra-textual originalism or purposive method of interpretation on the other. The assumptions of the approach in the *Engineers' Case* relate not simply to the methodological proposition that the content of powers reserved to the states can only be ascertained after fully ascertaining the explicit powers conferred on the Commonwealth. These assumptions also relate to a deeper conception of the configuration of state and Commonwealth power along the lines of the testamentary analogy first proposed by Isaacs J, which casts the Imperial Parliament as testator, the Commonwealth as a specific beneficiary and the states as residuary beneficiaries. While the legal force of the *Constitution*, at least in 1901 and perhaps until 1986, may be traced back to the Imperial Parliament, the terms, structure, underlying principles and overarching purposes of the *Constitution* were determined by elected representatives of the Australian colonies, who understood their task as one of conferring only limited powers upon the Commonwealth and reserving the balance to the states. In this light, the terms, structure, underlying principles and overarching purposes of the *Constitution* provide good reason to construe federal heads of power so as to take into consideration the powers and capacities that will be left to the states. Kirby and Callinan JJ, in dissent, sought to do precisely this. They understood the interpretive choices presented by the case and they chose to interpret the corporations power in a way that took into account the fact that the *Australian Constitution* is the constitution of a federal commonwealth.<sup>260</sup>

<sup>260</sup> See *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, preamble, s 3.