

THE ROLE OF NEGATIVE IMPLICATIONS IN THE INTERPRETATION OF COMMONWEALTH LEGISLATIVE POWERS

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One of the bases for the view that Commonwealth powers should be interpreted broadly is the idea that it is wrong to draw negative implications from positive grants of power. The paper argues that far from being wrong to draw negative implications from positive grants of power it is necessary to do so in that it is impossible to interpret such grants sensibly without drawing negative implications from them. This paper considers Isaacs J's argument in Huddart Parker that it is wrong to draw negative implications from positive grants of power, as it is the most detailed defence of that position, and the adoption of similar arguments in Work Choices. It then considers the merits of Isaacs J's argument, rejecting it because it is impossible to interpret positive grants of power without drawing negative implications from them in any context and in the Australian constitutional context in particular. This paper looks at how the scope of such implications is to be determined and how constitutional grants of power ought to be interpreted in the light of negative implications. It concludes that it is possible to determine the scope of the negative implications implicit in the s 51 grants of power and to interpret those powers in the light of the implications while accepting that state powers are residual and that their content cannot be determined until the content of all Commonwealth powers is known.

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I INTRODUCTION

The orthodox approach to the interpretation of Commonwealth grants of power which was endorsed in *New South Wales v Commonwealth* ('*Work Choices*')¹ is that each power is to be interpreted broadly as a discrete stand-alone power. As a result, each power is usually interpreted without reference to the existence of other grants of power and the limits which they contain.² Similarly, the impact of any interpretation on the position of the states and the scope of state residual legislative power is for the most part considered irrelevant.³ As a result of the consistent application of the orthodox approach in cases such as *Commonwealth v Tasmania* ('*Tasmanian Dam Case*')⁴ and *Work Choices*, Commonwealth legislative powers have expanded greatly, and there has been a corresponding reduction in the scope of effective state legislative power.⁵

¹ (2006) 229 CLR 1.

² See, eg, *ibid* 71 [49] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

³ See, eg, *ibid* 127 [219]–[221] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁴ (1983) 158 CLR 1.

⁵ *Work Choices* has been seen as endorsing such a radical increase in Commonwealth power that it has been variously described as a 'shipwreck of titanic proportions' in which '... the High Court has delivered ... an omniscient national government effectively unrestrained by a constitutional division of powers': ABC Radio National, 'Work Choices Shipwreck', *Perspective*, 6 December 2006 (Greg Craven) <<http://www.abc.net.au/radionational/programs/perspective/greg-craven/3382392>>); as 'the most significant change in the "constitutional contours" of federal-state relations delivered since 1920': Nicholas Aroney, 'Constitutional Choices in the *Work Choices* Case, or What *Exactly* is Wrong with the Reserved

There are few limits to the orthodox approach. Section 51(xxxi) of the *Australian Constitution*, which contains a guarantee of compensation on just terms, limits the scope of other powers so that they cannot be used to acquire property without just terms.⁶ Similarly, prohibitions on the exercise of Commonwealth legislative power, such as those contained in the powers over banking and insurance, limit the scope of other powers.⁷ Despite these exceptions, the general rule is that each power is interpreted broadly without considering other powers or the limitations which they contain or the impact of the interpretation on the states.

This article argues that the reasoning underlying the orthodox approach is so flawed that it lacks a rational basis. The words of the *Constitution*, interpreted according to normal principles of interpretation, require an interpretation of Commonwealth powers in which limits on some powers are relevant to the interpretation of other powers. This is the case even if we discount the history of the *Constitution*, the intentions of the framers and the context in which the *Constitution* was adopted and do not impose any model of federalism or of the Commonwealth–state balance of legislative power on it. Accordingly, even if we limit ourselves to the literalistic approach favoured by the High Court, the orthodox approach lacks any justification.

According to received wisdom, the orthodox approach originated in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('*Engineers' Case*').⁸ Alternatives to this approach in which the limits on other powers and the impact on the states are seen as relevant to the interpretation of a power, are castigated as variants of the reserved powers doctrine which the *Engineers' Case* is said to have rejected.⁹ The orthodox understanding of the effect of the

Powers Doctrine?' (2008) 32 *Melbourne University Law Review* 1, 3, quoting Ron McCallum, 'The *Work Choices Case*: Some Reflections' (2007) 19 *Judicial Officers' Bulletin* 29, 29; and both 'as a revolutionary decision which has up-ended our conventional understanding of the 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' and 'as the entirely predictable application of long established methods of interpreting federal legislative power': Aroney, 'Constitutional Choices', above n 5, 2–3.

⁶ *Re Döhnert Müller Schmidt & Co; A-G (Cth) v Schmidt* (1961) 105 CLR 361, 371–2 (Dixon CJ); *Theophanous v Commonwealth* (2006) 225 CLR 101, 112–13 [5] (Gleeson CJ).

⁷ *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, 285–6 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁸ (1920) 28 CLR 129.

⁹ See, eg, *Tasmanian Dam Case* (1983) 158 CLR 1, 168–9 (Murphy J); *Work Choices* (2006) 229 CLR 1, 84–5 [82] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

Engineers' Case was summarised in *Work Choices* as the discarding of an 'approach to constitutional construction that started in a view of the place to be accorded to the states formed independently of the text of the *Constitution*'.¹⁰ Although the *Engineers' Case* laid down the general approach to be followed in determining Commonwealth–state issues, it was mainly concerned with the issue of whether the states were subject to Commonwealth law and did not consider the arguments for a stand-alone interpretation of Commonwealth powers in any detail. But Isaacs J, who was the principal author of the judgment in the *Engineers' Case* did consider them in detail in *Huddart, Parker & Co Pty Ltd v Moorehead* ('*Huddart Parker*'),¹¹ concluding that the corporations power and by implication other Commonwealth powers were to be interpreted broadly as separate stand-alone grants. That conclusion is important because it, along with the *Engineers' Case*, is the source of the current approach to interpreting Commonwealth powers. The majority in *Work Choices* relied on similar arguments to support their conclusion that the limits on the arbitration power were irrelevant to the interpretation of the corporations power.¹²

There are three main arguments for a stand-alone interpretation of Commonwealth powers: the broad grants argument, the no negative implications argument, and the argument that it is impossible to devise coherent limits on Commonwealth power without first defining state powers. The first argument, the argument that grants of power to the Commonwealth are to be interpreted broadly, is based on dicta of O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* ('*Jumbunna Case*')¹³ and on the judgment of the majority in the *Engineers' Case*.¹⁴ It has been relied on in many cases on the interpretation of Commonwealth powers.¹⁵ Isaacs J first developed the second argument, the argument that it is wrong to draw negative implications about the scope of Commonwealth powers from positive grants of power, in

¹⁰ *Work Choices* (2006) 229 CLR 1, 119 [194] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

¹¹ (1909) 8 CLR 330, 389–96.

¹² The majority judgment in *Work Choices* is considered in detail below in Part III.

¹³ (1908) 6 CLR 309, 367–8.

¹⁴ See especially *Engineers' Case* (1920) 28 CLR 129, 153–5 (Knox CJ, Isaacs, Rich and Starke JJ).

¹⁵ Aroney, 'Constitutional Choices', above n 5, 22.

Huddart Parker.¹⁶ This argument was taken up by Latham CJ in *Pidoto v Victoria*,¹⁷ without reference to *Huddart Parker*, and was adopted by the majority in *Work Choices*.¹⁸ It was one of the key arguments on which the majority in *Work Choices* based their judgment. The third argument, the argument that it is impossible to devise coherent limits on Commonwealth power without first defining state powers, was advanced in the *Engineers' Case* and variants of it were developed in the two most important cases on the interpretation of Commonwealth powers in the last 30 years, the *Tasmanian Dam Case* and *Work Choices*.¹⁹

This article focuses largely on the second argument, the no negative implications argument, demonstrating that it is wrong. This article argues that regardless of context, it is difficult, if not impossible, to interpret positive grants of power, individually or as a whole, without drawing negative implications from them. As it is a normal step in the interpretation of individual grants of power to draw negative implications from them, it is a small step to use negative implications drawn from the scope of one grant of power in the interpretation of other grants of power. If negative implications drawn from the words of one power may be used in the interpretation of other powers, this article argues that we can determine coherent limits to the scope of Commonwealth powers without first determining the scope of state powers. If that is the case, we can accept that state exclusive powers are residual without accepting that each Commonwealth power is to be interpreted separately, without reference to the wording of other powers. This article accepts the former but rejects the latter, arguing that the *Constitution* requires that Commonwealth powers be interpreted holistically rather than separately.

Part II of this article considers Isaacs J's arguments for the view that it is wrong to draw negative implications about the scope of Commonwealth powers from positive grants of power, as they are the most detailed defence of this position. As Isaacs J developed these arguments as a critique of the views of the majority in *Huddart Parker*, Griffith CJ, Barton J and O'Connor J, it is difficult to understand Isaacs J's position without first considering the

¹⁶ (1909) 8 CLR 330, 389–91.

¹⁷ (1943) 68 CLR 87, 101.

¹⁸ (2006) 229 CLR 1, 119 [192] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

¹⁹ See, eg, *Tasmanian Dam Case* (1983) 158 CLR 1, 168 (Murphy J).

majority's position. Hence Part II considers the majority's position and its strengths and weaknesses before looking at Isaacs J's critique.

Part III examines the way in which the majority in *Work Choices* used a similar argument to that of Isaacs J in *Huddart Parker* to defend their conclusion that the limits on the arbitration power, s 51(xxxv), have no implications for the interpretation of the corporations power and do not prevent the use of the corporations power to enact a general law on industrial relations.

Part IV considers when it is legitimate and necessary to draw negative implications from positive grants of power. It criticises the majority argument in *Work Choices* that it is only legitimate to draw negative implications from grants of power which prohibit legislation on a particular topic or which contain a safeguard in the nature of a right. This Part argues that it is difficult, if not impossible, to make sense of positive grants of power without implying negative limitations from them. It demonstrates that this is the case whether the limits on power are found in a federal constitution or in legislation conferring limited powers on subordinate authorities.

Part V considers when it is appropriate to draw negative implications from one grant of power for the interpretation of other powers. Not every limit on every power is relevant to the interpretation of every other power. This Part considers the types of case in which the limits on one power are relevant to the interpretation of other powers and the situations in which those limits are not relevant.

Part VI examines arguments in the *Tasmanian Dam Case* and in *Work Choices* that it is impossible to give any content to implications drawn from the limits on one power for the interpretation of another power without assuming that the *Constitution* reserves to the states some identifiable exclusive powers which can be used to define the scope of Commonwealth powers. It rejects those arguments. In doing so it examines in more detail the differences between interpreting Commonwealth powers in the light of reserved state powers and interpreting Commonwealth powers in the light of implications drawn from other powers.

Identifying negative implications which limit the scope of positive grants of power is only a first step in interpreting those grants. The next step is to develop an interpretation which is consistent with the words of the grant, the negative implications and the constitutional context. Part VII suggests that it may not be possible to do this without developing a coherent, holistic interpretation of Commonwealth powers. It argues that this can be done without first identifying state exclusive powers and using those powers to

limit the scope of Commonwealth powers. Although it is possible to develop a holistic interpretation of Commonwealth grants of power, this article argues that that is unlikely to happen until the High Court reconsiders its interpretation of the corporations power and the relationship between that power and the trade power, because any holistic interpretation of the two powers is likely to limit the scope of the corporations power in order to give effect to the limits on the trade power. As part of the reconsideration of the relationship between the corporations and trade powers, the Court needs to adopt a broader interpretation of the trade power as the Commonwealth's most important economic power, to ensure that it gives the national government adequate power over the national economy. Failure to do that is a major barrier to the development of a coherent, holistic interpretation of Commonwealth grants of power.

This article concludes that the current approach to interpreting Commonwealth powers, in which the limits on one power are seen as irrelevant to the interpretation of other powers, is rationally indefensible even if we ignore the fact that s 51 imposes limits on Commonwealth powers in order to achieve a federal division of legislative power between the Commonwealth and state Parliaments. The approach is based on the claim that it is wrong to draw negative implications from positive grants of power. That claim is wrong because limited grants of power cannot be interpreted in any context unless we draw negative implications from them. A more rational approach is one in which negative implications for the scope of some powers are drawn from the limits on other powers. Not only does such an approach give effect to stated limits on power, but it has the advantage of recognising that in the absence of any grant of specific exclusive powers to the states, the express limits on Commonwealth power are the most important way in which the *Constitution* divides power between the Commonwealth and the states.²⁰

²⁰ Aroney has come to the similar conclusion that what he describes as an 'interpretive' version of the reserved powers doctrine is a better fit with the text and history of the *Constitution* than is the current orthodoxy: Aroney, 'Constitutional Choices', above n 5, 5. For reasons set out below, I do not agree that all of what he calls interpretive versions of the reserved powers doctrine are examples of that doctrine at all. Apart from this disagreement about names, I agree with the conclusions of that paper, although for somewhat different reasons.

II THE ORIGIN OF THE ARGUMENT THAT IT IS WRONG TO DRAW NEGATIVE IMPLICATIONS FROM POSITIVE GRANTS OF POWER

Isaacs J developed the negative implications argument in his critique of the majority judgments in *Huddart Parker*,²¹ concluding that it was wrong to take into account the limits on one power in the interpretation of other powers. This Part examines the majority position in *Huddart Parker* before considering Isaacs J's critique of it.

A *The Huddart Parker Express Reserved Powers Doctrine*

The phrase 'the state reserved powers doctrine' is used to describe the approach of the High Court to the interpretation of Commonwealth powers before the *Engineers' Case* in 1920. This approach adopted a coherence model of Commonwealth powers, appealing to express or implied limits on Commonwealth powers to attempt a coherent division of power between the Commonwealth and the states. The reserved powers doctrine is often presented as one in which the High Court implied limits to the scope of Commonwealth powers in order to reserve certain identifiable powers exclusively to the states. These powers were reserved so as to implement the view that the *Constitution* was a treaty between the states in which they agreed to confer some vaguely defined powers on the Commonwealth and to reserve the rest to themselves.²²

Cases such as *Peterswald v Bartley*,²³ *R v Barger*,²⁴ and *Australian Boot Trade Employés Federation v Whybrow & Co*²⁵ fit this understanding of reserved powers. In these cases, the Court tended to start from an assumption that the states had exclusive control over their domestic economies or internal affairs and used that assumption to limit the scope of Commonwealth powers. However, in *Huddart Parker* and to a lesser extent in *A-G (NSW) ex rel Tooth & Co Ltd v Brewery Employees Union of New South Wales* ('Union Label

²¹ (1909) 9 CLR 330, 389–91.

²² Aroney describes this version of the reserved powers doctrine as the 'abridged' reserved powers doctrine and outlines the major criticisms to which it is subject: Aroney, 'Constitutional Choices', above n 5, 9–12.

²³ (1904) 1 CLR 497.

²⁴ (1908) 6 CLR 41.

²⁵ (1910) 10 CLR 266.

Case'),²⁶ Griffith CJ, Barton J and O'Connor J developed another version of the reserved powers doctrine, the express reserved powers doctrine, which was based on an interpretation of the express words of the *Constitution*.²⁷ Their Honours argued that by limiting the power over trade to overseas trade and trade among the states, s 51(i) expressly reserved to the states power over their internal economies. In Griffith CJ's opinion, that reservation of power was as clear as if it had been in express words.²⁸ That reservation of power to the states governed the interpretation of other related Commonwealth powers, such as the corporations power, which had to be interpreted so as to be consistent with it. Hence, it was wrong to interpret other powers as enabling the Commonwealth to invade the power over local trade which the trade power reserved to the states unless the express words of the grant required that the power extend to the internal affairs of the states.²⁹ This led to a narrow interpretation of powers such as the corporations power, which was seen as adding little to the commerce power.³⁰

Although Griffith CJ, Barton J and O'Connor J concluded that the limits on the trade power limited the scope of other powers, the judgments do not suggest that their Honours viewed the limits on other powers, such as the corporations power, as relevant to the interpretation of the trade power. For example, their Honours did not suggest that limiting the scope of the corporations power to foreign, trading and financial corporations limited the scope of the trade power, so that it could only be used to regulate the activities of trading, foreign and financial corporations and could not be used for the regulation of other types of corporation. It is probable that their Honours did

²⁶ (1908) 6 CLR 469.

²⁷ Aroney has described this as an 'interpretive' version of the reserved powers doctrine because the majority emphasised that the express reservation of power to the states had to give way to inconsistent words in grants of power to the Commonwealth: Aroney, 'Constitutional Choices', above n 5, 17. An interpretive version of the doctrine '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': at 11. It seems to me that it has elements better described in Aroney's typology as an 'absolute' version of the doctrine because it asserts that there is a 'definite content to the powers reserved to the states and suggests that this creates a clear-cut and [mostly] unqualified prohibition upon federal laws entering the reserved field'. See generally Aroney's interpretation of the case: at 16–18.

²⁸ *Huddart Parker* (1909) 8 CLR 330, 351–2.

²⁹ *Ibid* 351–2 (Griffith CJ), 361–3 (Barton J), 370 (O'Connor J).

³⁰ *Ibid* 354 (Griffith CJ), 371–4 (O'Connor J).

not view the corporations power as limiting the scope of the trade power or of other powers in this way because their Honours did not see it as containing an express reservation of power over other corporations to the states.

Because their Honours interpreted s 51(i) as containing an express reservation of power to the states, Griffith CJ, Barton J and O'Connor J appear to have assumed that it was the governing power so that the limits it contained governed the interpretation of other grants of power, while the limits that they contained were of little relevance to its interpretation. Their Honours derived the view that the commerce power was the governing power not only from the constitutional text, but from American cases on the corresponding provision in the *United States Constitution*. It was possible in 1900 to argue, on the basis of the American precedents, that the commerce power in s 51(i) was of paramount importance, so that the limits it contained governed the interpretation of other economic powers. By 1900, the American commerce power was seen as the most important of the legislative powers of the United States Congress.³¹ The limits on the United States commerce power prevented it and other powers being used to regulate the internal trade of the states so that the federal balance of power over the economy in that country was largely seen as involving a balance between the commerce power and state powers over their internal economies.³² Griffith CJ in *Huddart Parker* relied heavily on American authority. His Honour argued that as the Australian provision was in similar terms to that in the *United States Constitution*, the Australian drafters, in adopting the words of the United States section, intended to adopt the way in which it had been interpreted.³³

Even if the United States cases are ignored, there are good reasons for assuming that the limits on the trade power are relevant to the interpretation of other Commonwealth powers. Any attempt to divide economic power so as to give the Commonwealth control of the national elements in the economy while retaining state control over purely local economic activity is likely to give some priority to the trade power and to see its limits as relevant to the interpretation of other economic powers. It is the broadest of the Commonwealth's economic powers, applying to commerce as a whole rather than to

³¹ Westel Woodbury Willoughby, *The Constitutional Law of the United States* (Baker, Voorhis & Co, 1910) vol 2, 629–773.

³² *Ibid.*

³³ *Huddart Parker* (1909) 8 CLR 330, 350–1, quoting *Union Label Case* (1908) 6 CLR 469, 502–3 (Griffith CJ), quoting *United States v Dewitt*, 76 US (9 Wall) 41, 44 (Chase CJ) (1869).

particular aspects of it such as corporations, intellectual property or communications. It also supports a rational division of economic power, inviting courts to consider what aspects of the economy are properly national and therefore should be subject to Commonwealth control and what is properly local and hence better left to state control.³⁴ No other economic power shares these two characteristics. Some, such as the conciliation and arbitration power,³⁵ distinguish between national and local economic activity, but are limited in scope to a particular topic, such as industrial relations. Others, such as the corporations power, are capable of being interpreted so as to cover a broad range of economic activity, but do not embody a distinction between national and local economic activity. Hence no other power provides as much support as does the trade power for a division of economic power in which the Commonwealth has control over the national elements in the economy while the states retain control over the local elements.

To base a division of power over the national and local economies on the trade power, it is necessary to interpret that power as being the broadest and most important of the Commonwealth powers over the economy and to interpret the limits on that power as governing, to some extent at least, the interpretation of other Commonwealth economic powers. As the majority in *Huddart Parker* conceded, some of those powers may be worded so as to give the Commonwealth some control over local elements in the economy.³⁶ However, for that to be the case, the words of the grant have to be clear,³⁷ and the control over the local economy has to be clearly defined and limited in scope.³⁸ If it is not, it risks giving the Commonwealth so much control over the local economy that the division of powers based on the trade power breaks down. Hence, using the trade power to achieve a division of power over the economy requires that a power such as the corporations power, which has the potential to give the Commonwealth broad-ranging powers

³⁴ I do not wish to suggest that this is the only rational division of economic power in a federation, only that it is one way of dividing that power rationally.

³⁵ *Australian Constitution* s 51(xxxv).

³⁶ (1909) 8 CLR 330, 351–2 (Griffith CJ), quoting *Union Label Case* (1908) 6 CLR 469, 503 (Griffith CJ), 363 (Barton J), 370 (O'Connor J).

³⁷ *Ibid.*

³⁸ The implications of the limits in the trade power for the interpretation of other limited powers over aspects of the economy is discussed in more detail: below nn 94–7 and accompanying text.

over the local economy of a state, not be interpreted as giving such a broad power. Therefore, the majority in *Huddart Parker* were not without justification in treating the trade power as the most important of the Commonwealth's economic powers. There is also some justification for the conclusion that it governs to some extent the interpretation of other Commonwealth economic powers. However, there is little justification for interpreting it as an express reservation of some specific identifiable powers to the states, rather than as containing limits on power which are relevant to the interpretation of other powers.

B *Isaacs J's Critique of the Reserved Powers Doctrine in Huddart Parker*

In his Honour's dissent in *Huddart Parker*, Isaacs J developed a detailed critique of the reserved powers doctrine which is similar to that of the majority in *Work Choices*.³⁹ The critique was aimed at the view that the limitation of the trade power to overseas trade and trade among the states governed the scope of other economic powers so as to reserve power over state internal trade to the states. The critique led Isaacs J not only to reject that doctrine, but to the conclusion that as a general rule it is wrong to hold that the limits on one power are relevant to the interpretation of other powers. Instead, his Honour argued for an interpretation of Commonwealth powers in which each power is interpreted as a stand-alone power not subject to any implications drawn from other powers and their limits.⁴⁰

Isaacs J argued that as a general rule it is wrong to hold that the limits on one power are relevant to the interpretation of other powers for two reasons. First, his Honour argued that it is wrong because it is based on implying unjustified prohibitions into s 107 and grants of power such as s 51(i). Secondly, his Honour argued that the interpretation is based on a more fundamental mistake, that of reading negative implications into positive grants of power.⁴¹ That mistake, his Honour argued, made it impossible to interpret Commonwealth powers sensibly because it entailed the illogical

³⁹ See below Part III.

⁴⁰ *Huddart Parker* (1909) 8 CLR 330, 389–93.

⁴¹ *Ibid* 390–1.

conclusion that the more powers the Commonwealth had, the less actual power it possessed.⁴²

Isaacs J's first argument was that neither s 51(i) nor s 107 contained an express reservation of exclusive power to the states or any express prohibition prohibiting the Commonwealth from using any of its powers to legislate on local trade, so that the reservation of power over local trade to the states had no basis in the constitutional text. The point differs from the one his Honour made with respect to s 107 in the *Engineers' Case*, which has become part of the received wisdom with respect to reserved powers. In the *Engineers' Case*, Isaacs J argued that it was wrong to assume that s 107 reserved any power, including power over their domestic economies, to the states.⁴³ Other judges have since adopted this criticism, so that it is now well recognised that s 107 of the *Constitution* does not reserve any exclusive powers to the states.⁴⁴

Isaacs J's point in the *Engineers' Case* cannot be accepted as a criticism of *Huddart Parker* because no judge in *Huddart Parker* relied on s 107 alone as reserving power to the states. The majority in *Huddart Parker* found the reservation of exclusive powers to the states in the limits which s 51(i) imposed on the Commonwealth commerce power, combined with s 107, not in s 107 alone. Although Griffith CJ in the *Union Label Case*, quoted in *Huddart Parker*, said:

It follows that the power does not extend to trade and commerce within a State, and consequently that 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, in the words of Chase CJ, 'as a necessary and proper means for carrying into execution some other power expressly granted.'⁴⁵

Griffith CJ was not arguing that s 107 by itself reserves any powers exclusively for the states. His Honour's point was that the limit in s 51(i) by itself does not

⁴² Ibid 392.

⁴³ (1920) 28 CLR 129, 154 (Knox CJ, Isaacs, Rich and Starke JJ).

⁴⁴ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 83 (Dixon J), quoted in *Work Choices* (2006) 229 CLR 1, 119 [192] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁴⁵ *Huddart Parker* (1909) 8 CLR 330, 351 (Griffith CJ), quoting *Union Label Case* (1908) 6 CLR 469, 503, quoting *United States v Dewitt*, 76 US (9 Wall) 41, 44 (1869).

reserve any powers exclusively to the states. All it does is limit the Commonwealth power to trade among the states, preventing the Commonwealth from legislating with respect to trade within the one state. As s 107 gives the states a general legislative power unlimited as to subject matter, the combined effect of the two provisions is to reserve power over trade within a state exclusively to the state concerned.

In *Huddart Parker*, Isaacs J recognised this and his Honour's point was not that s 107 is not a grant of exclusive power to the states but that the conclusion that the *Constitution* reserves exclusive power over intrastate trade to the states has to be based on a provision which reserves that exclusive power or prohibits the Commonwealth from legislating on that topic.⁴⁶ The only candidates for such a provision are s 51(i), the trade power, and s 107. Section 51(i) does not reserve any exclusive power to the states because, as Griffith CJ conceded in the above quote from the *Union Label Case*, s 51(i) only contains a limitation on the Commonwealth power over trade. Isaacs J argued that that limitation could not be fairly interpreted as a reservation of power over domestic trade to the states or a prohibition on the Commonwealth using other powers to legislate with respect to that trade. To do so was to read a prohibition or negative implication into the words of a positive grant of power and that was wrong.⁴⁷ Section 107 does not reserve power over domestic trade to the states because it is not a reservation of any exclusive powers. Hence the interpretation of ss 51(i) and 107 as reserving some exclusive powers to the states had no textual base and could not be accepted. With respect to s 107, Isaacs J said:

Sec. 107 of the *Constitution* is relied on by my learned brothers who have preceded me. No doubt that section expressly reserves certain powers to the States. But an inspection of the clause at once discloses that the reservation of a power to a State does not imply prohibition to the Commonwealth. The reserved powers are those which are not either exclusively vested in the Commonwealth, or withdrawn from the States. But a power may be concurrent in both; and such a power is reserved to the State though existing also in the Commonwealth. Consequently reservation to the States cannot be taken as the test of whether a given federal power includes the right to affect internal trade, and cannot amount

⁴⁶ Ibid 391.

⁴⁷ Ibid 389–90 (Isaacs J), quoting *R v Burah* (1878) 3 App Cas 889, 904–5 (Lord Selbourne for the Court).

to a prohibition express or implied. It is always a question of grant, not of prohibition, unless that is express.⁴⁸

The argument demonstrates that s 107 standing alone does not enable us to identify exclusive state powers because the powers it reserves to the states may be shared with the Commonwealth or be exclusive to the states. That may be accepted but does not rule out the possibility that ss 51(i) and 107 combined reserve some powers exclusively to the states.

Isaacs J argued that the interpretation of s 51(i) as reserving power over local trade exclusively to the states was not consistent with the plain meaning of the words of s 51(i) which only contain a limitation on Commonwealth power, not an express prohibition of any attempt to regulate local trade.⁴⁹ Interpreting s 51(i) as containing that prohibition can only be defended by implying that s 51(i) does more than impose a limit on Commonwealth power and reserves some subjects to the states exclusively by excluding those subjects from the scope of other Commonwealth powers.⁵⁰

Isaacs J's arguments are a fair criticism of a rigid application of the majority's argument in which the limits on the trade power are interpreted as identifying specific state reserved powers, which are then used to reduce the scope of all other Commonwealth powers so as to prevent any infringement of the state powers so identified.⁵¹ Such an interpretation falls within Isaacs J's criticism because it does see the limits on s 51(i) as prohibiting any regulation of local trade under any other Commonwealth power and hence as reserving some specific powers to the states. However, the argument is not a fair criticism of a more moderate version of the majority's argument in which the limits on the trade power are seen as indicating an intention to divide economic power between Commonwealth and states, so that the Commonwealth controls the national elements of the economy, while the states control the local elements, without specifying exactly how the line is to be drawn.⁵² This version does not see the limits on s 51(i) as prohibiting any regulation of

⁴⁸ Ibid 391 (emphasis altered).

⁴⁹ Ibid 390–3.

⁵⁰ Ibid.

⁵¹ Aroney describes this as the 'absolute' version of the reserved powers doctrine: Aroney, 'Constitutional Choices', above n 5, 11.

⁵² Aroney is of the opinion that the majority in *Huddart Parker* intended to adopt this more moderate 'interpretive' version: ibid 17. I am not so sure: above n 27.

local trade under any other head of Commonwealth power because it requires that those powers be interpreted before we know the exact demarcation between Commonwealth and state power. However, it does require a division of power, thus ruling out any interpretation of any other Commonwealth power which tends to undermine that division of power.

Hence, Isaacs J's argument does not by itself support his Honour's conclusion that as a general rule the limits on one power are irrelevant to the interpretation of other powers. An interpretation in which the limits on one power are seen as playing an important role in dividing power between the Commonwealth and the states, and hence as relevant to the interpretation of other powers, does not entail that the limits on that power reserve identifiable exclusive powers to the states or impose any specific prohibitions on the exercise of other Commonwealth powers. Hence it is not open to Isaacs J's objection that it is implying too much into sections such as ss 51(i) and 107.

There is a more fundamental objection to Isaacs J's conclusion that as a general rule the limits on one power are irrelevant to the interpretation of other powers. An interpretation which sees the limits on one power as relevant to the interpretation of other powers is consistent with ordinary principles of statutory interpretation because it interprets specific provisions in the light of the document as a whole. It also has the advantage of giving due weight to all the words of the Commonwealth grants by preventing limits on one power being evaded and being rendered of no effect by the use of other, more broadly drafted powers.⁵³

Although Isaacs J was committed to the view that ordinary principles of statutory interpretation are relevant to constitutional interpretation,⁵⁴ his Honour did not view those principles as requiring that limits on one power be taken into account in interpreting other powers. Isaacs J described this approach to interpretation as that of drawing negative implications from positive grants of power. His Honour was critical of it on the grounds that if the limits on one power, such as the trade power, govern the interpretation of another power, such as the corporations power, then the opposite should apply, so that the limits on the corporations power should govern the interpretation of the trade power. If the limits on each power were interpreted as

⁵³ *Work Choices* (2006) 229 CLR 1, 333 [798]–[799] (Callinan J).

⁵⁴ His Honour defended this approach most strongly in the *Engineers' Case* (1920) 28 CLR 129, 148–50. However, it also influenced his Honour's reasoning in *Huddart Parker* (1909) 8 CLR 330, 388–90.

reserving state exclusive powers and hence as limiting the scope of every other power, Commonwealth power would be reduced to almost nothing. Each grant of additional power would do more to limit than to extend the scope of Commonwealth powers. This leads to the seemingly perverse result that the more powers the Commonwealth was given the less power it would actually have. Isaacs J suggests that this is counterintuitive because the cumulative effect of giving the Commonwealth many rather than few grants of power may be to leave it with very little actual power:

With reference to *United States v. Dewitt* I would observe that, even if I agreed with the wide meaning placed by my learned brothers who have preceded me on the words used by Chase C.J., I could not see my way to incorporate his dictum into the *Australian Constitution*, and then construe that document as if the Imperial legislature had enacted his words. If the interpretation placed on his observations be correct, it applies equally well to everything excluded from the various enumerated powers; and, inasmuch as manufacturing and mining companies are not included in paragraph (xx.), they ought prima facie by parity of reasoning to be excluded from the commerce clause, and the taxation clause, and the bills of exchange clause, notwithstanding the generality of the words, because it is quite consistent with a restricted construction of the language of those clauses to regard the unspecified classes of corporations as entirely reserved to the States. Those corporations are not, expressly or by necessary implication, contained in those powers except upon a fair construction of the words themselves, and are not there at all if this doctrine of implied prohibition be applied to the several clauses referred to.⁵⁵

Isaacs J's argument demonstrates that the principles governing the interpretation of s 51(i) as reserving power to the states cannot be applied across the board to the other powers. They are special principles applying to the trade power alone. Isaacs J assumed that for this reason they are inconsistent with the plain meaning of s 51 because there is nothing in the words of s 51 which requires that special principles be used in the interpretation of the trade power.⁵⁶ This assumption may be unjustified because, as argued above, there are good reasons for treating the trade power as the most important of

⁵⁵ *Huddart Parker* (1909) 8 CLR 330, 392 (emphasis altered), quoting *United States v Dewitt*, 76 US (9 Wall) 41, 43–4 (1869).

⁵⁶ *Ibid* 392–3.

the Commonwealth's economic powers, the limits on which are important for the interpretation of the other economic powers.⁵⁷

Isaacs J assumed that the above argument ruled out not only the *Huddart Parker* reserved powers doctrine but any interpretation of s 51 in which the limits on some powers are seen as limiting the scope of other powers. This is because if the limits on some powers limit the scope of others, then as a matter of logic, the limits on each power must limit the scope of every other power. That assumption cannot be accepted because it ignores the possibility that not all or even most of the limits on each power limit the scope of other powers.⁵⁸

Isaacs J's critique of the drawing of negative implications from positive powers is the most comprehensive defence of that position and the conclusion to which it leads: the conclusion that each power must be interpreted separately. It remains important because the assumption that it is wrong to draw negative conclusions from positive grants of power is widely accepted and forms one of the bases of the majority judgments in *Work Choices*.⁵⁹

III WORK CHOICES AND THE INTERPRETATION OF COMMONWEALTH POWERS

The *Work Choices* majority adopted an approach to the interpretation of Commonwealth powers in which each power is interpreted as a stand-alone power, separately and broadly. In doing so the majority followed a well-established line of authority beginning with *Strickland v Rocla Concrete Pipes Ltd* ('*Strickland*')⁶⁰ and including among others, the *Tasmanian Dam Case* and *Re Dingjan; Ex parte Wagner*.⁶¹ But their Honours also considered the relevant principles for interpreting Commonwealth grants of power and based their interpretive approach on arguments similar to those used in Isaacs J's critique of the majority in *Huddart Parker*, especially his Honour's attack on the drawing of negative implications from positive grants of power and his

⁵⁷ See above nn 33–8 and accompanying text.

⁵⁸ This possibility is explored in greater depth below in Part V.

⁵⁹ (2006) 229 CLR 1, 84–5 [82]–[84], 128–31 [223]–[229] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁶⁰ (1971) 124 CLR 468.

⁶¹ (1995) 183 CLR 323.

Honour's claim in the *Engineers' Case* that the Griffith Court was guilty of arguing that s 107 reserved some specific powers to the states:

So, too, the doctrine of reserved powers depended upon drawing negative implications from the positive grants of legislative power to the federal Parliament, and sought to draw support for that approach from s 107 of the *Constitution*. As Dixon J pointed out in *Melbourne Corporation v The Commonwealth*, 'the attempt to read s 107 as the equivalent of a specific grant or reservation of power lacked a foundation in logic'. But no less fundamentally, the doctrine of reserved powers could be supported only if the *Constitution* was understood as *preserving* to the States some legislative power formerly held by the unfederated Colonies.⁶²

It is the first of these arguments, the critique of drawing negative implications from positive grants of power, which will be considered here.

In holding that no implications could be drawn from the conciliation and arbitration power, s 51(xxxv), for the interpretation of the corporations power, s 51(xx), the *Work Choices* majority agreed with Isaacs J's conclusion that it was improper to draw negative implications from a positive grant of power where the power contained no express prohibition. The majority dealt at some length with cases in which other powers had been interpreted as allowing the Commonwealth to legislate with respect to industrial disputes and other aspects of industrial relations, pointing out that the Commonwealth had been permitted to use the defence power and the trade power to regulate industrial relations.⁶³ The majority expressly approved a statement of Gleeson CJ from *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* ('*Re Pacific Coal*')⁶⁴ to the effect that the arbitration power did not contain any negative implication or express prohibition preventing the Commonwealth from using other powers to regulate industrial disputes:

First, it is one thing to say that the nature of the power is such that it deals with instituting and maintaining a system of conciliation and arbitration, and that it

⁶² *Work Choices* (2006) 229 CLR 1, 119 [192] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) (emphasis in original), quoting *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 83. See also *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 359–60 [29] (Gleeson CJ).

⁶³ *Work Choices* (2006) 229 CLR 1, 128–31 [223]–[229] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁶⁴ (2000) 203 CLR 346.

is only through such a system that conditions of employment may be regulated under s 51(xxxv); it is another thing to find some negative implication amounting to a prohibition against the Parliament enacting any law which has the effect of altering conditions of employment. That there is no such negative implication, and no such prohibition, must follow from the acceptance that, where Parliament can rely upon some other power conferred by s 51, it can legislate in relation to conditions of employment. Such an implication was rejected, for example, in *Pidoto v Victoria*. In the present case, an attempt was made to rely, if necessary, upon the power conferred by s 51(xx). It is unnecessary to deal with that attempt but if, in a given case, legislation were validly enacted pursuant to that power, then it would not be affected by any negative implication or prohibition of the kind mentioned.⁶⁵

The *Work Choices* majority adopted reasons similar to those of Isaacs J for holding that it was impermissible to draw negative implications from positive grants of power. As noted above, Isaacs J argued that if negative implications were to be drawn from the limits on one power, they had to be drawn from the limits on all powers, leading to some peculiar limitations on particular powers and to the odd conclusion that the more powers the Commonwealth was granted the narrower its powers were likely to be.⁶⁶ The majority did not refer to Isaacs J's argument on this point but did quote Latham CJ in *Pidoto v Victoria* to similar effect:

[It was argued that s 51(xxxv) implies] not only that the Commonwealth Parliament shall have power to legislate in relation to the industrial disputes there defined and in the manner there prescribed, but also that the Commonwealth Parliament shall not have power to deal with any other industrial matter or with any industrial dispute in any other manner. ... Section 51 (xxxv.) is a positive provision conferring a specific power. The particular terms in which this power is conferred are not, in my opinion, so expressed as to be capable of being so construed as to impose a limitation upon other powers positively conferred. Further, if s. 51 (xxxv.) were construed so as to prevent the Parliament from dealing with industrial matters except under that specific provision, similar reasoning would lead to the conclusion that the Commonwealth Parliament

⁶⁵ *Re Pacific Coal* (2000) 203 CLR 346, 360 [29], quoted in *Work Choices* (2006) 229 CLR 1, 130–1 [228] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) (citations omitted).

⁶⁶ See above nn 54–8 and accompanying text.

could not (under *any* legislative power) provide for the use of conciliation and arbitration in relation to any other matter than inter-State industrial disputes. It must, I think, be conceded, for example, that the Commonwealth Parliament can, in legislating with respect to the public service of the Commonwealth (Constitution, s. 52 (ii.)), provide for conciliation and arbitration in relation to matters such as wages, conditions and hours, whether or not any dispute about those matters is industrial ...⁶⁷

It has been accepted for a long time that limits on some powers do limit the scope of other powers. For example, the just terms limit on the acquisitions power has been incorporated into other powers which could be used to authorise acquisitions,⁶⁸ and the exceptions in the banking and insurance powers which prevent the Commonwealth from controlling state banking and state insurance extend to other powers.⁶⁹ The majority in *Work Choices* conceded that these limits do limit the scope of other powers because the safeguard or guarantee of just terms in s 51(xxxi) would be of no effect if the Commonwealth could compulsorily acquire without giving just terms under other heads of power, while positive prohibitions, such as that on the Commonwealth legislating with respect to state banking or insurance, would be of no effect if they did not extend to other powers.⁷⁰ The majority distinguished these powers from the arbitration power on the grounds that they contained a limitation in the form of a prohibition on Commonwealth legislation on a particular topic, whereas the arbitration power was a positive grant of power containing no such prohibition. Unlike Kirby J in dissent,⁷¹ their Honours did not find any guarantee or safeguard in the arbitration power analogous to that in s 51(xxxi) or any prohibition of laws on a particular topic analogous to the prohibitions in the banking and insurance powers.⁷²

⁶⁷ *Pidoto v Victoria* (1943) 68 CLR 87, 101.

⁶⁸ *Australian Constitution* s 51(xxxi); *Re Döhnert Müller Schmidt & Co; A-G (Cth) v Schmidt* (1961) 105 CLR 361, 371–2 (Dixon CJ); *Theophanous v Commonwealth* (2006) 225 CLR 101, 112–13 [5] (Gleeson CJ).

⁶⁹ *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, 285 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁷⁰ *Work Choices* (2006) 229 CLR 1, 123–4 [205]–[208], 127 [219]–[220] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁷¹ *Ibid* 213–14 [508]–[510].

⁷² *Ibid* 127–8 [221]–[222] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

IV THE LEGITIMACY AND NECESSITY OF DRAWING NEGATIVE IMPLICATIONS FROM POSITIVE GRANTS OF POWER

The argument that each power should be interpreted as a stand-alone power because it is wrong to infer prohibitions or negative implications from positive grants of power fails for a number of reasons. It depends on a distinction between limits on positive grants of power and prohibitions on the exercise of a power which is less clear cut than Isaacs J and the *Work Choices* majority supposed. The *Work Choices* majority considered both the substance and form of particular grants in drawing the distinction. The distinction between the limitation in the banking and insurance powers to banking and insurance other than state banking, and the limitation in the arbitration power to disputes extending beyond the limits of any one state, is purely one of form, while the distinction between the acquisition power and other powers is one of substance, in that the acquisition power gives individuals a guarantee akin to a right whereas most other powers do not.⁷³

There is room for disagreement about whether the limits on a power contain a guarantee akin to a right. In *Work Choices*, Kirby J in dissent argued that the arbitration power guaranteed workers and employers the right to an impartial umpire in industrial disputes, thus protecting the weaker party from the coercion which can result from imbalances of economic power. His Honour held that this guarantee limited the scope of other powers, preventing the Commonwealth from enacting workplace laws which did not provide such guarantees.⁷⁴ The majority did not find any such guarantee in the provision.⁷⁵ Disagreements of this sort do not undermine the distinction. We can recognise that there is a real difference between grants of power which contain a guarantee akin to a right and those which do not, although we disagree about whether a particular section contains such a guarantee. Kirby J developed a broad concept of safeguard or guarantee which threatened to undermine the distinction between provisions which contain guarantees and those which merely contain limitations. His Honour's conception of a safeguard included safeguards designed to protect the interests of the states as

⁷³ Ibid 123–4 [205], 127–8 [219]–[222] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁷⁴ Ibid 215–17 [515]–[519], 219–20 [525] (Kirby J).

⁷⁵ Ibid 127–8 [221]–[222] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

well as those designed to protect individual interests.⁷⁶ The guarantee of an impartial umpire in industrial disputes is designed to protect the individual interests of workers and employers, not the interests of the states. But although Kirby J did not point it out, the second safeguard which his Honour argued that the arbitration power contained — the requirement that it only extends to industrial disputes extending beyond the limits of any one state — safeguards the interests of states, not of individuals.⁷⁷ On this view, almost all the limits on powers in s 51 can be interpreted as safeguards because they are designed to safeguard the interests of the states. Hence it may seem that Kirby J is misusing the distinction between safeguards and the limited terms in which powers are granted to advance his Honour's argument. However, in his Honour's defence it is not unreasonable to view the limits on power in s 51 as the safeguards of the states and to require that the limits on one power be taken into account in the interpretation of other powers. In the end, the majority's position is that safeguards other than safeguards for the interests of the states may be taken into account in interpreting a provision which divides up power in a federal system. That is an odd conclusion because it ignores the obvious purpose of most of the limits in s 51, which is to safeguard state legislative power.

As noted above, the majority does allow one exception to this conclusion.⁷⁸ Where a limit on power takes the form of a prohibition on the exercise of a Commonwealth power, the majority interpreted it as limiting powers other than the power which contains it, even though the prohibition protects state interests rather than individual interests. The distinction is formalistic and makes the way in which a grant of power is drafted decisive in determining whether the limits on power which it contains are relevant to the interpretation of other powers:

Paragraph (xxxv) is to be read as a whole; it does not contain any element which answers the description in *Bourke* of a positive prohibition or restriction upon what otherwise would be the ambit of the power conferred by that paragraph. ... The text of para (xxxv), like that of para (i), expresses a compound conception; the paragraph contains within it, and not as an exception

⁷⁶ Ibid 184–5 [430].

⁷⁷ Ibid.

⁷⁸ See above n 72 and accompanying text.

or reservation upon what otherwise would be its scope, the element of inter-state dispute.⁷⁹

This passage infers that the result may have been different if s 51(xxxv) had been drafted differently so that the requirement of an interstate dispute took the form of a restriction on what would otherwise have been the scope of the grant rather than as part of the definition of the power. For example, if the power had read ‘for the prevention and settlement of industrial disputes but not disputes limited to one state’, the majority may have interpreted the exception ‘disputes limited to one state’ as a prohibition on legislating with respect to local disputes which limited the scope of other powers.

The argument places far too much weight on form and not enough on substance. The majority do not explain why so much should turn on whether a limitation is included in the subject over which the Commonwealth is given power or is drafted as an exception to what would otherwise be a broader grant of power, especially as the choice of phrase makes no obvious difference to the overall meaning of the grant. If the arbitration power had read ‘for the prevention and settlement of industrial disputes but not disputes limited to one state’ rather than ‘for the prevention and settlement of industrial disputes extending beyond the limits of any one state’,⁸⁰ there is no apparent difference in meaning except that in the opinion of the *Work Choices* majority, the former form of words is capable of limiting the scope of other powers, whereas the latter is not. The distinction would be defensible if the majority could point to a drafting convention under which one form of words indicates an intention to limit the scope of other powers whereas the other does not, but their Honours did not appeal to such a convention. In the absence of such a convention, the distinction is empty formalism and indefensible.

Even if it were justifiable to distinguish between limitations defining the power granted and limitations restricting what would otherwise be a broader grant, the argument that it is a mistake to draw negative implications from positive grants of power fails for a more fundamental reason: refusing to draw negative implications from positive grants of power may render other grants of power otiose. In *Work Choices* the plaintiffs and the minority, especially Kirby J, relied on this argument pointing out that a failure to draw negative

⁷⁹ *Work Choices* (2006) 229 CLR 1, 127–8 [221]–[222] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁸⁰ *Australian Constitution* s 51(xxxv).

implications from the arbitration power to prevent the corporations power being used to control industrial relations, would render the arbitration power irrelevant.⁸¹ This result was counterintuitive because it entailed that over 100 years of detailed exegesis of s 51(xxxv) had been unnecessary because the corporations power covered the same ground but was not subject to the s 51(xxxv) limitations.⁸²

The majority rejected this argument. Their Honours stressed that in 1901, interpreting the corporations power as extending to industrial relations would not have had the effect of making the arbitration power redundant because corporations did not play such a major role in the economy as they do now. The majority argument suggests that interpreting the corporations power as a stand-alone power in 1901 would not have had a dire impact on state powers or rendered other powers irrelevant because of the more limited role of corporations in the economy and in society. The changing and expanding role of corporations as the preferred way of structuring large and small businesses may have greatly increased the reach of the corporations power to an extent which the framers could not have expected or foreseen, but the majority implied that this is not a reason for limiting the scope of the corporations power.⁸³ To use hindsight to limit the corporations power because economic and commercial changes have brought far more activities in its scope than was the case in 1900, would be to remake the *Constitution* in the light of changing economic and social conditions, something which the Court has no power to do.

This may not be a reasonable argument because as early as 1909, in *Huddart Parker*, Higgins J described the implications of a broad interpretation of the corporations power as ‘extraordinary, big with confusion’, giving as examples the possibility that the Commonwealth could directly regulate the wages and conditions of corporate employees, stipulate who could be a director and establish special licensing laws for hotels owned by trading and financial corporations.⁸⁴ His Honour’s argument indicates that even then, a broad interpretation of the corporations power had such major implications

⁸¹ *Work Choices* (2006) 229 CLR 1, 74–5 [57] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 205 [482] (Kirby J) (dissenting), 333–4 [799] (Callinan J) (dissenting).

⁸² *Ibid* 14 (B W Walker SC) (during argument), 185–90 [432]–[445] (Kirby J).

⁸³ *Ibid* 97–8 [121]–[124] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁸⁴ *Huddart Parker* (1909) 8 CLR 330, 409–10.

for the constitutional balance of power and for the relevance of other powers that it should not be accepted.

Kirby J's argument was stronger than his Honour may have realised because the law normally draws negative implications from positive grants of power because failure to do so undermines the *raison d'être* of limited grants of power. The law assumes that grantors of limited power, including constitutional and legislative power, do not intend to give the recipient of the grant other unlimited powers, because to do so would render the grant of limited power unnecessary and otiose. Hence, arguments about the scope of the grants of power in s 51 assume that the grant of limited powers in that section, taken as a whole, gives rise to a negative implication, the implication that the Commonwealth does not have a general legislative power unlimited as to subject matter. This is not stated anywhere in the *Constitution*, but is an obvious implication because if the Commonwealth had a general legislative power, the grants in s 51 would not be needed.

The interpretation of specific grants of power proceeds on the basis of a similar implication which is so obvious that it escapes notice. For example, the grant of power over trade among the states contains the negative implication that the Commonwealth cannot use the trade power to regulate trade confined within one state and the power over trading, and financial corporations contains the negative implication that the corporations power cannot be used to regulate corporations which are not trading and financial corporations. These are negative implications because there is nothing in the words of the grant of power over trade which specifically says that the Commonwealth does not have a general power over local trade and there is nothing specific in the words of the corporations power which says that it does not have a general power over non-trading corporations.⁸⁵ We draw the negative implication as a matter of course because there would be no point in granting a power over a topic if the Commonwealth already had power over that topic. The issue is not whether negative implications can be drawn from positive grants of power because we routinely draw them. The issue is whether the negative implications in one grant of power are limited to that grant itself or whether they extend to other grants.

⁸⁵ The negative implications we draw from the existence of these powers do not necessarily rule out the possibility that the Commonwealth may have other specific powers over some limited aspects of local trade or non-trading corporations.

It is clear that the existence of a power may have negative implications for the scope of other powers. Taken alone, the trade power may be wide enough to allow the Commonwealth to regulate corporations on the basis that as most corporations are business corporations, a law regulating them is at least incidental to trade. But the grant of a specific power over corporations implies that the trade power does not extend to corporations, at least in some respects, because, if it did, there would be no need for a separate corporations power. Hence, the grant of a power over corporations has a negative implication for the trade power: the implication that the trade power does not extend to those aspects of corporations covered by the corporations power. The argument for this implication is identical in form to the argument that the overall grant of power in s 51 implies that the Commonwealth does not have a general legislative power and the argument that the grant of a power over interstate and overseas trade implies that the Commonwealth does not have a general power over trade; if the broader power existed there would be no need for the grant of a narrower power.

The argument that the limits on one power are relevant to the interpretation of other powers is slightly more complex but has a similar basis: the existence of a broad power over a topic renders the limits on the grant of a narrower power over that topic pointless. Hence the existence of a narrow power subject to defined limits is a good reason for assuming that the Commonwealth does not possess a broad unlimited power over the same subject matter. For these reasons, it may be implied from the existence of the arbitration power that the Commonwealth has no general power over industrial disputes, especially the power to intervene in disputes limited to one state. If that is the case, no other power should be interpreted as containing that general power so as to enable the Commonwealth to avoid the limits on the arbitration power completely.

Isaacs J's judgment in *Huddart Parker* suggests that the only argument for not interpreting each power as a separate stand-alone grant is the argument that the purpose of the limitations on the grants is to reserve power to the states and that if we reject that as the purpose of the limitations, there is no reason why limitations in one grant should influence the interpretation of other grants.⁸⁶ The argument above suggests that Isaacs J is wrong because, regardless of purpose, it is reasonable and commonplace to infer negative

⁸⁶ (1909) 8 CLR 330, 390–1.

implications from positive grants of power and to read limitations in one power into the scope of other powers.⁸⁷ That can be demonstrated by considering the interpretation of grants of power in other contexts.

Not all limited grants of legislative power have the purpose of dividing up power between two levels of government in a federation. It is common to give subordinate authorities, such as local government, defined grants of power to make regulations and by-laws. This is done not to achieve a division of power with the central government, because typically the central government retains jurisdiction over all matters over which it has granted power to a subordinate authority and because the central government may at any time repeal the grants. Instead its purpose is to limit the powers of the subordinate authority to defined topics. Because the central government retains power over all matters over which it has granted jurisdiction to the subordinate authority, it would be futile to look to the powers of the central government in order to define the limits on the powers of the subordinate authority. But that does not entail that each power of the subordinate authority must be interpreted in a stand-alone fashion or that negative implications for the scope of particular powers cannot be drawn from the fact that other powers were granted. In cases interpreting the powers of subordinate authorities, it is common for the courts to draw negative implications from positive grants of power although no issue with respect to a division of power with another authority arises.⁸⁸ In particular, where the subordinate authority is given a narrow power subject to limitations and a broad power not subject to those limits, the broad power will not usually be interpreted as enabling the authority to avoid the limits on the narrower power, thus rendering the narrower power otiose and the limits it contains of no effect.⁸⁹

This Part has defended an interpretive approach which views limits on each power as relevant to the interpretation of other powers without taking

⁸⁷ Cf Aroney, 'Constitutional Choices', above n 5, 25, who suggests that arguments in which limits on one power have been used to limit by implication the scope of other powers contain 'elements of reserved powers reasoning'. I disagree because there are good reasons for adopting such an approach to the interpretation of grants of power even if federal considerations are left out of account.

⁸⁸ See, eg, *Evans v NSW* (2008) 168 FCR 576, 591 (French, Branson and Stone JJ); *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672, 678 (Mason J); *R v Wallis; Ex parte Employers Association of Wool Selling Brokers* (1949) 78 CLR 529, 550–1 (Dixon J).

⁸⁹ *Ibid.*

into account the federal reasons for limiting the scope of Commonwealth powers or arguments based on the history and purpose of the *Constitution*. The argument has been developed without reference to the fact that ss 51, 106, 107, 109 and other sections of the *Constitution* are intended to achieve a division of power between the Commonwealth and the states. That this is their intended purpose supports an interpretation of s 51 in which the limits on one power are seen as relevant to the interpretation of other powers because, as noted above, the limits on Commonwealth powers in s 51 are the most important way in which the *Constitution* guarantees the states some exclusive powers,⁹⁰ and this interpretation takes that fact seriously. But even if the federal reasons are ignored, there are still good reasons for drawing negative implications from positive grants of power and their limitations.

V DRAWING NEGATIVE IMPLICATIONS FROM POSITIVE GRANTS OF POWER AND THE INTERPRETATION OF COMMONWEALTH GRANTS OF POWER

Although it is natural to draw negative implications from positive grants of power, we cannot, from that conclusion alone, determine which powers ought to be subject to implications or what the content of those implications ought to be because it is not always obvious what limits need to be imposed on a power to prevent another power being rendered otiose. That raises the question of how those powers which are subject to limits implied from other powers are to be identified and how the content of the limits is to be determined. In this Part, I shall argue that most of these problems may be solved by paying close attention to the reason for drawing negative implications, which is to prevent a power and the limitations which it contains being rendered otiose, and to the nature of the powers concerned and to their interpretation, without recourse to controversial doctrines such as the reserved powers doctrine.

Isaacs J in *Huddart Parker* argued that drawing negative implications for the scope of one Commonwealth power from the limits on another power has the capacity to limit Commonwealth power unreasonably because, once it is conceded that the limits on one power limit the scope of another power, then it follows that the limits on every power limit the scope of every other

⁹⁰ See above n 20 and accompanying text.

power.⁹¹ This argument cannot be accepted. It assumes that all limitations on all powers are alike in purpose and effect and thus either constrain all other powers or constrain none of them. There is no reason to accept that assumption.

The principle that we can draw negative implications from the limits on one power for the scope of other powers does not provide a textual basis for seeing the limits on each power as relevant to the interpretation of every other power. As argued above, the principle only justifies the drawing of negative implications in cases where failure to do so would render a grant or the limits which it contains unnecessary or of no effect.⁹² Where not drawing the implication does not have that effect, there is no reason to draw the implication. Applying this principle, the limits on many powers do not give rise to any implications for the interpretation of most other powers because the subject matters of most powers are relatively narrow and discrete. For example, the limiting of the power over intellectual property to copyright, patents of inventions and designs and trade marks has no implications for the interpretation of the powers over marriage, aliens or invalid and old age pensions.⁹³

Implications designed to prevent a grant of power or the limits it contains from being rendered otiose are most relevant in determining the relationship between broad grants of power and other narrower powers, and between one broad grant of power and another. The problems raised are of four types. First, problems may arise in determining whether the limits on a broad power limit by implication narrower powers with respect to related subjects which are not expressly subject to those limits. Secondly, there are problems in determining whether the existence of a limited power on a specific subject limits by implication a broader power which could be interpreted as extending to the same subject. Thirdly, it may not be clear whether limitations on the scope of one broad power limit the scope of another power which could be interpreted as covering much of the same subject matter. Finally, it is not clear what implications should be drawn from specific grants of power and the limits which they contain for grants of power such as the defence power and the external affairs power, which, at least on some interpretations, have the

⁹¹ (1909) 8 CLR 330, 392.

⁹² See above nn 82–9 and accompanying text.

⁹³ *Australian Constitution* ss 51(xvii), (xix), (xxi), (xxiii).

potential to expand in response to outside events so as to render some grants and the limits they contain otiose.

The relationship between the broad trade power and other narrower powers over aspects of the economy such as the powers over bills of exchange and promissory notes, bankruptcy and insolvency and copyright, patents of inventions and designs, and trade marks, provides good examples of the first problem. The issue raised is whether the limiting of the trade power to trade with other countries and among the states limits by implication powers over specific economic matters to the international and interstate aspects of those matters. In *Huddart Parker*, Isaacs J suggests that if the limits on one power are relevant to the interpretation of other powers, then the limits on a broad power such as the trade power will limit by implication the scope of other more specific powers. The examples his Honour gives are the limitations on the corporations power, arguing that if the limits on the trade power limit the scope of the corporations power, then logically the limiting of the corporations power to foreign corporations and trading and financial corporations should limit the scope of more specific powers, such as the power with respect to bills of exchange and promissory notes and the power to tax.⁹⁴

Isaacs J's argument cannot be accepted. It is a logical possibility that if the corporations power is subject to limits contained in the trade power, then the other powers mentioned are subject to limits in the corporations power. But that conclusion has nothing else to recommend it. It ignores all arguments about the purpose of giving the Commonwealth some broad powers such as the trade power and other more limited powers such as the power with respect to promissory notes. There are good reasons for interpreting the trade power as the broadest of the Commonwealth's economic powers and for treating the limitations which it contains as highly relevant to the interpretation of other economic powers.⁹⁵ However, there are no good reasons for interpreting powers over specific aspects of the economy, such as promissory notes and bills of exchange or intellectual property, as subject to those limits. An obvious purpose for granting specific powers over aspects of the economy in a constitution which gives the Commonwealth a broad power over the international and interstate elements of trade is to ensure that, despite the limitations on the trade power, the Commonwealth can regulate those aspects

⁹⁴ *Huddart Parker* (1909) 8 CLR 330, 392.

⁹⁵ See above nn 33–8 and accompanying text.

of the economy in their entirety. The grant of the specific powers embodies a judgement that national uniformity may be desirable in certain areas to avoid the inconvenience of different regimes in interstate trade and in each state economy. Subjecting the specific economic powers to the limits in the trade power would frustrate this purpose. Hence, even if we accept that the limits on the trade power were intended to divide economic power between Commonwealth and state, there is little reason for implying the limits in the trade power into specific economic powers. In the *Union Label Case*, Griffith CJ, who held that s 51(i) reserved exclusive power to the states over their internal economies, was of the opinion that despite the reservation, the power with respect to trade marks allowed the Commonwealth to regulate trade marks within a state as well as in interstate trade.⁹⁶ That conclusion was correct.

Secondly, there may be problems in determining whether the existence of a limited power on a specific subject limits by implication a broader power which could be interpreted as extending to the same subject. The classic example of the problem is *Work Choices*, in which the High Court was required to determine whether the limits on the relatively narrow arbitration power impliedly limited the scope of the corporations power. The case for the limits on the narrower power impliedly limiting the broader power is much stronger than are the arguments for the limits on a broad power impliedly limiting narrower more specific powers. If the limits on the narrower power do not limit the broader power, then the broader power may give more power over the topic than the narrower power gives, thus rendering the narrower power otiose. However, it may not be easy to determine the content of any implication to be drawn or to determine whether an implication drawn from a narrower power limits all broader powers or just some of them.

In my opinion, the answer to both questions depends upon the interpretation of the narrower power, the power from which any limitations are derived. Any negative implication which can be inferred from a narrow power, such as the arbitration power, requires that other powers should not be interpreted as overlapping or dealing with the same subject matter without good reason, where the result is to make the narrow power otiose. It may not be clear what that subject matter is. In the case of the arbitration power, it could be defined narrowly as the prevention and settlement of industrial disputes,

⁹⁶ (1908) 6 CLR 469, 502–4.

so that other Commonwealth powers should not be interpreted as enabling general legislation on that topic. The other alternative is to define it broadly as industrial relations so that other Commonwealth powers should not be interpreted as permitting general legislation on that topic without good reason.

The majority judgment in *Work Choices* rejected the broad interpretation of the implication. One of the plaintiffs in *Work Choices*, the Australian Workers' Union, argued that the existence of the limits on the arbitration power prevented the Commonwealth from using the corporations power to legislate on 'similar' topics including industrial relations in general.⁹⁷ The majority rejected these arguments on the grounds that there was no good reason for interpreting the arbitration power as excluding the corporations power from the area of industrial relations in part because the subject of arbitration is much narrower than that of industrial relations.⁹⁸ The argument suggests that any implication, if one can be drawn, only prevents the Commonwealth from using other powers to legislate with respect to the prevention and settlement of industrial disputes, not industrial relations in general.

An analysis of the scope of the arbitration power suggests that the Court's conclusion was wrong. The arbitration power is a power with respect to conciliation and arbitration for the prevention and settlement of industrial disputes. Under the arbitration power, arbitrators have a power to set new standards binding on the parties to the arbitration as well as to apply existing ones.⁹⁹ Arbitration as it developed under the arbitration power became the accepted method of setting standards on industrial matters such as wage rates, working conditions and holidays.¹⁰⁰ Therefore, it is arguable that other Commonwealth powers should be interpreted so as not to give the Commonwealth a more general power to set standards in the area of industrial relations, because if it had that more general power, the arbitration power would be otiose in that the Commonwealth would be able to do all which the arbitration power authorises under the broader power. We would only be

⁹⁷ *Work Choices* (2006) 229 CLR 1, 122 [199]–[200] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁹⁸ *Ibid* 123 [203], 124 [208] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

⁹⁹ *The Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 462–5 (Isaacs and Rich JJ).

¹⁰⁰ For an account of that development, see W Antsey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Lawbook, 5th ed, 1976) 312–41.

justified in limiting any implication to one preventing the use of other powers to legislate with respect to the prevention and settlement of industrial disputes if we rejected the long held view that the arbitration power can be used to set standards on industrial matters.

An implication drawn from a narrower power does not necessarily limit all broader powers, only those which may be interpreted as giving a general power over the subject matter in question, thus rendering the narrower power otiose. Hence the grant of the arbitration power as the only specific power over industrial disputes justifies an assumption that the Commonwealth does not have a general power over industrial relations or industrial disputes which makes the grant otiose or unnecessary. It does not entail that the Commonwealth has no other powers which can be used to regulate industrial relations. However, the fact that the Commonwealth does not have any other specific powers over industrial relations does suggest that other powers can only extend to narrow aspects of industrial relations so as not to render the arbitration power otiose. So, in wartime or in other emergencies, the defence power may extend to industrial relations because bad industrial relations can have a negative impact on the war effort or the defence of the realm.¹⁰¹ The fact that control of industrial relations under the defence power is limited in time to the duration of the war or emergency prevents it from rendering the arbitration power unnecessary.

The trade power may extend to some aspects of industrial relations in interstate trade, especially industrial relations relating to transport, because the Commonwealth was given specific powers with respect to shipping and state government railways, the major methods of transport at federation.¹⁰² However, the trade power should not be interpreted as giving the Commonwealth a general power over industrial relations relating to trade among the states because such a power would be so broad that it would render the arbitration power otiose. This is especially the case if that power is interpreted broadly as suggested below in Part VII. Similarly, it is arguable that the posts and telegraphs power gives some power over industrial relations in the communications sector because it is narrowly defined and does not threaten to make the arbitration power unnecessary.

¹⁰¹ See, eg, *Pidoto v Victoria* (1943) 68 CLR 87, 102 (Latham CJ).

¹⁰² *Australian Constitution* s 98; *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397, 413 [36] (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

The corporations power differs from the powers with respect to transport and communications in that it is much broader. The decision in *Work Choices*, that the corporations power could be used to enact general industrial relations legislation, has largely rendered the arbitration power otiose. It ignores the implications which are inherent in the grant of a limited power over industrial disputes. There is nothing special or different about the industrial relations of corporations which distinguishes them from industrial relations generally and justifies using the corporations power in this way. A corporation's industrial relations are no different from the industrial relations of any enterprise, whether incorporated or not. Therefore, there is no reason why industrial relations should fall within the scope of the corporations power which is sufficiently strong to justify the impact of that interpretation on the arbitration power.¹⁰³ Hence the majority in *Work Choices* was wrong to assume that if the limits on the arbitration power did not by implication limit the trade power or the defence power, they could not logically limit the corporations power.¹⁰⁴

Thirdly, as noted above, it may not be clear whether limitations on the scope of one broad power limit the scope of another power which could be interpreted as covering much of the same subject matter. Again, the answer depends in large part on the basic purpose of drawing such negative implications: to prevent one power or the limits it contains being rendered otiose. Hence the answer depends upon the degree of overlap and the extent to which it is possible to use one of the powers to avoid the limits on the other power. Federalist arguments may be important as well if the limits on one of the powers are seen as important in dividing power between the Commonwealth and the states. The classic example is the overlap between the trade and corporations power. Since *Strickland* the limits on the trade power have been seen as irrelevant in the interpretation of the corporations power, so that the latter is now the major Commonwealth power over the economy.¹⁰⁵ As it is not limited to regulation of the international and interstate elements of corporate activity, it enables the Commonwealth to evade the limits in the

¹⁰³ The majority in *Work Choices* rejected arguments of this type on the grounds that they were inconsistent with accepted principles of constitutional interpretation and with existing authorities: (2006) 229 CLR 1, 122–31 [199]–[229] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

¹⁰⁴ Ibid 128–31 [223]–[229] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

¹⁰⁵ Aroney, 'Constitutional Choices', above n 5, 31.

trade power. There is a strong argument that to prevent the limits on the trade power being reduced to no effect, they should by implication apply to the corporations power.

Federal principles support this conclusion because, as argued above, there are good reasons for treating the trade power as the most important of the Commonwealth's general powers over the economy, in part because the limits it contains embody a rational division of economic power between the Commonwealth and the states.¹⁰⁶ As a result, those limits are highly relevant to the interpretation of the Commonwealth's other economic powers, especially a potentially broad power such as the corporations power. The federal principles they embody are important in determining which power should be the dominant power if the two powers cover basically the same subjects, so that one or the other must be interpreted narrowly or rendered otiose. Since *Strickland* interpreted the corporations power as authorising the regulation of the trade of trading corporations,¹⁰⁷ the two powers have largely overlapped, so that the Court has little alternative but to allow the corporations power to enable the limits on the trade power to be ignored or to interpret the corporations power extremely narrowly. The Court has given precedence to the corporations power, thus rendering the limits on the trade power and the division of legislative power over the economy which they embody largely otiose.

The High Court could have avoided the dilemma by interpreting the corporations power so that it did not cover much the same subject matter as the trade power.¹⁰⁸ Having not taken this option, the question is how it should have resolved the dilemma. The principle that one power should be interpreted so as not to render another otiose is of little assistance because it points in both directions; a broad interpretation of the corporations power makes the trade power and its limits largely irrelevant, while subjecting the corporations power to the limits in the trade power reduces its scope to almost nothing. At this point, federal principles ought to be decisive, subjecting the corporations power to the trade power in order to preserve the division of power over the economy embodied in the limits to the latter.

¹⁰⁶ See above nn 33–8 and accompanying text.

¹⁰⁷ (1971) 124 CLR 468, 489–90 (Barwick CJ), 510 (Menzies J).

¹⁰⁸ See below nn 145–50 and accompanying text for discussion of this option.

Finally, it is not clear what implications should be drawn from specific grants of power and the limits which they contain for grants of power such as the defence power and the external affairs power, which at least on some interpretations, have the potential to expand in response to events so as to render some grants and the limits they contain otiose. The problems posed by the defence power are reasonably contained because although in times of war it expands to encompass topics which are otherwise outside the scope of Commonwealth power, in peace it contracts to its former limits.¹⁰⁹

The external affairs power presents more difficult problems. One aspect of the external affairs power, the power to implement treaties and conventions, has the potential to give the Commonwealth legislative power on a wide range of topics, enabling it to avoid limits on its powers.¹¹⁰ For this reason, some judges have argued that this aspect of the power should be limited to implementing treaties which deal with matters which have an external or international aspect, rather than those which only set standards on domestic matters.¹¹¹ This interpretation was finally rejected in the *Tasmanian Dam Case*.

The principle that one power should not be interpreted so as to render other powers otiose provides some support for the narrower interpretation of the external affairs power, even if we do not accept the alarmist view that the broader interpretation enables the Commonwealth executive to extend the legislative powers of the Commonwealth by the simple expedient of entering into a treaty with a foreign power.¹¹² It is not the only consideration, as the implied limits on the power which it suggests must be weighed against the need to ensure that Australia can act effectively to implement its international obligations. A majority in the *Tasmanian Dam Case* decided that the need for Australia to implement its international obligations outweighed any considerations based on the impact of the broad interpretation on other more limited grants of power and on the legislative powers of the states.¹¹³ This is not the place to examine their Honours' arguments in detail, except to point out that

¹⁰⁹ Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis Butterworths, 3rd ed, 2012) 461–2, 466–7.

¹¹⁰ See, eg, *Tasmanian Dam Case* (1983) 158 CLR 1, 196–8 (Wilson J); *ibid* 474, 480–1.

¹¹¹ *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 658 (Starke J), 668–70 (Dixon J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 198–202 (Gibbs CJ), 243 (Aickin J), 248–52 (Wilson J).

¹¹² For an example of such a view, see *ibid* 198–201 (Gibbs CJ).

¹¹³ *Tasmanian Dam Case* (1983) 158 CLR 1, 127 (Mason J), 170–2 (Murphy J), 222 (Brennan J), 254–7 (Deane J).

their Honours were able to strengthen them by appealing to the common assumption that any argument suggesting that a power be limited by reference to the limits found in other grants of power is expressly or impliedly based on the view that the states possess identifiable, exclusive powers.¹¹⁴

VI RESERVED POWERS AND THE DRAWING OF NEGATIVE IMPLICATIONS FROM POSITIVE GRANTS OF POWER

As the majority judgments in the *Tasmanian Dam Case* demonstrate, it has often been assumed that the only way to determine the content of implications of the type under discussion is to assume that the states have identifiable exclusive powers and to use those powers to define the scope of any implied limits on Commonwealth powers. The assumption probably arises because it is impossible to gain much assistance in determining the scope and nature of implications to be drawn from the limits on Commonwealth powers from the fact that s 107 gives the states a general legislative power subject to the principle in s 109 that Commonwealth laws prevail over inconsistent state laws. Those provisions suggest that the *Constitution* intended to divide legislative power between the Commonwealth and states but do not give substance to that division or establish any specific balance of power.

In *Work Choices*, the plaintiffs' counsel — who relied on the division of powers between Commonwealth and state to argue for limits on Commonwealth power, but did not submit that the states had any exclusive powers which could be identified — were unable to give any definite content to the balance of legislative power between the Commonwealth and the states. As a result, they were unable to define the limits that the *Constitution* imposed on the corporations power, instead arguing that it should be subject to some limits and suggesting a range of alternatives.¹¹⁵ The majority made the point that unless content can be given to the concept of a federal balance of power, it is not helpful in determining the scope of a power such as the corporations power.¹¹⁶ And the majority implied that it is not possible to give the concept any content. The majority accepted that it was permissible to draw implica-

¹¹⁴ Ibid 128 (Mason J), 168–9 (Murphy J), 220–1 (Brennan J), 254–5 (Deane J).

¹¹⁵ The alternatives are listed in the majority judgment: *Work Choices* (2006) 229 CLR 1, 117 [184] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

¹¹⁶ Ibid 120–1 [196].

tions but argued that as the *Constitution* did not give the states any specific powers or specify what were the states' core functions, the only implication which could be fairly drawn was that the *Constitution* contemplated that the states were to continue in existence as separate polities but were not guaranteed any exclusive powers or functions.¹¹⁷

Similar points were made even more forcefully in the *Tasmanian Dam Case*, especially by Murphy J. His Honour argued that the notion of federal balance assumed that the states had exclusive reserved powers on which the Commonwealth could not trespass and that the federal balance could only be used to determine limits on Commonwealth power by interpreting Commonwealth powers in the light of the assumed reserved powers.¹¹⁸ Such an approach was wrong because it ignored the fact that state exclusive powers were residual and that their scope could only be discovered after the scope of all Commonwealth powers, including the one before the Court, had been fully determined:

Closely allied to the fallacy of reserved State powers is the doctrine of federal balance. Novel uses of federal legislative power challenged by the States are said to upset 'the federal balance'. According to this proposition, when a challenged law is supported as an exercise of the power to make laws with respect to any subject enumerated in s 51, the Court should disregard the federal power sought to be relied upon, and conceive a federal balance between the other enumerated federal powers and State powers. Then it is claimed that the exercise of the federal power sought to be relied upon would upset the federal balance. ...

In this case, it was contended that the use of the external affairs or the corporations power to support the Acts would upset 'the federal balance'. There are two serious objections to this doctrine. One is that the State powers brought into the balance can only mean 'reserved State powers'. The other is that no rational argument is advanced for disregarding the particular federal power relied upon when achieving the balance. It builds upon the doctrine of reserved State powers by a fallacious method of 'balancing' those notional State powers with some only of the undoubted federal powers. As advanced in this and recent

¹¹⁷ Ibid 119–21 [194]–[196]. See also *Tasmanian Dam Case* (1983) 158 CLR 1, 128–9 (Mason J).

¹¹⁸ *Tasmanian Dam Case* (1983) 158 CLR 1, 168–9.

constitutional cases the doctrine of federal balance presents only a balance between fallacies.¹¹⁹

The majority arguments in *Work Choices* and Murphy J's strictures in the *Tasmanian Dam Case* show the difficulties inherent in appealing to general federal principles, without more, in order to argue for the need to limit Commonwealth powers. Such appeals could work if the *Constitution* granted the states some specific powers which could be appealed to in order to define the limits on Commonwealth powers. But in the absence of such a grant, appeals to the federal balance alone as an argument for limiting the scope of a Commonwealth power lack logic for the reasons given by Murphy J and rightly fail.

Although an interpretive approach in which the states are assumed to have exclusive powers, even if ill-defined, and Commonwealth powers are interpreted so as not to trespass on those powers avoids some of the difficulties posed by appeals to general federal principles such as that of the federal balance, it is unacceptable for a number of reasons.¹²⁰ It lacks a strong foundation in the text, which does not identify specific state powers. Because it identifies state exclusive powers and uses them to determine limits on the scope of Commonwealth powers, it is inconsistent with the general consensus, which has a strong textual basis, that exclusive state powers are residual, only to be discovered after all Commonwealth powers have been interpreted.¹²¹ If a state exclusive powers approach was the only way of giving substance to negative implications on Commonwealth powers, it would greatly strengthen the argument that each Commonwealth power should be interpreted as a stand-alone power not subject to any negative implications. Although a stand-alone interpretation of each power may not be consistent with the intentions of the *Constitution* to divide legislative power between the Commonwealth and the states, the alternative, to define the content of the states' exclusive powers before knowing the full scope of Commonwealth powers, ignores the

¹¹⁹ Ibid 169 (Murphy J).

¹²⁰ Aroney calls such an approach the 'absolute' reserved powers doctrine and is very critical of it for similar reasons: Aroney, 'Constitutional Choices', above n 5, 9–11.

¹²¹ See above nn 43–4 for discussion of the consensus on the meaning of s 107.

fact that the states' powers are residual and cannot be discovered until all Commonwealth powers have been interpreted fully.¹²²

The absence of a grant of specific, exclusive powers to the states does not make it impossible to determine when implications ought to be drawn from the limits on Commonwealth powers and what those implications ought to be. The principle underlying the drawing of such implications, which is that a general power should not be interpreted so as to render a more limited grant of no effect or so as to enable the limits on the narrower grant to be ignored or evaded, gives substantial guidance in determining when to draw such implications and in defining their content. The principle gives guidance both in the identification of those powers which may need to be subject to limits derived from other powers, and the identification of the powers from which such limits should be drawn, ruling out the possibility that every power might be subject to every limit contained in the other powers.¹²³ It also gives guidance in determining the content of any implication which ought to be drawn.

The two ways of identifying negative implications limiting Commonwealth powers — that which seeks first to identify state exclusive powers and implies limits into Commonwealth powers in order to prevent them from trespassing into fields reserved for the states, and that which implies limits into some powers in order to prevent other powers being rendered otiose — do not operate harmoniously together. The principle that states have identifiable exclusive powers is a stand-alone way of determining the necessary limits to Commonwealth powers and does not need to be supplemented by appeals to implied limits on Commonwealth powers drawn from the limits on other powers. If the states have identifiable exclusive powers, they are sufficient to determine the scope of implied limits on Commonwealth powers because the fact that the states have exclusive identifiable powers entails that Commonwealth powers should not be interpreted so as to enable the Commonwealth to exercise powers reserved for the states. This leaves little room for the operation of the independent principle that Commonwealth powers are subject to limits drawn from other powers where necessary to ensure that the

¹²² If these are the only alternatives, they support Winterton's contention that the failure to define exclusive state powers in the *Constitution* was a serious error: George Winterton, 'The High Court and Federalism: A Centenary Evaluation' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 197, 204.

¹²³ See above Part V.

other powers or the limits they contain are not rendered otiose. This is because the limits on power used to identify the exclusive powers of the state are likely to include the limits on power to which some powers must be subject in order to prevent other powers being rendered otiose.

As the majority argument in *Huddart Parker* shows, supporters of the view that the states have identifiable exclusive powers may appeal to limits on Commonwealth power to assist in the identification of those powers.¹²⁴ However, that use of the limits on Commonwealth power is different from the way in which the limits are used in the argument that some Commonwealth powers are by implication subject to limits on other powers where that is necessary to prevent the other powers being rendered otiose. The difference, especially with respect to the identification of state exclusive powers, becomes obvious if the two arguments are set out in point form.

The argument that limits on Commonwealth power can be used to identify the exclusive powers reserved to the states takes the following form:

- The express limits on Commonwealth powers are used to identify the powers exclusively reserved to the states;
- Other Commonwealth powers are interpreted so as not to trespass on the exclusive powers reserved to the states.

In this argument, exclusive state powers are not seen as residual but are identified before the limits on Commonwealth powers are known and are used to determine the limits of Commonwealth powers.

The argument that some Commonwealth powers are by implication subject to limits on other powers where that is necessary to prevent the other powers being rendered otiose takes the following form:

- As a general rule, Commonwealth powers are subject to limits implied from the existence of other powers and the limits which they contain, where failure to make the implication would lead to the other powers being rendered otiose;
- The consistent application of this principle may, by leading to the development of a more coherent picture of the scope of Commonwealth powers, assist in the identification of powers reserved exclusively to the states.

¹²⁴ *Huddart Parker* (1909) 8 CLR 330.

In this argument, exclusive state powers are seen as residual so that they cannot be identified until the scope of all Commonwealth powers has been determined.

VII IMPLICATIONS AND THE HOLISTIC INTERPRETATION OF COMMONWEALTH POWERS

Determining the content of any implications necessary to prevent the interpretation of one power from rendering other powers otiose is one step on the way to defining the content of that power. But all it does is set some limits on the possible scope of that power. By itself, it does not generate a complete interpretation of the power. That has to be based on the words of the grant read in their context. In doing this, we can resolve problems arising from drawing implications for one power from the limits on another power by interpreting the powers so as to avoid overlap and conflict. Consider Isaacs J's example of the potential impact on the trade power of the limit in the corporations power to foreign, trading and financial corporations. His Honour argued that if the limit on the trade power restricted the scope of the corporations power, then the limits on the corporations power should restrict the scope of the trade power, preventing the Commonwealth using the trade power to regulate trade and commerce involving corporations which were not foreign corporations, trading corporations or financial corporations.¹²⁵ That is a counterintuitive result but is not an inevitable result of drawing negative implications from grants of power.

The corporations power only restricts the trade power in the ways suggested if we assume that the corporations power allows the Commonwealth to regulate the trading and other activities of trading corporations. We can avoid most of Isaacs J's difficulties if we adopt an interpretation of the corporations power which does not allow it to be used to control the trade of corporations; for example, interpreting it as a power over the internal affairs of such corporations. *New South Wales v Commonwealth* ('*The Incorporation Case*'),¹²⁶ which followed *Huddart Parker* in denying the Commonwealth power to incorporate companies and regulate their internal affairs, stands in the way of such an interpretation and would have to be reconsidered to allow it. That is

¹²⁵ Ibid 392.

¹²⁶ (1990) 169 CLR 482.

not improbable because the decision has been subject to telling criticism.¹²⁷ Interpreted as limited to permitting the Commonwealth to control the internal affairs of companies, the corporations power has few negative implications for the use of the trade power to control trade. Isaacs J's argument tends to undermine his Honour's own interpretation of the corporations power as extending to the regulation of the trading activities of trading corporations because it makes it difficult to develop a sensible view of the relationship between the trade power and the corporations power.¹²⁸ However, it does not undermine the idea that limits on the scope of one power are relevant to the interpretation of other powers.

The above example shows it is possible to draw some conclusions about the interpretation of some powers from the limits imposed on others by considering what is a reasonable way for them to relate to each other without reference to any overview of the scope of Commonwealth powers or to any theory of the way in which powers are divided between Commonwealth and state. However, it may be difficult to develop an interpretation of other Commonwealth powers which reflects the weight and effect of the limitations on one power for the scope of other powers without developing a holistic, coherent overview of the scope of Commonwealth powers. That cannot be done without some reference to the purpose of giving the Commonwealth limited grants of power, which is to divide power between the Commonwealth and the states.

The doctrine that state power is residual does not rule out holistic interpretations of Commonwealth power in light of the purposes for which limits were imposed on those grants. The residual state powers doctrine reflects the truth that the *Constitution* does not give the states any express exclusive powers, so that state exclusive powers can only be identified after we know the scope of all Commonwealth powers. It rules out an approach in which the states are assumed to have certain identifiable exclusive powers and Commonwealth powers are interpreted so as not to invade those powers. But a

¹²⁷ R L Simmonds, 'The Commonwealth Cannot Incorporate under the Corporations Power: *New South Wales v The Commonwealth*' (1990) 20 *University of Western Australia Law Review* 641, 650–1; Robert P Austin, 'Corporate Confusion: Commonwealth Companies and Securities Regulation after the Constitutional Challenge' (1990) *Australian Corporation Law Bulletin* 27, 29; James Crawford, 'The High Court and the Corporations Power: Incorporations "Reserved" to the States' (1990) *Australian Corporation Law Bulletin* 32, 33.

¹²⁸ *Huddart Parker* (1909) 8 CLR 330, 393.

holistic approach to the interpretation of Commonwealth powers can be developed without assuming that the states have any particular reserved powers. The way to do that is to develop a theory of the role of the Commonwealth government given the powers it was granted and the fact that it is the national government of a federation. It may be impossible to develop such a theory without considering the role of the states, but as long as that can be done without specifying the exclusive powers which the states possess, the approach is not inconsistent with the residual powers doctrine.

Although the idea that state powers are residual does not rule out a holistic interpretation of Commonwealth powers, a holistic interpretation is inconsistent with what has been called the testamentary theory of grants of power to the Commonwealth.¹²⁹ This theory supports the view that when interpreting Commonwealth powers, we should adopt the broadest interpretation consistent with the plain meaning of the words of the grant and ignore the impact of the interpretation on state powers. According to this theory, constitutional grants of power are to be interpreted in a similar way to bequests in a will. The grantor of the power, whether the people or the Imperial Parliament, is assumed to be in a position analogous to that of a testator. The specific grants of power to the Commonwealth are assumed to be similar to specific bequests in a will, while the grant of residual powers to the states is equated to the gift of any residue to a residual legatee. According to the analogy, just as it is wrong to interpret specific grants in a will in order to ensure that the residual legatee receives a bequest, it is wrong to interpret Commonwealth powers so as to ensure that the states retain some specific residual powers. Instead, just as the words of specific bequests in a will are to be given a broad natural meaning without regard to the impact on the residual bequest, Commonwealth powers should each be interpreted as broadly as the natural meaning of the words permits without any reference to the impact on the legislative powers of the states.¹³⁰

The analogy implies that the Imperial Parliament, like a testator, had total control over how powers were divided between Commonwealth and states, thus ignoring the drafting history of the *Constitution*, in which the division of powers was the subject of negotiation and debate between delegates represent-

¹²⁹ Aroney, 'Constitutional Choices', above n 5, 23.

¹³⁰ *Huddart Parker* (1909) 8 CLR 330, 389–91 (Isaacs J); *Engineers' Case* (1920) 28 CLR 129, 153–5 (Knox CJ, Isaacs, Rich and Starke JJ).

ing the interests of the 'legatees', the future Commonwealth and state governments. The analogy also fails because a residuary bequest is not necessarily a device for dividing up an estate but may only be intended to ensure that no part of the estate falls outside a bequest. Hence there is no reason for interpreting specific bequests so as to ensure that the residual legatee receives a reasonable amount. On the other hand, the grant of specific powers to the Commonwealth and of all other powers to the states is designed to divide up legislative power so that there is good reason for interpreting the grants so as to ensure that the states retain a reasonable amount of exclusive residual power.¹³¹

The testamentary model receives its greatest support from the principles used to interpret grants of legislative powers to self-governing colonies. Isaacs J pointed out that the Imperial Parliament typically granted plenary powers, that is 'an "authority as plenary and as ample ... as the Imperial Parliament in the plenitude of its power possessed and could bestow"', to colonial and dominion legislatures.¹³² Applying this principle, his Honour concluded that in each grant of power to the Commonwealth, the Imperial Parliament granted all of the power over the subject matter of the grant which it possessed, so that each power should be interpreted broadly, giving the words their natural meaning, without assuming any limits designed to protect the states.¹³³ The conclusion is unwarranted. It is true that the Imperial Parliament did grant plenary powers to self-governing colonies and dominions, but in the Australian context, that grant was to the Commonwealth and states combined. Hence the principle only entails that in the Australian context, the combined powers of the Commonwealth and state Parliaments are plenary. The principle has nothing to say on the division of power between Commonwealth and state because the principles governing that were not a

¹³¹ Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 199–200. Sawer is also critical of the analogy.

¹³² *Engineers' Case* (1920) 28 CLR 129, 153 (Knox CJ, Isaacs, Rich and Starke JJ), quoting *Hodge v The Queen* (1883) 9 App Cas 117, 132 (Sir Barnes Peacock for the Court). See also *Huddart Parker* (1909) 8 CLR 330, 389 (Isaacs J).

¹³³ *Engineers' Case* (1920) 28 CLR 129, 153–4 (Knox CJ, Isaacs, Rich and Starke JJ).

matter of Imperial law or policy but were a domestic matter for Australians to determine.¹³⁴

The fact that the states are not granted any express exclusive powers, but only have residual powers, does not require that Commonwealth powers are to be interpreted broadly as stand-alone grants without considering the impact on the states. Instead, the residual nature of state exclusive power may require rather than rule out a holistic interpretation of Commonwealth powers which takes into account the impact on the states. In the absence of any express exclusive state powers, the interpretation of s 51 should start from the premise that the limits on the grants of power it contains are the main way in which the *Constitution* preserves some exclusive powers to the states. As a result, Commonwealth powers ought to be interpreted as a whole because the notion of state residual powers requires that any negative implications as to the scope of Commonwealth powers, designed to protect state power, must be drawn from the existence of specific grants to the Commonwealth and from the terms of the grants rather than from any assumptions about which powers the *Constitution* reserves to the states.

In the *Tasmanian Dam Case*, Murphy J criticised attempts to use notions of the federal balance in the interpretation of a particular power as being unjustifiable.¹³⁵ These criticisms also apply to approaches to holistic interpretations in which a holistic interpretation is developed without taking into account the power being interpreted and is then used to limit the scope of the power in question. But they are only true of a rigid application of a holistic interpretation to limit the scope of a power where the clear meaning of the words of the power requires a broader interpretation. They do not rule out an interpretation in which, in cases where more than one interpretation is consistent with the words of a grant, the court looks at a holistic overview of the extent of Commonwealth powers and adopts the interpretation which is more consistent with that overview. To appeal to an overview in cases where more than one interpretation is open on the words is to do no more than

¹³⁴ Hence, the Privy Council had no inherent jurisdiction over questions relating to the Commonwealth–state balance of power, but only had jurisdiction with the leave of the High Court: *Australian Constitution* s 74.

¹³⁵ See above n 119 and accompanying text. See also *Tasmanian Dam Case* (1983) 158 CLR 1, 254–5 (Deane J).

apply the well-accepted canon of construction that, especially in cases of doubt, words are to be interpreted in their context.¹³⁶

Mason J was also critical of holistic approaches to interpreting Commonwealth powers based on ideas of federal balance in the *Tasmanian Dam Case*. His Honour argued that such holistic approaches tended to substitute a model of the federation and of the proper role of the Commonwealth in it as it was at a particular point in time, especially federation, for the actual division of powers embodied in the *Constitution*.¹³⁷ His Honour is correct to the extent that there is a tendency to base holistic approaches on models of how the *Constitution* worked at a particular point in time. His Honour is also correct in that there is no justification for taking a snapshot of the federation as it was at any time and arguing that this is how the *Constitution* intends the federation to operate for all time. However, neither of these criticisms are reasons for rejecting holistic interpretations completely. They are warnings that the advocates of holistic approaches must do more than base those interpretations on particular historic models of the balance of power. What is required is a holistic model of the Commonwealth grants of power which is consistent with the terms in which they are granted and which is justifiable in terms of federal, democratic, republican and other principles, rather than one which the framers would have endorsed or which was current at any particular time. Fine-grained arguments about the scope of the negative implications to be drawn from the limits of grants of power, such as that with respect to the implications which flow from the terms of the arbitration power developed above,¹³⁸ should play a major role in any holistic model.

Perhaps because of criticisms of the type Mason J and Murphy J made and because of a more general sense that a holistic interpretation is inconsistent with the idea of residual powers, even judges who have dissented from the prevailing paradigm under which Commonwealth powers are interpreted separately and broadly have been reluctant to embrace holistic interpretations of Commonwealth powers wholeheartedly. Gibbs CJ, Wilson J and Dawson J adopted a narrow version of such an approach in their Honours' dissents in

¹³⁶ It has always been accepted that this canon of construction is relevant to constitutional interpretation. Even Isaacs J accepted it in *Huddart Parker*: (1909) 8 CLR 330, 388. His Honour also appeared to consider it relevant in the *Engineers' Case*: (1920) 28 CLR 129, 151.

¹³⁷ *Tasmanian Dam Case* (1983) 158 CLR 1, 126–7. See also *Work Choices* (2006) 229 CLR 1, 73–4 [54] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

¹³⁸ See above nn 97–100 and accompanying text.

the *Tasmanian Dam Case*, arguing that no one power should be interpreted as giving the Commonwealth a general, unlimited legislative power which would render the limited grants of power in s 51 otiose.¹³⁹ Limiting the approach so that it only ruled out interpretations of one power which were potentially so broad as to give the Commonwealth a general legislative power or to render the other grants of power otiose, enabled their Honours to avoid the task of developing a defensible overview of Commonwealth powers. It also enabled their Honours to argue that they were not attempting to revive the reserved powers doctrine.¹⁴⁰ But it is easily dismissed on the ground that realistically there is no power which went close to giving the Commonwealth unfettered legislative power.

In *Work Choices*, the two dissenting judges, Kirby J and Callinan J, were more prepared to adopt a holistic approach. Kirby J addressed the issue directly, adopting a position akin to that taken in this article: that a holistic approach is relevant in determining the scope of Commonwealth powers before any state powers are identified and that it does not entail a commitment to the view that the Constitution preserves particular state powers.¹⁴¹ Callinan J was equally direct, arguing that:

Each of the placita of s 51 deals with a discrete topic. There may be, indeed there is in some cases, a clear possibility of some overlapping, but instances of it are likely to be rare and slight, and a construction which allows them should, wherever possible, be avoided, for two reasons: that it is unlikely that the authors of the *Constitution* intended to repeat themselves, or did so by accident; and because it is an elementary principle of construction that each word and phrase of an instrument has its own work to do.¹⁴²

In his Honour's view, interpreting each grant of power broadly without reference to its relationship to other powers is inconsistent with a holistic interpretation and should be rejected for that reason:

[B]ut it is a negation of that acceptance [of the need to interpret the Constitution as a whole] to read each placitum, in particular placitum (xx), as broadly as possible, regardless whether it is verbally apt for the matters enacted in pur-

¹³⁹ (1983) 158 CLR 1, 99–100 (Gibbs CJ), 196–8 (Wilson J), 302–4 (Dawson J).

¹⁴⁰ Ibid 100 (Gibbs CJ), 197 (Wilson J), 302 (Dawson J).

¹⁴¹ (2006) 229 CLR 1, 201–2 [469]–[472].

¹⁴² Ibid 333 [798].

ported reliance upon it, or whether it is productive of a form of overlapping of a power of a kind which it is inconceivable that careful and accomplished drafters such as the founders would ever have intended or achieved.¹⁴³

Since *Strickland*, the High Court has been reluctant to adopt a holistic interpretation of the corporations power or to consider how it relates to other powers in s 51. This reluctance may be based on the realisation that a holistic interpretation requires that some limitations need to be placed on the extent to which the corporations power authorises the Commonwealth to regulate the trading activities of trading companies in order to give effect to the limitation on the trade power to trade with other countries and trade among the states. As argued above, a holistic interpretation of the grants of Commonwealth power needs to recognise that the trade power is the most important of the Commonwealth powers over the economy because of its broad scope, extending to trade and commerce in general, rather than to particular aspects of it such as the activities of corporations, intellectual property or communications.¹⁴⁴ Recognition of the primacy of the trade power entails recognising that the Commonwealth's power over the economy is necessarily limited.

However, before the primacy of the trade power can be recognised, it needs to be interpreted broadly in a way which is consistent with its status as the most important power of the national government over the economy. The High Court has consistently failed to do that, instead equating the constitutional term 'trade ... among the States',¹⁴⁵ with interstate trade and refusing, with few exceptions, to adopt anything approaching the doctrine that when national and local elements of an economic activity 'are so intermingled'¹⁴⁶ that it is impossible to control the national elements effectively without being able to control the local elements, the trade power extends to both elements.¹⁴⁷ That interpretation leaves the Commonwealth with too little power

¹⁴³ Ibid 333 [799].

¹⁴⁴ See above nn 33–8 and accompanying text.

¹⁴⁵ *Australian Constitution* s 51(i).

¹⁴⁶ *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 628 (Latham CJ).

¹⁴⁷ Ibid 628–9 (Latham CJ), 671 (Dixon J), 677 (Evatt and McTiernan JJ); *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54, 78 (Barwick CJ), 115 (Kitto J), 128 (Taylor J), 142–3 (Menzies J), 155 (Windeyer J); *A-G (WA) ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492, 499 (Barwick CJ), 502–3 (Gibbs J), 508–11 (Stephen J). Before *Cole v Whitfield* (1988) 165 CLR

over the national economy, making it inevitable that the Court would find another source of power which the Commonwealth could use to make up the shortfall.

In *Strickland* the Court found that source of power in the corporations power. In doing so, it of necessity abandoned holistic interpretations of the grants of Commonwealth power because they did not support the interpretation of the corporations power necessary for it to become a source of power over the whole economy. Hence, it is unlikely that the Court will ever adopt a holistic interpretation of Commonwealth powers without at the same time reconsidering the scope of the trade power and its relationship to the corporations power. Until that happens, many limits on Commonwealth power will remain ineffective because they are not seen as relevant to the interpretation of other powers. As a result, they will not operate as they should as the major constitutional device for limiting Commonwealth power and thus ensuring some residual powers remain for the states.

It may seem that, if we adopt a broad interpretation of the trade power, the imbalance of power between the Commonwealth and states will remain and all that will change is the head of power on which Commonwealth predominance is based. That is not the case. If the trade power is to resume its proper place as the predominant Commonwealth power over the economy, it needs to be interpreted broadly. It is not desirable or feasible to turn the clock back to a time in which the Commonwealth had little power over the economy. The Commonwealth has become the dominant regulator of the economy and that change cannot be reversed.

However, having the trade power as the dominant economic power requires the Court to consider whether a particular aspect of trade is truly trade among the states and subject to Commonwealth regulation, or is predominantly local and subject to exclusive state control. Hence, it requires the Court to consider directly how power over the economy should be divided between the Commonwealth and the states. The corporations power does not require the Court to confront such issues.

There are many reasons why the Court needs to confront these issues, which can only be mentioned in this paper. First, states have a legitimate

360, the Court may have adopted a narrow interpretation of the trade power because it feared that a broad interpretation of its terms may have extended the scope of s 92, which uses the same terms, to an unwarranted extent: Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 83–7.

claim to share in the power to regulate the economy. They are equally democratic so increasing state powers over the local economy does not necessarily lead to any democratic deficit. Principles such as subsidiarity suggest that accountability, democracy and efficiency are enhanced if decisions are made by the people who are most affected by them.¹⁴⁸ According to these principles, local issues, including local aspects of the economy, are better regulated locally than nationally.

Besides, we cannot assume that centralising regulation of the economy in the Commonwealth rather than allowing for decentralised state regulation always leads to greater efficiency and fairness. In some areas of regulation, allowing states to offer competing regulatory models may enhance efficiency and fairness as long as we can avoid a race to the bottom.¹⁴⁹ However, there are disadvantages in permitting greater state control. Compliance costs increase where a business has to deal with more than one regulator. Smaller states in particular may lack the resources and the political will to enforce regulations properly. States may also be more likely to be captured by local sectional interests than is the Commonwealth.¹⁵⁰

It may seem that politically responsible legislators rather than courts ought to determine issues of the sort outlined above because they involve complex political judgements. If that is correct, it suggests that Commonwealth powers

¹⁴⁸ There is a huge literature on subsidiarity, which is of growing significance in constitutional systems around the world. For a good introduction, see Michelle Evans and Augusto Zimmermann (eds), *Global Perspectives on Subsidiarity* (Springer, 2014). Subsidiarity cannot be seen as a magic bullet which will solve all problems relating to the federal balance in Australia: Nicholas Aroney, 'Subsidiarity: European Lessons for Australia's Federal Balance' (2011) 39 *Federal Law Review* 213.

¹⁴⁹ For example, Whincop considers the arguments for pursuing efficiency through allowing competition in corporate law through state control, showing that in this area at least the arguments for state control are stronger than often assumed: Michael J Whincop, 'The Political Economy of Corporate Law Reform in Australia' (1999) 27 *Federal Law Review* 77, 99–100, 101–3, 119–20.

¹⁵⁰ One of Madison's arguments for a strong federal government in the United States was that it was likely to be less prone to capture by factions or special interests than the governments of the states: James Madison, 'The Same Subject Continued: The Union as a Safeguard against Domestic Factions and Insurrection' (*Federalist No 10*) (23 November 1787) in Library of Congress, 'The Federalist Papers' (online) <thomas.loc.gov/home/histdox/fed_10.html>. For examples of the impact of special interests on state decision-making in the area of environmental impact assessment, see Tim Bonyhady and Andrew Macintosh (eds), *Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects* (Federation Press, 2010).

ought to be interpreted as broadly as possible, so that the Commonwealth legislature is unconstrained in its consideration of these issues. However, leaving such issues in the hands of politicians leaves them in the hands of the Commonwealth because there is no constitutional or other mechanism for ensuring that state legislatures have any input. Hence it negates any interest which the states have in the constitutional balance of power. An unbiased mediator is needed to ensure that the interests of the states are taken into account. The courts are the nearest we have to that.

VIII CONCLUSION

A common criticism of the drawing of negative implications from positive grants of power is that it is derived from a view of the constitutional powers of the states ‘formed independently of the text’, in which it is assumed that the states possess identifiable exclusive powers.¹⁵¹ This article rejects that criticism, arguing that it is possible to determine the content of such implications from the principle that broad powers should not be interpreted so as to render other powers and the limits they contain of no effect.

If that is correct, an interpretive approach in which limits on some grants of power may limit the scope of other grants of power is a better interpretation than one in which each power is interpreted as a separate stand-alone power without taking into account other powers and their limits. There is a strong textual basis for treating state exclusive powers as residual and only discoverable after the scope of all Commonwealth powers has been identified. However, this entails that, given the *Constitution* provides for a federation in which the Commonwealth and states share jurisdiction over the same territory, the limits on Commonwealth power in s 51 are the main means of guaranteeing the states some legislative power. That this is their purpose needs to be taken into account in their interpretation. An interpretive approach in which negative implications arising from the existence of one power and the limits it contains are seen as relevant to the interpretation of other powers, gives effect to these limits so as to ensure the states have permanent identifiable powers, something which the stand-alone approach does not do.

¹⁵¹ *Work Choices* (2006) 229 CLR 1, 119–20 [194] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

The interpretive principles which the *Engineers' Case* adopted favour giving the words of the *Constitution* their natural meaning without limiting their scope by means of unnecessary implications.¹⁵² They only require a stand-alone approach to interpreting grants of power if all approaches to interpretation in which the limits on one power are taken into account in the interpretation of other powers are based on unnecessary implications. In *Huddart Parker*, Isaacs J criticised interpretive approaches in which the limits on one power are seen as relevant to the interpretation of other powers on the grounds that they drew unwarranted negative implications from positive grants of power.¹⁵³ This article rejects this criticism, demonstrating that it is necessary to draw negative implications from positive grants of power and that any acceptable interpretation of positive grants of power, including an interpretation in which each grant is interpreted without reference to the other grants, necessarily draws such negative implications. As some negative implications are a necessary corollary of positive grants of power, the issue become one of the exact content of the implications. This article argues that the best interpretation of the *Constitution* is one in which the negative implications which result from the grant of a power and the limits on that grant are relevant to the interpretation of other powers.

Once the assumption that it is wrong to draw negative implications from positive grants of power is discounted, the major justification which Isaacs J offers for interpreting each grant as a stand-alone grant is that an interpretation in which negative implications are drawn from positive grants of power and the limits which they contain is unworkable. That justification depends in large part on an exaggeration of the number of negative implications which can be derived from the grants of Commonwealth power.

Isaacs J's arguments led his Honour to adopt an interpretation which does not give full weight to the limits on each power. It allows powers to be interpreted so as to enable the limits on one power to be avoided and rendered of no effect by the use of another power which is not subject to those limits. *Work Choices* and other recent cases which have applied Isaacs J's approach have led to so much power being concentrated in the hands of the Commonwealth that the states face the prospect of being left with little power or autonomy. Although it is counterintuitive to allow one of the powers in a

¹⁵² (1920) 28 CLR 129, 148–50 (Knox CJ, Isaacs, Rich and Starke JJ).

¹⁵³ (1909) 8 CLR 330, 390–2.

list of powers to swallow up other powers and to give almost unlimited power to the Commonwealth, Isaacs J's approach allows the corporations power to be interpreted so as to achieve that result.

This article recognises that determining the content of negative implications limiting the scope of a broad power is only the first step in the interpretation of that power. After this has been done, it is necessary to develop an interpretation of the words of the grant which is consistent with the limits to which the power is subject. Any interpretation of grants of power which takes into account implications derived from the existence of other powers and the limits which they contain must be based on a view of how those powers relate to each other. Hence it favours a coherent, holistic interpretation of Commonwealth powers. This article has rejected common criticisms of holistic approaches, especially the claim that they are necessarily based on the claim that the states have identifiable exclusive powers. It has recognised that approaches which adopt a holistic interpretation in order to maintain a preconceived notion of the federal balance are based on such a claim, but not all holistic approaches have that purpose. Instead, this article argues that some holistic interpretations are more consistent with the text of the *Constitution* than interpretations which interpret each power as a stand-alone power, because they recognise that the limits on Commonwealth power are the main way of defining the exclusive powers of the states.

This article concludes that it is unlikely that a holistic interpretation of Commonwealth powers will be adopted unless there is a reconsideration of the scope of the trade power and its relationship to the corporations power. The trade power has been interpreted so narrowly that it has not given the Commonwealth the power over the national economy which a national government needs. As a result, it became inevitable that the High Court would develop another power as a broad economic power. It chose the corporations power. That choice necessitated the abandonment of any attempt to develop a holistic approach to the interpretation of Commonwealth powers in which the limits on one power are seen as relevant to the interpretation of other powers because such an approach requires a consideration of the relationship between the corporations power and the trade power. Such a consideration would probably have ruled out the development of the corporations power as a power over the trade of corporations, thus preventing its development as a general power over the economy.