Wong

v.

Commonwealth of Australia

Selim

v.

Lele, Tan and Rivett constituting the Professional Services Review Committee No 309

High Court of Australia
2 February 2009
[2009] HCA 3

FRENCH CJ AND GUMMOW J.

The appeals

1 These appeals were heard together. Both appellants carry on in New South Wales private practice as general medical practitioners. They are "vocationally registered general practitioners" within the meaning of s 3F of the *Health Insurance Act* 1973 (Cth) ("the Act").

2 Part VAA of the Act (ss 80-106ZR) is headed "The Professional Services Review Scheme" and was introduced in its original form in 1994 by the *Health Legislation (Professional Services Review) Amendment Act* 1994 (Cth) ("the 1994 Act")[1]. The definition in s 82 of "inappropriate practice" is central to the operation of the scheme established by Pt VAA. A finding that a practitioner has engaged in "inappropriate practice" may lead, among other consequences, to the imposition of an obligation to repay to the Commonwealth Medicare benefits paid for services rendered in connection with inappropriate practice (s 106U(1)(ca)) and to full disqualification

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1 Part VAA was amended by the *Health Insurance Amendment (Professional Services Review) Act* 1999 (Cth) and the *Health Legislation Amendment Act (No 3)* 1999 (Cth). Part VAA was further amended by the *Health Insurance Amendment (Professional Services Review and Other Matters) Act* 2002 (Cth) ("the 2002 Act"). This was after the institution of proceedings respecting the appellants and the Full Court applied Pt VAA as it stood before the 2002 Act: (2008) 167 FCR 61 at 63.

from provision of services under the Act (s 106U(1)(h)) for a period of up to three years (s 106U(4)).

3 On 13 January 2004 (in the case of Dr Wong) and 10 October 2003 (in the case of Dr Selim) findings were made that the appellants had engaged in conduct constituting "inappropriate practice".

4 The appeals are brought to this Court from the decisions of the Full Court of the Federal Court reported as *Selim v Lele*[2]. The Full Court (Black CJ, Finn and Lander JJ) dismissed an appeal by Dr Selim from the decision of Stone J[3], and answered adversely to Dr Wong questions referred to the Full Court in a proceeding which had been instituted by him in this Court and remitted by order of Gleeson CJ to the Federal Court.

5 The relief sought in this Court is in or to the effect of a declaration that:

> "Sections 10, 20, 20A and [Pt] VAA (or any provision of [Pt] VAA) of [the Act] amount to 'civil conscription' within the meaning of [s] 51(xxiiiA) of the Constitution, and are outside the legislative powers of the Commonwealth and invalid."

6 Sections 10, 20 and 20A of the Act deal with entitlement to Medicare benefit, payment to the persons incurring the medical expenses in respect of professional service and assignment of Medicare benefit to the relevant practitioner.

7 Section 51(xxiiiA) was added after a referendum conducted under s 128 of the Constitution on 28 September 1946 and reads:

> "the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances".

The Full Court decision

8 Of the claims respecting the invalidity of ss 10, 20 and 20A of the Act, the Full Court concluded[4] that these provisions do not compel a medical practitioner to render any professional service to any person.

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2 (2008) 167 FCR 61.

3 (2006) 150 FCR 83.

4 (2008) 167 FCR 61 at 80.

9 With respect to Pt VAA, the Full Court adopted the statement by Davies J in *Yung v Adams*[5]:

> "The Commonwealth's interest is to see that the services which are provided by a medical practitioner and for which a Commonwealth benefit is or may be claimed are services in respect of which the medical practitioner provides due care and skill, that a claim if made is brought under the correct item and that overservicing does not occur."

The Full Court then concluded[6]:

> "To the extent that there is a practical compulsion for general practitioners to participate in the Medicare Scheme, what is compelled is not service of the Commonwealth. Rather, it is that they conduct their practices with the care and skill that would be acceptable to the general body of practitioners. Such a condition is 'clearly necessary to the effective exercise of the power conferred by s 51(xxiiiA)'. The Act does not authorise civil conscription."

The quotation in the third sentence is from the judgment of Gibbs J in *General Practitioners Society v The Commonwealth*[7]. As will become apparent later in these reasons, what was said by Gibbs J is not wholly satisfactory. With that caveat, and for the reasons that follow, the conclusions reached by the Full Court should be accepted and the appeals dismissed.

Previous decisions

10 In *General Practitioners*[8] the Court rejected the submission by the plaintiffs[9] that for "civil conscription" within the meaning of s 51(xxiiiA) of the Constitution:

> "[a]ll that is required is that an action which otherwise would not be done or might otherwise be done voluntarily is now required by federal law. No question of degree is involved. If there is any species or kind of conscription, the law is bad."

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5 (1997) 80 FCR 453 at 459.

6 (2008) 167 FCR 61 at 80-81.

7 (1980) 145 CLR 532 at 557; [1980] HCA 30.

8 (1980) 145 CLR 532.

9 (1980) 145 CLR 532 at 535.

On the other hand, the Court, whilst upholding the challenged provisions, did not wholly accept the submission for the Commonwealth[10] that there is civil conscription only where the compulsion in the statute:

> "extends across the area of medical practice so as to render the service compelled a medical service of the Commonwealth".

In the submissions by the Solicitor-General on the present appeals, the Commonwealth renewed and developed that submission. The Solicitor-General contended that, within the meaning of s 51(xxiiiA), "civil conscription" involves (a) some form of compulsion or coercion which is properly described as the rendering of service or the doing of work and (b) that work or service is for or at the direction of the Commonwealth; the challenged legislation did not satisfy requirement (a) and there was no form of civil conscription.

11 Upon a stated case, the Full Court in *General Practitioners* answered "No" to questions challenging the validity of ss 16A, 16B and 16C of the Act and of certain regulations. Various obligations were placed upon persons wishing to become and remain approved pathology practitioners; the payment of medical benefits was contingent upon the provision of services by approved pathology practitioners. A distinction was drawn in *General Practitioners* between regulation of the manner in which some of the incidents of the practices of medical practitioners were carried out and the compulsion, legal or practical, to carry on that practice and provide the services in question. The laws under challenge were held to be of the former character and thus were valid.

12 The distinction was treated by Gibbs J[11] as supported by what had been said by Dixon J in his dissenting judgment in *British Medical Association v The Commonwealth*[12], respecting the permissible regulation of financial and administrative incidents of medical or dental practice. However, to fix upon a notion of reasonable regulation, with its resonances of judicial exegesis of s 92 of the Constitution[13], manifests an inadequate appreciation of the reasoning of Dixon J in the *BMA Case*. His Honour said that inherent in the notion conveyed by the words "any form of civil

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10 (1980) 145 CLR 532 at 536.

11 (1980) 145 CLR 532 at 558. Stephen J (at 563), Mason J (at 564), Murphy J (at 565) and Wilson J (at 571-572) agreed with Gibbs J in this respect.

12 (1949) 79 CLR 201 at 278; [1949] HCA 44.

13 *Betfair Pty Ltd v Western Australia* (2008) 82 ALJR 600 at 618-621 [85]-[105]; 244 ALR 32 at 56-60; [2008] HCA 11.

conscription" was "compulsion to serve"[14]. The service so compelled might be "irregular or intermittent", so that a duty to give medical attention to hospital outpatients for two hours once a fortnight "would no doubt be a form of civil conscription"[15]. Nor, in Dixon J's view, was it necessary that the proscribed law involve the relationship of employer and employee; a law requiring a medical practitioner to perform medical services for patients at the practitioner's own rooms would involve a form of civil conscription[16].

13 But, to Dixon J, compulsion to serve medically or to render medical services was one thing, and a law stipulating the manner in which an incident of medical practice was carried out, was another. Those incidents included financial and administrative matters, and s 7A was a law of this character. It did not compel a form of civil conscription because[17]:

> "There is no compulsion to serve as a medical man, to attend patients, to render medical services to patients, or to act in any other medical capacity, whether regularly or occasionally, over a period of time, however short, or intermittently."

14 A provision numbered s 7A was inserted in the *Pharmaceutical Benefits Act* 1947 (Cth) by the *Pharmaceutical Benefits Act* 1949 (Cth)[18], then repealed by the *Pharmaceutical Benefits Act (No 2)* 1949 (Cth)[19] which introduced s 7A in the form successfully challenged in the *BMA Case*. In that case, Williams J said of the statute as enacted in 1947 that it[20]:

> "did not seek to compel medical practitioners to write prescriptions on Commonwealth forms. They were supplied with copies of the formulary and with forms and requested to use the forms when a pharmaceutical benefit was prescribed."

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14 (1949) 79 CLR 201 at 278.

15 (1949) 79 CLR 201 at 278.

16 (1949) 79 CLR 201 at 278.

17 (1949) 79 CLR 201 at 278.

18 Act 8 of 1949.

19 Act 26 of 1949.

20 (1949) 79 CLR 201 at 288.

His Honour continued[21]:

> "We were told by the Attorney-General that the government believed that medical practitioners would co-operate voluntarily and that it would not be necessary to use compulsion. It may have been thought that patients would exercise a practical compulsion by urging practitioners to use the forms so that they might become entitled to receive the pharmaceutical benefits. But neither event happened and s 7A was inserted in the principal Act by Acts Nos 8 and 26 of 1949 to make the use of the Commonwealth forms compulsory."

15 In the *BMA Case*, the majority decision (Latham CJ, Rich, Williams and Webb JJ; Dixon and McTiernan JJ dissenting) was that s 7A was invalid as authorising a form of civil conscription of medical services. The section, however, required use of a statutory form for the writing of any prescription, whether or not the medicines were to be obtained free by the patient under the Commonwealth scheme. Thus there was no necessary connection with the head legislative power in s 51(xxiiiA) of the Constitution. The result in the *BMA Case* was rationalised by Barwick CJ and by Gibbs J on that basis in their reasons in *General Practitioners*[22]. (The question whether, upon that understanding of the earlier case, s 7A was to be read down, and with what consequences, was not explored by their Honours in *General Practitioners*.) The argument of the plaintiffs in *General Practitioners*, described above, was derived from a wider reading of the *BMA Case* than that which was to be accepted in *General Practitioners*.

16 Gibbs J expressed his conclusion in terms reflecting the reasoning of Dixon J in the *BMA Case*, saying[23]:

> "The provisions in question in these proceedings do compel medical practitioners to perform certain duties in the course of carrying out their medical practices, but they do not go beyond regulating the manner in which some of the incidents of those practices are carried out, and they do not compel any medical practitioner to perform any medical services. Most of the duties imposed relate only to things done incidentally in the course of practice, rather than to a medical service itself."

17 There was some debate in *General Practitioners* as to whether "practical compulsion" as distinct from "legal compulsion" would satisfy the constitutional

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21 (1949) 79 CLR 201 at 288-289.

22 (1980) 145 CLR 532 at 537, 558-559 respectively.

23 (1980) 145 CLR 532 at 559-560.

conception of "civil conscription". Mason J and Wilson J[24] reserved their position. However, in argument on the present appeals, the Commonwealth accepted that "practical compulsion" would suffice.

Constitutional interpretation

18 As demonstrated by the arguments submitted on the present appeals to this Court, there remains some uncertainty respecting the phrase "(but not so as to authorize any form of civil conscription)". Each side sought to turn this to its advantage. However, both approached the issue of constitutional interpretation in a manner which differs from that in the two previous cases. These were decided in 1949 and 1980 respectively, at a time when the doctrine of the Court took a limited view of the use of extrinsic materials in the interpretation of the Constitution, including interpretation of provisions added to the Constitution under the alteration procedures of s 128.

19 The present parties, encouraged by *Cole v Whitfield*[25] and *Betfair Pty Ltd v Western Australia*[26], relied upon matters of legislative history to assist the interpretation of s 51(xxiiiA).

20 The issues which arise in the pursuit of that endeavour illustrate the proposition that diverse and complex questions of construction of the Constitution are not answered by adoption and application of any particular, all-embracing and revelatory theory or doctrine[27]. The character of s 51(xxiiiA) as a product of the machinery prescribed by s 128 for the alteration of the Constitution gives a particular character to matters of legislative history.

21 Sir William Harrison Moore saw in s 128 a recognition of three principles: those of Parliamentary government, of democracy and of federalism[28]. The requirement that the genesis of change be a proposed law for the alteration of the Constitution and that this be placed before each legislative chamber directs attention to the considerations which animated the executive and legislative branches of government.

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24 (1980) 145 CLR 532 at 564, 571-572 respectively.

25 (1988) 165 CLR 360; [1988] HCA 18.

26 (2008) 82 ALJR 600; 244 ALR 32.

27 See *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51 at 75 [40]-[44]; [2002] HCA 18; Heydon, "Theories of Constitutional Interpretation: a Taxonomy", *Bar News* (Winter 2007) 12 at 26-27.

28 *The Constitution of the Commonwealth of Australia*, 2nd ed (1910) at 599.

22 Section 128 goes on to provide that the vote upon a proposed law submitted to the electors "shall be taken in such manner as the Parliament prescribes". The Parliament acted accordingly in 1906, enacting the *Referendum (Constitution Alteration) Act* 1906 (Cth) ("the Referendum Act"). Section 6A, first introduced in 1912[29], was designed to enable electors to be informed of "the plain facts of the case, as set forth by each side"[30]. Mr W M Hughes, the Attorney-General, went on[31]:

> "Quite a number of measures, admirable in themselves, have been rejected by the Swiss people; and to a large extent this has been due to the lack of precise information at the disposal of the elector. In America, the referendum and initiative have been grafted on to the Constitution in several States, and many of them have adopted this method of approaching the elector."

23 The procedures mandated by the Constitution for the adoption of s 51(xxiiiA) in 1946 invite particular attention to the matters of history and usage to which reference was made in the submissions in these appeals. No doubt those matters cannot be and are not determinative of the construction and interpretation of the addition made to s 51. But their importance is supported by the lack of any clear meaning apparent on the face of the text of the expression "any form of civil conscription".

24 In their reasons in the *BMA Case*, Rich J said of the phrase "civil conscription" that it was "somewhat of a novelty", Williams J said it had "no ordinary meaning in the English language", and Webb J said that he could not remember seeing or hearing it until he saw it in the proposed law for the 1946 referendum[32].

25 Later, in the course of his reasons in *General Practitioners*, Aickin J remarked[33]:

> "'Civil conscription' is not a technical expression with a settled historical meaning. It is no doubt used by way of analogy to military conscription but the use of the words 'any form of civil conscription' indicates to my mind an intention to give the term a wide rather than a narrow meaning, the precise extent of which cannot be determined in advance."

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29 By s 2 of the *Referendum (Constitution Alteration) Act [No 2]* 1912 (Cth).

30 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 December 1912 at 7153.

31 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 16 December 1912 at 7154.

32 (1949) 79 CLR 201 at 255 per Rich J, 287 per Williams J, 292 per Webb J.

33 (1980) 145 CLR 532 at 571.

26 Those remarks repay study and invite comment.

Conscription – The Australian setting

27 In this country, the subject of military conscription, especially for service beyond the limits of the Commonwealth, is associated with highly controversial political and social divisions during World War I. The *Military Service Referendum Act* 1916 (Cth) had authorised a plebiscite, conducted on 28 October 1916, posing the question "Are you in favour of the Government having, in this grave emergency, the same compulsory powers over citizens in regard to requiring their military service, for the term of this War, outside the Commonwealth, as it now has in regard to military service within the Commonwealth?".

28 Compulsory military service within the Commonwealth was provided for in Pt IV (ss 59-61A) of the *Defence Act* 1903 (Cth). The distinction between military service within and beyond the geographical limits of the Commonwealth, which was critical to the controversies during World War I, has a general significance. It shows that the place at which service is required may be an aspect of a form of conscription.

29 The conduct of the 1916 plebiscite, called a "referendum", was controlled by provisions of the Referendum Act which were applied (by s 7) as if the prescribed question were a proposed law to which s 128 of the Constitution applied. The Referendum Act included the compulsory voting provisions introduced by the *Compulsory Voting Act* 1915 (Cth)[34].

30 The War Precautions (Military Service Referendum) Regulations[35] made under the *War Precautions Act* 1914 (Cth) provided for a second plebiscite, to be conducted on 20 December 1917, where the question was "Are you in favour of the proposal of the Commonwealth Government for reinforcing the Australian Imperial Force oversea?". Both plebiscites, which were popularly understood as turning upon "conscription", failed to carry[36].

31 Whilst it may be true to say that the phrase "civil conscription" lacked a settled meaning at the time of the amendment of the Constitution in 1946, the related expression "industrial conscription" had at that time played a considerable part in political discourse. In the United Kingdom the *Emergency Powers Act* 1920 (UK),

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34 Repealed by the *Statute Law Revision Act* 1934 (Cth).

35 Statutory Rules 1917, No 290.

36 Sawer, *Australian Federal Politics and Law 1901-1929*, (1956) at 135-136, 159-160.

while providing for the proclamation of an emergency and the making of regulations, had stated (s 2(1)):

> "Provided that nothing in this Act shall be construed to authorise the making of any regulations imposing any form of compulsory military service or industrial conscription".

32 Shortly thereafter in Australia the *Public Safety Preservation Act* 1923 (Vic) ("the 1923 Act") had included s 7 which stated:

> "Nothing in this Act shall be construed to authorize the making of any regulations imposing any form of industrial conscription."

33 Also at the State level, the *National Emergency Act* 1941 (NSW), which received the Royal Assent on 20 March 1941[37], contained a provision following that in the 1923 Act. Section 3 authorised the making of raid precaution schemes for the protection of persons or property in the event of "any warlike attack". However, s 8(2) preserved the operation of industrial awards and agreements, and s 8(1) dealt with the avoidance of "industrial conscription" in the same terms as s 7 of the 1923 Act.

34 Section 5 of the *National Security Act* 1939 (Cth) ("the 1939 Act") conferred in broad terms a power for the making of regulations. However, s 5(7) provided that nothing in the section authorised:

> "(a) the imposition of any form of compulsory naval, military or air-force service, *or any form of industrial conscription*, or the extension of any existing obligation to render compulsory naval, military or air-force service". (emphasis added)

35 The *National Security Act* 1940 (Cth) ("the 1940 Act") amended the 1939 Act by inserting s 13A, as follows:

> "*Notwithstanding anything contained in this Act*, the Governor-General may make such regulations making provision for requiring persons to place themselves, their services and their property at the disposal of the Commonwealth, as appear to him to be necessary or expedient for securing the public safety, the defence of the Commonwealth and the Territories of the Commonwealth, or the efficient prosecution of any war in which His Majesty is or may be engaged:
>
> Provided that nothing in this section shall authorize the imposition of any form of compulsory service beyond the limits of Australia." (emphasis added)

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37 Repealed by the *Statute Law Revision Act* 1976 (NSW), Sched 1.

(Thereafter provision was made by the *Defence (Citizen Military Forces) Act* 1943 (Cth) for compulsory military service in "the South-Western Pacific Zone" and in *Polites v The Commonwealth*[38] this system was held validly to apply to conscripted aliens.)

36 Regulation 15(1) of the National Security (Man Power) Regulations[39] ("the Man Power Regulations") was made in 1943 in reliance upon s 13A and stated:

> "The Director-General [of Man Power] may direct any person resident in Australia to engage in employment under the direction and control of the employer specified in the direction, or to perform work or services (whether for a specified employer or not) specified in the direction."

37 Section 13A was substantially in the form of s 1 of the *Emergency Powers (Defence) Act* 1940 (UK) and reg 15 was in substantially the same form as reg 58A of the Defence (General) Regulations made on 22 May 1940 under the United Kingdom legislation[40]. In the Second Reading Speech on the Bill for the 1940 Act, the Prime Minister (Mr R G Menzies) had said of the proposed s 13A[41]:

> "It takes power to control persons in relation to themselves so that they, for example, may be taken and trained to prepare for the defence of Australia. It takes power over their services so that they may be, notwithstanding any limitation contained in the original act, directed as to what services they are to perform and where they are to perform them. That applies all round."

38 On 8 June 1944, in *Reid v Sinderberry*[42], this Court allowed an appeal from the Full Court of the New South Wales Supreme Court[43]. On 25 May 1944 the Full Court had held that upon its construction s 13A of the 1939 Act did not authorise the making of reg 15 of the Man Power Regulations. Jordan CJ had said that "read according to [its] natural construction [reg 15] would, if valid, reduce the population of Australia to a

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38 (1945) 70 CLR 60; [1945] HCA 3.

39 Statutory Rules 1943, No 23.

40 See the argument of Fullagar KC in *Reid v Sinderberry* (1944) 68 CLR 504 at 505; [1944] HCA 15.

41 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 20 June 1940 at 15.

42 (1944) 68 CLR 504.

43 *Ex parte Sinderberry; Re Reid* (1944) 44 SR (NSW) 263.

state of serfdom more abject than any which obtained in the Middle Ages"[44]. That reasoning was rejected by this Court. In the course of upholding the validity of reg 15, Latham CJ and McTiernan J[45] remarked that notwithstanding the provision in s 5(7) of the 1939 Act that nothing in the regulation making power was to authorise the imposition of "any form of industrial conscription", it was clear that reg 15 imposed a "very wide form of industrial conscription". However, the opening words of s 13A, introduced by the 1940 Act, made it clear that its operation was not limited by any reference to the terms of s 5(7) as it had been enacted in the 1939 Act.

39 The present appellants emphasise that the treatment by this Court in *Reid* of reg 15 as imposing a form of industrial conscription, was in respect of a provision which required work to be performed not under the control of the Commonwealth, but at the direction of a specified employer.

40 With effect 4 April 1944, reg 15AA was added[46] to the Man Power Regulations. This empowered the Director-General, among other matters, to order that a particular person or those in a class of persons, without consent, neither cease to carry on or practise their "trade, profession or calling" at any particular place, nor commence to do so at some other place, whether on his own account or as an employee. This provision extended the system of conscription beyond the trades, to professions. It also directed the place at which these activities were to be conducted.

41 On 19 August 1944 a proposed law[47] to amend the Constitution by inserting after Ch I a chapter to be headed "Chapter IA – Temporary Provisions" was placed before the electors. This new chapter was to comprise s 60A which would empower the Parliament, subject to the Constitution, to make laws for the peace, order and good government of the Commonwealth with respect to 14 subject matters listed as pars (i)-(xiv) of s 60A(1). Paragraph (ii) of s 60A(1) would read "employment and unemployment". The proposed s 60A(5) provided for s 60A to cease to have effect and for any laws then current to cease to have effect at the expiration of a period of five years from the cessation of hostilities in the then present war.

42 The referendum was not approved by the majorities of electors required by s 128 of the Constitution. In both the "YES" and "NO" cases distributed pursuant to s 6A of the Referendum Act, there was discussion of the prospect that the proposed legislative

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44 (1944) 44 SR (NSW) 263 at 266.

45 (1944) 68 CLR 504 at 509.

46 Statutory Rules 1944, No 61.

47 Cited as *Constitution Alteration (Post-war Reconstruction and Democratic Rights)* 1944 (Cth).

power with respect to "employment and unemployment" would authorise laws providing for industrial conscription during the present war and in the five year period after the end of hostilities. The "NO" case said of what it called "the Government's 'Brains Trust'":

> "It is all very simple as they explain it. All you have to do is to give up your right to choose your own way of living and take orders to go to the job selected for you (that is, accept industrial conscription) and the industries which are to give you your livelihood will be re-organized by men who, for the most part, have never had to organize or control a successful pie-stall!"

The 1946 referendum

43 The *Pharmaceutical Benefits Act* 1944 (Cth) had provided for the supply by chemists without charge to the public of certain medicines prescribed by medical practitioners, had appropriated money to pay the chemists for those medicines and had imposed obligations upon medical practitioners and chemists in relation to the prescription and supply of the medicines. On 19 November 1945 this Court held in *Attorney-General (Vict) v The Commonwealth*[48] that the legislation was not authorised under the power of appropriation found in s 81 of the Constitution or by the incidental power conferred by s 51(xxxix). It followed that the statute was invalid.

44 Thereafter at a referendum conducted on 28 September 1946 the majorities of electors required by s 128 of the Constitution approved a proposed law to alter s 51 of the Constitution by inserting par (xxiiiA).

45 The "YES" case for the proposed law under the heading "No question of socializing medical and dental services" stated:

> "You will not be voting for any particular method of providing medical and dental services. Whether or not they are to be provided, and if so how, will both be matters for your representatives in Parliament from time to time to decide, in accordance with your wishes. At least once in every three years, you can change your representatives if you do not approve their actions.
>
> But there is one thing the Parliament will not be able to do. It will not be able to bring in any form of civil conscription. That, you will see if you refer to the heading in black type, is expressly safeguarded in the new power itself.

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48 (1945) 71 CLR 237; [1945] HCA 30. The Attorney-General for Victoria sued at the relation of the president, vice-president and honorary secretary of the Medical Society of Victoria: (1945) 71 CLR 237 at 237-238.

This means that doctors and dentists cannot be forced to become professional officers of the Commonwealth under a scheme of medical and dental services."

46 Under the heading "This referendum not a political matter", the "YES" case said:

"There is no Party question at all. The idea that doctors and dentists might be conscripted was the only real objection of the Opposition parties in Parliament. The Government has set that doubt at rest by agreeing to the insertion of a clause in the power itself that there shall be no conscription. After that, only three out of all the members of the Federal Parliament voted against the Social Services Bill – Mr A Cameron (South Australia) in the House of Representatives and Senators Mattner and McLachlan (both of South Australia) in the Senate. These three are the only persons in Australia authorized to present a Case for 'No' in this pamphlet on this question."

47 Under the heading "Three reasons for voting 'NO'", the "NO" case stated:

"The following are three important reasons why you should vote 'NO' to No 1 proposal, against the powers to provide specified social services:-

(1) Because through them the Commonwealth can gain further far-reaching controls over your daily lives;

(2) Because they will enable the States to be ousted from their present role of providing additional social services; and

(3) Because they are one step further towards the centralization of all controls and powers in Canberra."

48 The proposed law had taken the form in which it was submitted to the electors after detailed consideration in the Parliament. On 27 March 1946 the Attorney-General and Minister for External Affairs, Dr H V Evatt, moved the second reading of the Constitution Alteration (Social Services) Bill 1946. He said[49]:

"The object of this bill is to alter the Constitution so that this Parliament can continue to provide directly for promoting social security in Australia. This is in no sense a party measure. Ever since federation, it has been assumed by successive governments and parliaments that the National Parliament could spend for any all-Australian purpose the money that it raises. In 1944, I warned the House and the country that, under the Constitution as it stands, the legal

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49 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 646-647.

> foundations for even the most urgent modern social service legislation were doubtful and insecure. The High Court's decision last year in the pharmaceutical benefits case has shown that these doubts were only too well founded. The object of this bill is to place Australian social service legislation on a sound legal footing."

Mr Percy Spender, a member of the Opposition, asked whether[50]:

> "the power to legislate in respect of medical and dental services, if granted, enable the Parliament to nationalize those services".

Dr Evatt responded: "We might discuss that in some detail at a later stage." Upon the resumption on 3 April 1946 of the debate on the second reading, the Leader of the Opposition (Mr R G Menzies) referred to Mr Spender's question and to what, he said, was the inadequate response of the Attorney-General[51]. Mr Menzies referred to the decision delivered on 14 December 1945 in *Australian National Airways Pty Ltd v The Commonwealth*[52]. This established that the Parliament was authorised by s 51(i) of the Constitution to create a body corporate with power to conduct inter-State services for the transport by air of passengers and goods for reward. Mr Menzies continued[53]:

> "In those circumstances, very little doubt exists that not only the words of the proposed amendment but also the decision of the High Court will mean that under those words, the medical and dental professions could be nationalized by making all doctors and dentists members of one government service which had a monopoly of medical and dental treatment. In that sense, this power includes a power to nationalize medicine and dentistry."

49 In the course of the resumed debate on 9 April 1946, Mr Haylen blamed the failure of the 1944 referendum upon the effectiveness of the "lie" which had been circulated in the newspapers "that a 'Yes' vote would be a vote for industrial conscription"[54].

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50 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 648.

51 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 April 1946 at 899.

52 (1945) 71 CLR 29; [1945] HCA 41.

53 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 April 1946 at 900.

54 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 9 April 1946 at 1183.

50 In further debate, on 10 April 1946, Mr Menzies moved that the proposed new par (xxiiiA) include after the word "services" the words "(but not so as to authorize any form of civil conscription)". Mr Menzies said that he had borrowed the form of words from that appearing in another measure then before the Parliament, the Constitution Alteration (Industrial Employment) Bill, in which the proposed additional head of legislative power was "Terms and conditions of employment in industry but not so as to authorize any form of industrial conscription"[55]. (That measure was to be submitted at a referendum also to be conducted on 28 September 1946; it failed to carry.) Mr Menzies remarked of the medical and dental professions[56]:

> "their members are entitled to be protected against conscription just as are industrial workers under the bill I have mentioned. This is a perfectly fair proposition: If industrial workers are to be put beyond the danger of industrial conscription, then what is good for them should be good for professional workers also."

Dr Evatt had been on notice of the amendment and forthwith accepted it. He had available to him a written advice dated 9 April 1946 from the Solicitor-General, Sir George Knowles[57], and two officers of the Attorney-General's Department[58]. The advice was headed "Amendment to be moved by Mr Menzies". The document stated:

> "The meaning assigned by the Oxford Dictionary to the word 'conscription' is *inter alia* the compulsory enlistment of men for military service – more generally, enrolment or enlistment.
>
> In view of the meaning assigned to 'conscription' in the Oxford Dictionary it is of the essence of conscription that there must be some form of compulsory enlistment or enrolment of the conscript.
>
> The question arises whether, if the amendment is agreed to, the Commonwealth would be precluded from passing any legislation which would have the effect of preventing medical practitioners, registered under State law,

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55 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 April 1946 at 1214-1215.

56 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 April 1946 at 1215.

57 Solicitor-General 1932-1946.

58 M Boniwell and C K Comans.

> from refusing to treat patients who are entitled to benefits provided under Commonwealth legislation."

The authors concluded:

> "In our view the Commonwealth would, under the power proposed to be taken, as proposed to be amended by Mr Menzies, have ample authority *to require practising doctors or dentists to treat patients entitled to medical or dental benefits under Commonwealth legislation* passed in pursuance of the power.
>
> The only kind of legislation which the amendment would preclude would be such *as compelled doctors or dentists in effect to become servants of the Commonwealth, or to have the whole of their professional activities controlled by Commonwealth direction*." (emphasis added)

51 The Constitution Alteration (Social Services) Bill 1946 came into effect on 19 December after the passage of the referendum and the giving of the Royal Assent. It may be noted that the 1939 Act was then still in force. That statute and all remaining regulations thereunder ceased to have effect only on 31 December 1946[59]. The Man Power Regulations had been repealed with effect 1 May 1946[60], and so had remained in force during the Parliamentary debates in March and April 1946.

The utility of the extrinsic materials

52 These materials and the events described above assist in an understanding of what was conveyed by the phrase "any form of civil conscription" at the time of the introduction of s 51(xxiiiA) under the procedures of s 128 of the Constitution[61].

53 The phrase had been used, consistently with the submissions now made by the Solicitor-General, to identify the compulsory provision of service or doing of work for the Commonwealth, or for a third party as directed by the Commonwealth. The later legislation challenged in this Court has not sought to deny to medical practitioners the power to refuse to treat patients entitled to benefits under the legislation. The occasion thus far has not been presented to test the gravamen of the advice provided to the Attorney-General on 9 April 1946 and upon which he appears to have relied in accepting the amendment moved by Mr Menzies.

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59 By operation of s 2 of the *National Security Act* 1946 (Cth).

60 National Security (Regulations Repeal) Regulations (No 7). Statutory Rules 1946, No 78.

61 See *Cole v Whitfield* (1988) 165 CLR 360 at 385.

54 What can be taken from the extrinsic materials is the notion of compulsion to serve. This may fix upon the place of provision of the service, the identity of the recipient of the service and the occasions for its provision, but need not compel the creation of a status of servant of the Commonwealth. This notion is reflected in the reasoning of Dixon J in the *BMA Case*.

55 In their submissions to this Court the appellants rely upon the advice to the Attorney-General of 9 April 1946 as indicative of the scope of the reservation contained in s 51(xxiiiA). In particular, the appellants emphasise the phrase "to have the whole of their professional activities controlled by Commonwealth direction", and submit that Pt VAA deals so extensively with the conduct of practitioners as to cover "everything that the doctor might do".

Part VAA

56 In its application to the appellants, par (a) of s 82(1) provides:

> "(1) A practitioner engages in inappropriate practice if the practitioner's conduct in connection with rendering or initiating services is such that a Committee could reasonably conclude that:
>
> (a) if the practitioner rendered or initiated the referred services as a general practitioner – the conduct would be unacceptable to the general body of general practitioners".

57 The "Committee" is a Professional Services Review Committee set up under s 93; it must comprise a Deputy Director of Professional Services Review (appointed under s 85 after consultation between the Minister and the Australian Medical Association Limited) and at least two other Panel members who are general practitioners (s 95(5)). There are a number of such Committees. The first respondents in the Selim appeal constitute Professional Services Review Committee No 309.

58 In determining the question posed by s 82(1) regard must be had, as well as to other relevant matters, to "whether or not the practitioner kept adequate and contemporaneous records of the rendering or initiation of the services" (s 82(3)). The term "service" relevantly means a service for which Medicare benefit was payable (s 81). Entitlement to payment of Medicare benefit, where medical expenses are incurred in respect of a professional service, is conferred by s 10 of the Act. The benefit in respect of a service is, in general, an amount equal to 75 percent of the Schedule fee (s 10(2)).

59 Speaking of the introduction of Pt VAA by the 1994 Act, in *Pradhan v Holmes*[62] Finn J observed:

> "Previously the mechanism employed to protect public revenues was by policing 'excessive servicing' by a practitioner. The change to concern with 'inappropriate practice' was remarked on in the Second Reading Speech on the 1993 amending bill in the following terms[63]:
>
> > 'A significant change in the bill is the replacement of the concept of excessive servicing with one of inappropriate practice. Whereas excessive servicing is currently defined as the rendering or initiation of services not reasonably necessary for the adequate care of the patient, the concept of inappropriate practice goes further. It covers a practitioner engaging in conduct in connection with the rendering or initiating of services that is unacceptable to his or her professional colleagues generally.'"

Conclusions

60 The legislative history and the genesis of s 51(xxiiiA) supports a construction of the phrase "(but not so as to authorize any form of civil conscription)" which treats "civil conscription" as involving some form of compulsion or coercion, in a legal or practical sense, to carry out work or provide services; the work or services may be for the Commonwealth itself or a statutory body which is created by the Parliament for purposes of the Commonwealth[64]; it also may be for the benefit of third parties, if at the direction of the Commonwealth.

61 An issue whether legislation otherwise supported by s 51(xxiiiA) authorises a form of civil conscription may only be decided with close attention to the legislative scheme in question, in particular, to those aspects which are under challenge. The appellants contest the validity of certain provisions of the Act. The Act, and delegated legislation supported by it, provides a regime with a wide and diverse operation and many norms of conduct. To refuse the relief sought by the appellants indicates no view as to the validity or invalidity of other aspects of the legislation which may be the subject of other challenges yet unformulated.

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62 (2001) 125 FCR 280 at 282.

63 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 September 1993 at 1551.

64 cf *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334; [1969] HCA 44.

62 The reservation in the advice of 9 April 1946 respecting the control by Commonwealth direction of the professional activities calls for further consideration. Contrary to what was said there, something less than control of "the whole" of those activities may, if the necessary legislative compulsion or coercion be present, amount to a "form of civil conscription".

63 Does Pt VAA provide an example? The appellants complain of s 82(3) to which reference has been made above. The sub-section states:

> "A Committee must, in determining whether a practitioner's conduct in connection with rendering or initiating services was inappropriate practice, have regard to (as well as to other relevant matters) whether or not the practitioner kept adequate and contemporaneous records of the rendering or initiation of the services."

The keeping of adequate and contemporaneous records of the rendering or the initiation of services provided by the practitioner is, as the place of s 82(3) within the definition of "inappropriate practice" indicates, apt to assist the Committees in reaching their reasonable conclusions as to unacceptable conduct for s 82(1).

64 The statutory criterion of conduct unacceptable to the general body of general practitioners, of which the appellants also complain, is an adaptation for the operation of the Act of principles of professional responsibility developed in the second half of the 19th century. The phrase "infamous conduct in any professional respect" found in s 29 of the *Medical Act* 1858 (UK)[65] and memorably construed in *Allinson v General Council of Medical Education and Registration*[66] with use of the phrase "disgraceful or dishonourable", has been seen since as not necessarily requiring an appeal to a moral standard[67]. The essential question in such cases is whether "the practitioner was in such breach of the written or unwritten rules of the profession as would reasonably incur the strong reprobation of professional brethren of good repute and competence"[68]. The rendering of services not reasonably necessary for the care of the patient may be dubbed "overservicing", but may also attract the reprobation just described.

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65 21 & 22 Vict c 90.

66 [1894] 1 QB 750 at 760-761. See also *A Solicitor v Council of Law Society (NSW)* (2004) 216 CLR 253 at 264-265 [13]; [2004] HCA 1.

67 *Epstein v The Medical Board of Victoria* [1945] VLR 309 at 310; *Ex parte Meehan; Re Medical Practitioners Act* [1965] NSWR 30 at 36.

68 *Qidwai v Brown* [1984] 1 NSWLR 100 at 105; *Pillai v Messiter [No 2]* (1989) 16 NSWLR 197 at 199-200, 208; cf *Hoile v The Medical Board of South Australia* (1960) 104 CLR 157 at 162-163; [1960] HCA 30.

65 A legislative scheme for the provision of medical services supported by appropriation of the Consolidated Revenue Fund established under s 81 of the Constitution, by requiring the professional activities of medical practitioners to conform to the norms derived from *Allinson*, does not conscript them. Those norms are calculated to ensure that the activities be professional rather than unprofessional in character.

66 The formation of an opinion in the course of the performance of functions or the exercise of power under Pt VAA that the conduct of the person under review has caused, is causing, or is likely to cause "a significant threat to the life or health of any other person" leads to a reference under s 106XA to the appropriate regulatory body in the State or Territory in which the practitioner practises; provision is made under s 106XB for reference to the appropriate regulatory body where the opinion formed is that there has been a failure "to comply with professional standards". The presence of these further provisions in Pt VAA does not give it the character of a law which authorises a form of civil conscription.

67 There remains the alleged invalidity of ss 10, 20 and 20A of the Act. There was said to be a form of practical compulsion applied by these provisions to practitioners such as the appellants. The practical compulsion was said to be to participate in the Medicare scheme. Three matters were emphasised by the appellants. First, the medical practitioner must be prepared to accept that at least part of the fee may not be paid by the patient and rely upon payment by the Health Insurance Commission of an amount equal to that of the Medicare benefit (s 20(3)). Secondly, the medical practitioner may, as a practical matter, be left to rely for payment upon an assignment under s 20A of the Medicare benefit in respect of a service rendered to an eligible person. Thirdly, s 19(6) denies payment of a Medicare benefit where there has been a failure to record prescribed details (including particulars of the item number) of the service provided.

68 These provisions condition the enjoyment of membership of the scheme established by the Act. They do not amount to practical compulsion to perform a professional service. The Full Court was correct in the conclusion expressed as follows[69]:

> "Those sections assume that a medical practitioner has rendered a professional service to an eligible person and has rendered a fee for that service, and provides a scheme whereby either the eligible person, if he or she has paid that fee, becomes entitled to a Medicare benefit or, if the eligible person has not paid that fee, the medical practitioner becomes entitled to the Medicare benefit. Those sections provide for the payment of a medical practitioner's fee for a

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69 (2008) 167 FCR 61 at 80.

professional service when that professional service has been rendered in response to an eligible person's request."

Orders

69 Each appeal should be dismissed. In *Wong*, the appellant should pay the costs of the first respondent. In *Selim*, the appellant should pay the costs of the first, third and fourth respondents.

70 KIRBY J. Dr Chee Kan Kenneth Wong and Dr Ashraf Thabit Selim ("the appellants") challenge orders of the Full Court of the Federal Court of Australia[70]. That Court by those orders (in consolidated proceedings) dismissed an appeal by Dr Selim from orders of a single judge (Stone J)[71] and decided a reference to the Federal Court from this Court of like questions adversely to Dr Wong[72].

71 By the time special leave was granted, the constitutional questions which the appellants sought to agitate against the validity of the Professional Services Review ("PSR") scheme established by Pt VAA of the *Health Insurance Act* 1973 (Cth) ("the Act") were confined to the decision that the PSR scheme did not offend the prohibition on "civil conscription" contained in the grant of power to the Federal Parliament in s 51(xxiiiA) of the Constitution. Section 51(xxiiiA) allows the Parliament to make laws with respect to:

> "the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances".

72 The head of power itself was inserted by the *Constitution Alteration (Social Services)* 1946 (Cth) which was approved by the electors in a referendum conducted on 28 September 1946 in accordance with s 128 of the Constitution. Exceptionally, that referendum was carried nationally and in all six States[73]. Other issues agitated in the Federal Court were not maintained in this Court[74].

73 In deriving the meaning of the restriction on legislative power effected by the prohibition on measures amounting to "any form of civil conscription", the joint reasons in the Full Court of the Federal Court recognised that a preliminary question arose as to the approach to be taken to the interpretation of s 51(xxiiiA). They asked whether the paragraph should be "approached from the viewpoint of a committed originalist or from

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70 *Selim v Lele* (2008) 167 FCR 61.

71 *Selim v Lele* (2006) 150 FCR 83.

72 *Dimian v The Commonwealth* [2006] HCATrans 565.

73 The overall total vote in favour of the amendment was 51.59% of the electors, with 43.27% against and 5.14% informal. See Blackshield and Williams, *Australian Constitutional Law and Theory*, 4th ed (2006) at 1449.

74 Notably the challenge to the validity of s 106U of the Act on the ground that it purported to confer part of the judicial power of the Commonwealth on persons not appointed to office pursuant to s 72 of the Constitution. See (2008) 167 FCR 61 at 81-82 [51]-[56].

that of one who accepts that the Constitution is a 'living instrument', to be interpreted in light of the fact that its legitimacy stems from its 'original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people'"[75].

74 This was an important observation. It lies at the heart of the different approach that I take to the constitutional question presented by these appeals. In past authority this Court has accepted that, in resolving disputed questions concerning the meaning of the Constitution[76] (and specifically in deriving the meaning of provisions adopted following amendments made under s 128[77]), it is legitimate for the decision-maker to consider, and give weight to, historical materials as they throw light on the resolution of such problems[78].

75 Nevertheless, such historical materials do not control the meaning of the constitutional language. Identifying that meaning is a task of legal analysis, not of historical research. In this case the reasons of other members of this Court (both in the language chosen[79] and in their approach and emphasis[80]) might be read as suggesting otherwise. It is for this reason that I write separately. I could not agree to an interpretation of s 51(xxiiiA) that treated the history surrounding the adoption of that paragraph as determinative of the meaning of the provision as it operates today. Not only would this be contrary to the general view I hold as to the proper approach to deriving constitutional meaning (and the approach ordinarily taken by this Court). It would also risk accepting a view of the paragraph that would be unjust to the appellants and to other persons whose interests are protected by the constitutional prohibition against laws that "authorize any form of civil conscription". That notion is one that necessarily changes and adapts to different times and circumstances.

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75 (2008) 167 FCR 61 at 66 [17] applying *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171; [1994] HCA 46.

76 *Cole v Whitfield* (1988) 165 CLR 360 at 385; [1988] HCA 18.

77 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 361-362 [27]-[30] per Gaudron J, 382-383 [92]-[94] per Gummow and Hayne JJ, 407-408 [145]-[146] of my own reasons; [1998] HCA 22.

78 Reasons of Heydon J at [262]-[263].

79 Reasons of French CJ and Gummow J at [52]; cf reasons of Hayne, Crennan and Kiefel JJ at [192].

80 Reasons of French CJ and Gummow J dealing with the history of the 1946 referendum at [43]-[55]; see also reasons of Hayne, Crennan and Kiefel JJ at [174]-[186].

76 When the proper approach to deriving the meaning of s 51(xxiiiA) is adopted (including by appropriate but limited use of the historical record explaining what was in the minds of the legislators and the electors when the paragraph was added to the Constitution), the same result is reached as is stated in other reasons. Substantially, I agree in the analysis of Hayne, Crennan and Kiefel JJ. The provisions of the Act, as challenged in this Court, do not offend the prohibition on enacting "any form of civil conscription". The Full Court was correct to so decide. The appeals to this Court should be dismissed.

The proceedings

77 *The agreed facts*: Many of the background facts necessary to decide the constitutional issue raised by the appeals are stated in the reasons of other members of this Court[81]. However, because the Constitution (like other written laws) operates in the real world, it is useful, in approaching its meaning, to have an idea of the actual circumstances that call forth the remaining issue for decision.

78 Such circumstances were before the Full Court of the Federal Court and they are expressed in its reasons[82]. Although largely derived from the case of Dr Selim, they were contained in facts that were agreed for the purpose of both proceedings in that Court. It is therefore convenient, as other reasons do, to treat the facts in Dr Selim's case as indicative of the circumstances giving rise to the common constitutional objection of the appellants[83]. Adding a few facts to the bare bones of the disembodied constitutional submissions which they advance helps us to understand better the force of their argument that they have been subjected to at least a "form" of "civil conscription", contrary to the prohibition contained in s 51(xxiiiA).

79 Dr Selim, a medical graduate from Cairo University, came to Australia in 1984. He obtained the necessary Australian qualifications to practise as a medical practitioner in 1985. He has been in private practice as a general practitioner since 1987. He is vocationally registered as such under s 3F of the Act.

80 In December 2001, the Health Insurance Commission ("the Commission"), acting pursuant to s 86(1) of the Act, referred Dr Selim's conduct to the Director of PSR. The referral related to professional services rendered by Dr Selim to or on behalf of patients during the calendar year 2000. The Commission concluded that Dr Selim may have engaged in "inappropriate practice", contrary to ss 81 and 82 of the Act, as

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81 Reasons of French CJ and Gummow J at [3]-[4]; reasons of Hayne, Crennan and Kiefel JJ at [164]-[170].

82 (2008) 167 FCR 61 at 73-75 [34]-[35].

83 cf reasons of Hayne, Crennan and Kiefel JJ at [167]-[170].

amended by the *Health Legislation (Professional Services Review) Amendment Act* 1994 (Cth)[84]. In particular, the Commission's consideration of "inappropriate practice" was based on the concern that Dr Selim had rendered a very high volume of services in the nominated time and may not have provided the appropriate quality of clinical input into those services. If these allegations were established, Dr Selim (and, in his case which was in material respects similar, Dr Wong) would be exposed to the imposition of statutory sanctions, including disqualification for up to three years from participating in the Medicare Scheme established by the Act or disqualified from providing designated services or services to specified classes of persons.

81 If a non-"bulk billing" practitioner were fully disqualified it would be likely that he or she would lose a substantial number of patients from the practice unless the practitioner reduced the fees charged to approximately the difference between the fees previously charged and the Medicare benefit. How many of the lost patients might later return to the practice, after the period of disqualification, would depend on a number of factors, including the extent and duration of the disqualification, the availability of other practitioners in the area and other competitive and economic considerations.

82 During disqualification, the medical practitioner might engage a *locum tenens* to continue ongoing care to his or her patients, provided such a person was available and qualified. Likewise, if the practitioner were a member of a group practice, other members could continue ongoing care of the patients, provided their skills were suitable and they had the capacity to take on other patients[85].

83 Whilst fully disqualified, a medical practitioner would not be prevented from rendering medical services for which no Medicare benefit was payable – such as statutory services to veterans, services to workers' compensation patients, overseas visitors, patients in public hospitals, in the defence services, cosmetic surgery, health screening and so on. As well, the medical practitioner could carry on non-fee services, such as in medical journalism and administration as well as services for those patients who are "prepared to pay the practitioner's fee without claiming on Medicare". But the agreed facts accepted the unsurprising conclusion that "to provide services solely on this basis would rarely be economically practicable".

84 The Full Court expressed some general factual conclusions of its own relevant to the practicalities of disqualification to be ordered against the appellants[86]:

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84 Reasons of Hayne, Crennan and Kiefel JJ at [211]-[226]; reasons of Heydon J at [234]-[248].

85 (2008) 167 FCR 61 at 73-74 [34].

86 (2008) 167 FCR 61 at 75 [35].

> "[I]f patients cannot claim medical benefits in relation to the services that a doctor provides … a doctor will have few, if any, opportunities to practise as a general practitioner in private practice. The Act thus imposes a practical compulsion on those who wish to practise as general practitioners in private practice to participate in the Medicare Scheme and, as a result of Pt VAA, to conduct their practice in such a way as to avoid committing inappropriate practice. They therefore must not, in relation to the rendering or initiating of services for which medical benefits are payable, do anything that would be unacceptable to the general body of general practitioners [in accordance with s 82(1)(a) of the Act]. The other ways in which those with medical training could practise their profession were also available, to some extent, when the High Court heard the *BMA Case*[87] and the *General Practitioners Society Case*[88], and are not sufficient to avoid the practical compulsion upon all, or virtually all, of those wishing to practise as general practitioners in private practice."

85 The foregoing conclusions on the facts were unchallenged in this Court. They are obviously sensible and realistic. It was the practical consequences of the operation of the Act and its administration, by reference to the very broad criterion of "inappropriate practice", that the appellants argued had crossed the constitutional line and entered the territory forbidden to federal legislation by the prohibition on laws "authoriz[ing] any form of civil conscription".

86 *The legislation*: The history of the legislation, the subject of the constitutional challenge, is contained in other reasons[89]. So are the most important provisions of the Act. It is unnecessary for me to repeat this material.

87 On the basis of the record, it is important (particularly for the approach that I take to the meaning of the constitutional provision) to emphasise that the appellants' challenge to the constitutional validity of the Act was limited to the provisions of ss 10, 20 and 20A and "any provision of [Pt] VAA … of [the Act]"[90]. It is therefore unnecessary, and would be inappropriate, to consider whether any other provisions of the Act offend the constitutional prohibition or to speculate on broader questions that may present in the future. Such questions could concern particular aspects of a

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87 *British Medical Association v The Commonwealth* (1949) 79 CLR 201; [1949] HCA 44.

88 *General Practitioners Society v The Commonwealth* (1980) 145 CLR 532; [1980] HCA 30.

89 Reasons of French CJ and Gummow J at [56]-[59]; reasons of Hayne, Crennan and Kiefel JJ at [203]-[210].

90 Reasons of French CJ and Gummow J at [5].

"managed care" system of healthcare[91], including the concept of "case mix" and whether such features of the legislation, now or in the future, might offend the constitutional prohibition[92]. None of these issues is raised by the present appeals.

The issues

88 *Non-issues*: In addition to excluding the abandoned issue (raising a complaint that the scheme of Pt VAA and specifically s 106U of the Act were invalid on judicial power grounds) and any broader question as to the constitutional validity of "case mix" and "managed care" provisions[93], in the way the appeals were argued three particular issues can be noted and set aside:

(1) *The sickness and hospital benefits issue*: Before the Full Court, the Commonwealth argued that the impugned sections of the Act were laws with respect to "sickness and hospital benefits" and, for that reason, that they did not attract the prohibition on "civil conscription" that was the focus of the appellants' arguments[94]. The Full Court noted that this submission was reserved for possible pursuit in this Court; but their Honours observed that it "seems to stretch the notion of a 'sickness benefit' to argue that it would apply to all medical services for which benefits are payable under the Act"[95]. That comment was a proper one. I did not understand that, ultimately, the Commonwealth pressed a contrary submission on this Court;

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91 See *Health Legislation (Private Health Insurance Reform) Amendment Act* 1995 (Cth) amending both the *National Health Act* 1953 (Cth), which provided for a form of contributory health insurance, and the *Health Insurance Act* 1973 (Cth).

92 The "case mix" reimbursement system is based on identification and classification of various patient diagnoses ("diagnostically related groups") requiring a specific rate of funding to all patients with similar diagnoses. See Mendelson, "Devaluation of a Constitutional Guarantee: The History of Section 51(xxiiiA) of the Commonwealth Constitution", (1999) 23 *Melbourne University Law Review* 308 ("Mendelson") at 331. The "case mix" system was developed in the 1970s at Yale University. See Curran, Hall and Kaye, *Health Care Law, Forensic Science, and Public Policy*, 4th ed (1990) at 719-720. See also *National Health Act* 1953 (Cth), s 73BD(4)(a)(i) which was inserted by *Health Legislation (Private Health Insurance Reform) Amendment Act* 1995 (Cth).

93 Mendelson (1999) 23 *Melbourne University Law Review* 308 at 331-340.

94 (2008) 167 FCR 61 at 70 [28].

95 (2008) 167 FCR 61 at 70 [28].

(2) *The medical and dental services issue*: Likewise, as noted by Hayne, Crennan and Kiefel JJ[96], the foundation for the appellants' challenge to the constitutional validity of the identified provisions of the Act was only the prohibition upon "civil conscription" in the bracketed phrase in s 51(xxiiiA) of the Constitution. The appellants did not mount a separate challenge based upon the contention that all, or any, of the provisions impugned would, in their true character, take the Act outside the "central area" of the power provided by s 51(xxiiiA). Conventionally, a broad approach is adopted to the "central area" of such a grant of power, given the myriad circumstances for which the Parliament might decide to enact laws on that and related and incidental matters. Nevertheless, a point could arise as to the validity of a particular federal law where, for example, in its true character, an enacted provision was a law to achieve other and different purposes. The mere fact that a law was addressed to medical or dental practitioners, their actual or potential patients or healthcare issues generally, would not render it valid under s 51(xxiiiA) if, properly characterised, the law was not one with respect to the "provision" of "medical and dental services". Because this issue was not canvassed in these appeals, it can likewise be put aside; and

(3) *The employment and practical impact issue*: Although the Commonwealth, in response to challenges invoking s 51(xxiiiA) of the Constitution, has long argued that the prohibition on forms of "civil conscription" is confined to attempted laws to nationalise the medical and dental professions and the provision of their services (and thus to address "conscription" in the sense of actual or effective "employment" of such practitioners by or for the Commonwealth), in the way the arguments developed the submissions were not so limited. Correctly so, in my opinion. During argument, the Commonwealth accepted that it was appropriate for the Court to consider the extent to which the Act imposed obligations of "practical compulsion" upon the appellants whilst insisting that compulsion in various forms was not of itself necessarily offensive to s 51(xxiiiA) read as a whole and would not be so unless rising to the level of a "form" of "civil conscription"[97].

89 *The issues*: The exclusion of the foregoing issues leaves four issues to be resolved in these appeals:

(1) *Constitutional interpretation*: Is the meaning of s 51(xxiiiA) of the Constitution controlled, or substantially determined, by the debates and circumstances that surrounded the introduction of that paragraph into s 51 and the then

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96 Reasons of Hayne, Crennan and Kiefel JJ at [225].

97 [2008] HCATrans 352 at 2215.

understandings of various forms of military, industrial or other "conscription", existing in Australian, United Kingdom and other laws prior to that time?

(2) *Constitutional decisions*: Did the decision of this Court in *General Practitioners* in 1980 effectively restore a meaning of s 51(xxiiiA) that had been adopted by Dixon J in dissent in the *BMA* case of 1949? Is this Court now bound by the view expressed in *General Practitioners* by Gibbs J[98] that "[t]he words 'any form of' do not … extend the meaning of 'conscription', and that word connotes compulsion to serve rather than regulation of the manner in which a service is performed"? If the appellants wish to contest the narrower meaning of the prohibition in s 51(xxiiiA), adopted in *General Practitioners*, is it necessary for them to obtain the leave of the Court, or a majority of the Court, to contend that the earlier, broader meaning adopted and applied in the *BMA* case was correct and should be restored?

(3) *Meaning of "civil conscription"*: In the light of the resolution of the foregoing issues, is the phrase "any form of" civil conscription limited to "compulsion to serve" or does it extend to a wider range of coercive obligations so as to carry into effect its constitutional purpose?

(4) *Application of the prohibition*: Are all or any of the provisions of the Act impugned by the appellants invalid as offending the constitutional prohibition in the light of the resolution of the foregoing issues?

The centrality of constitutional interpretation

90 *Recognising the threshold issue*: French CJ and Gummow J are correct[99] in recognising the threshold importance of resolving an uncertainty that arises as to the interpretation of the constitutional phrase "but not so as to authorize any form of civil conscription". It is that uncertainty that the parties severally sought to exploit.

91 The Full Court was also correct in appreciating the significance, for the resolution of this issue, of identifying the approach to be taken to the understanding of the paragraph by reference either to the original materials available to the legislators and electors who agreed to the insertion of the paragraph in the Constitution, or by reference to the wider range of materials available today to those obliged to make decisions on the question[100].

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98 (1980) 145 CLR 532 at 557.

99 Reasons of French CJ and Gummow J at [18].

100 (2008) 167 FCR 61 at 66 [17].

92 These are not theoretical considerations. Unless this Court follows a consistent approach to resolving such questions it risks the criticism that it adopts, in some cases, a form of "originalist" approach to the most important task it fulfils (constitutional interpretation) and in other cases a broader approach that recognises the reification of the words appearing in the Constitution, either those surviving from its original adoption or those later inserted in accordance with s 128.

93 *Rejecting "originalist" approaches*: In many of the recent decisions of this Court judges of the Court (or at least a clear majority of them) have rejected the notion that constitutional meaning is to be derived from nothing more than what was in the minds of those who framed the applicable constitutional language. Thus, the observations of the entire Court in *Cheatle v The Queen*[101], to the effect that "in contemporary Australia, the exclusion of females and unpropertied persons [from a 'jury'] would itself be inconsistent with [s 80 of the Constitution]", is the clearest possible statement that the adoption of a 1900 meaning to the original language of the Constitution is not appropriate to fulfil the task of judicial interpretation assigned by the Constitution to this and other courts.

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101 (1993) 177 CLR 541 at 561; [1993] HCA 44.

94 Similarly, the conclusion of the Court in *Sue v Hill*[102] that the expression "subject … of a foreign power", appearing in s 44 of the Constitution[103], extends to a "subject" of the Queen who was a citizen of the United Kingdom. Had an "originalist" approach been applied to the meaning of the words in s 44(i), there is no doubt that, in 1900, a subject of the Queen of the United Kingdom would *not* have been included within the disqualification. There could scarcely be a clearer instance of a rejection of the "originalist" approach in *Sue v Hill* given that its consequence would have been the opposite disposition. A special exception has sometimes been suggested for technical words in the Constitution, requiring an "originalist" approach in such cases[104]. However, even this proposition must now be doubted in the light of recent decisions[105].

95 The fundamental difficulty of adopting an "originalist" interpretation of constitutional language is that it is incompatible with the character and purpose of the text being interpreted. This is a law that speaks of high governmental matters applicable from generation to generation and from age to age. In *Grain Pool of Western Australia v The Commonwealth*[106], by reference to a provision of the Constitution (s 51(xviii)), I said[107]:

> "[T]hose who were present at the conventions which framed the Constitution are long since dead. They did not intend, nor did they enjoy the power, to impose their wishes and understandings of the text upon contemporary Australians for whom the Constitution must, to the full extent that the text allows, meet the diverse needs of modern government[108]. Once the Constitution was made and brought into law, it took upon itself the character proper to an instrument for the

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102 (1999) 199 CLR 462; [1999] HCA 30.

103 Constitution, s 44(i).

104 As for example in defining the character and incidents of the constitutional writs mentioned in s 75(v).

105 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57. In that case, contrary to an historical exegesis, the Court held that, of their nature, all of the constitutional writs mentioned in s 75(v) are discretionary in character, whatever may have been the *historical* availability of the preceding prerogative writs in the United Kingdom.

106 (2000) 202 CLR 479; [2000] HCA 14.

107 (2000) 202 CLR 479 at 522-523 [111]. See also *Aala* (2000) 204 CLR 82 at 133 [136].

108 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 600-601; [1999] HCA 27; cf Inglis Clark, *Studies in Australian Constitutional Law*, (1901) at 21.

> governance of a new federal nation. A constitution is always a special law. It is quite different in function and character from an ordinary statute. It must be construed accordingly. Its purpose requires that the heads of lawmaking power should be given an ample construction because their object is to afford indefinitely … authority to the Federal Parliament to make laws responding to different times and changing needs."

96 I remain of these views. Assistance may sometimes be derived from the study of historical materials that accompanied the adoption of a constitutional provision. This is not so only in respect of the use of the Convention Debates and other materials concerning the original language of the Constitution[109]. It is also true of the use that may be made of materials concerning referenda to amend the Constitution, both where a referendum was successful[110] and where it was rejected by the electors[111]. I do not question the admissibility and utility, in particular cases, of such materials as they tend to identify the subjects of debate[112]. However, I adhere to the opinion I expressed in *Grain Pool*[113]:

> "Although it is sometimes helpful, in exploring the meaning of the constitutional text, to have regard to the debates in the Constitutional Conventions that led to its adoption[114] and other contemporary historical[115] and legal[116] understandings and presuppositions, these cannot impose unchangeable

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109 *New South Wales v The Commonwealth* (*Work Choices Case*) (2006) 229 CLR 1 at 199 [466], 219-220 [525]; [2006] HCA 52; cf *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; [2008] HCA 11.

110 *Kartinyeri* (1998) 195 CLR 337 at 401 [132]; cf (2008) 167 FCR 61 at 66 [16].

111 *Work Choices Case* (2006) 229 CLR 1 at 187 [437]; cf at 99-101 [125]-[135].

112 (2006) 229 CLR 1 at 245-246 [614] referring to unsuccessful attempts by successive Australian governments to enlarge the power with respect to the resolution of industrial disputes in s 51(xxxv) of the Constitution. See also at 285-301 [709]-[735] per Callinan J.

113 (2000) 202 CLR 479 at 523 [112] (emphasis added).

114 *Cole v Whitfield* (1988) 165 CLR 360; *Ha v New South Wales* (1997) 189 CLR 465 at 514; [1997] HCA 34.

115 *Ha* (1997) 189 CLR 465 at 494.

116 As was done by Isaacs J and Higgins J in *Attorney-General of NSW v Brewery Employees Union of NSW* ("the *Union Label Case*") (1908) 6 CLR 469; [1908] HCA 94.

> meanings upon the words. *They are set free* from the framers' intentions. They are free from the understandings of their meaning in 1900 whose basic relevance is often propounded to throw light on the framers' intentions. The words gain their legitimacy and legal force from the fact that they appear in the Constitution; not from how they were conceived by the framers a century ago."

97 The same is true of the intentions of the framers of constitutional amendments such as s 51(xxiiiA). The ultimate meaning is to be found in the text, interpreted in the usual way by reference to history, context and purpose. The Constitution is not a time capsule of history, to be uncovered and disclosed intermittently to later generations. It is a living charter of government of daily application for present and future Australians. This Court needs to say so. In the interpretation of the Constitution, the Court should act consistently.

98 *Limits of historical appreciation*: These considerations make me unwilling to assign undue importance to the historical materials, deployed in other reasons, whether:

. To show the original intention of those who propounded (and amended) what is now s 51(xxiiiA) of the Constitution;

. To reveal the political concerns over the nationalisation of the medical profession existing at that time in light of then recent New Zealand and United Kingdom laws and proposals[117]; or

. To demonstrate the knowledge of parliamentarians in 1946 concerning the use of statutory expressions relating to forms of "military conscription", "industrial conscription" and other like coercive regimes[118].

99 Whilst these historical materials are helpful as affording a context for approaching the meaning of s 51(xxiiiA), it would be a serious mistake to think of them as resolving the problem of meaning now before this Court, or of controlling the interpretation which the Court gives to the constitutional provision as adopted. When the Constitution was amended by referendum to incorporate the added paragraph, the words had thereafter to respond to new circumstances, quite different from the controversial war-time conscription for Australians to perform overseas military service in the Great War; or strike-breaking and man-power regulation in later years of the twentieth century, both in Australia and the United Kingdom.

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117 Mendelson (1999) 23 *Melbourne University Law Review* 308 at 312-313.

118 cf reasons of French CJ and Gummow J at [27]-[42]; reasons of Hayne, Crennan and Kiefel JJ at [187]-[201].

100 For example, the framers of s 51(xxiiiA) could not have envisaged the advances in "medical and dental services" that have occurred in the sixty years since the adoption of the amendment. These changes have arisen largely by reason of then unknowable technological developments. They could not have anticipated the complexity and potential costs of the resulting changes in healthcare; the appearance of new diseases; the advent of new and hugely expensive therapies; not to mention new means of affording the high standards of healthcare envisaged by the Universal Declaration of Human Rights[119]. That Declaration was being conceived and developed by the United Nations at the very time that the amendment, in terms of s 51(xxiiiA), was being adopted in Australia and given its initial effect.

101 Nor could the law-makers of 1946 (or the electors who approved the insertion of par (xxiiiA) in s 51 of the Constitution) have foreseen the advances in the "regulatory state"[120]; the collapse of the command economies; the spread of governmental notions of "economic rationalism"[121]; and the development of new techniques, designed to maximise the efficient provision of healthcare within society and to contain the costs and means of doing so[122].

102 Once a constitutional provision is adopted, it must apply to events and developments that could not have been imagined at the time of its adoption. This is why it is wrong in legal principle to confine the ascertainment of the boundaries of a constitutional power to the discovery of the purposes of those who devised it or the circumstances and experiences that may have been in their minds when they did so. These considerations afford but one portion of the material upon which the constitutional analysis proceeds. It is helpful, in part, to understanding the purpose or "mischief" that lay behind the constitutional provision. However, once the words are chosen, it is fundamental to the task of constitutional interpretation that those words apply as understood from time to time. They cannot be limited to the circumstances, experiences, purposes or objectives of those who adopted them.

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119 Adopted and proclaimed by the General Assembly of the United Nations, Resolution 217 A(III) of 10 December 1948; see esp Art 25.1; [1980] ATS 23. See also International Covenant on Economic, Social and Cultural Rights (1966), Art 12.

120 *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 595 [48] per Gummow, Hayne and Crennan JJ; [2007] HCA 29.

121 Mendelson (1999) 23 *Melbourne University Law Review* 308 at 344; Waitzkin and Iriart, "How the United States Exports Managed Care to Third-World Countries", (2000) 52(1) *Monthly Review* 21.

122 Faunce, "Selim v Lele and the Civil (Industrial) Conscription Prohibition: Constitutional Protection Against Federal Legislation Controlling or Privatising Australian Public Hospitals", (2008) 16 *Journal of Law and Medicine* 36 at 43.

103 *Application of recent authority*: Nothing in the foregoing observations is inconsistent with the general approach of this Court in recent years, once *Cole v Whitfield*[123] lifted the earlier prohibition on reference to, and use of, historical materials (specifically Convention Debates) in assisting in the derivation of the meaning of constitutional words. Neither in *Cole v Whitfield*[124] nor in later decisions, including the opinion of six members of the Court in *Betfair Pty Ltd v Western Australia*[125], was it suggested that the use of historical materials imposed an interpretation of words confining their meaning to the original understandings, without regard to the changing circumstances to which those words must apply in times far removed from those in which the words were first written.

104 It follows that history may afford an understanding of the general purpose of the words, viewed at the time of adoption[126]. But the constitutional function of the words, once chosen, requires that they should continue to apply in different and unenvisaged later circumstances according to the "broad and general" approach explained by O'Connor J in the early years of the Commonwealth[127]. That approach was specifically reaffirmed in *Betfair*[128]. Obviously, it applies to the problem presented by the present appeals.

105 *Distinguishing access to and use of history*: In these appeals, French CJ and Gummow J are therefore correct, with respect, in pointing out that the issue of constitutional interpretation, affecting s 51(xxiiiA), presented when the *BMA* case (1949) and *General Practitioners* (1980) were decided, necessarily involved a somewhat different approach because, at that time, this Court was limited in the use that it might make of extrinsic materials to understand the ambit of a constitutional provision[129]. However, it is one thing to permit access to such materials. It is quite

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123 (1988) 165 CLR 360 at 385.

124 See eg (1988) 165 CLR 360 at 385.

125 (2008) 234 CLR 418 at 453-454 [19]-[20].

126 See eg in *Betfair* (2008) 234 CLR 418 at 453-454 [19]-[20]. The joint reasons there referred to the "present operation of s 92 in the 'new economy' in which Betfair operates in Australia".

127 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368; [1908] HCA 95; cf *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 615; [1975] HCA 45.

128 (2008) 234 CLR 418 at 453 [19].

129 Reasons of French CJ and Gummow J at [18].

another to allow the resulting discoveries to control the meaning of the text, as then understood. Nothing in *Cole v Whitfield* or *Betfair* warrants an originalist view of the use of the historical materials deployed in the present appeals. On the contrary, the joint reasons in *Betfair* laid emphasis on the importance of the constitutional text and on the need to construe constitutional language as it speaks to new and differing circumstances arising at a later time.

The shift in constitutional decisions

106 *Narrowing of constitutional approach*: An analysis of the decisions of this Court on s 51(xxiiiA) demonstrates that a very significant shift occurred in reasoning between the majority decision in the *BMA* case (from which Dixon J and McTiernan J dissented)[130] and the decision in *General Practitioners*. Clearly, in *BMA*, the majority judges took a broader view of the prohibition on "civil conscription" appearing in s 51(xxiiiA). Thus, in his reasons in *BMA*, Latham CJ said[131]:

> "There could in my opinion be no more effective means of compulsion than is to be found in a legal provision that unless a person acts in a particular way he shall not be allowed to earn his living in the way, and possibly in the only way, in which he is qualified to earn a living.
>
> … [I]n determining whether there is compulsion it is proper to consider not only the bare legal provision but also the effect of that provision in relation to the class of persons to whom it is applied in the actual economic and other circumstances of that class."

107 To similar effect, Webb J observed[132]:

> "To require a person to do something which he may lawfully decline to do but only at the sacrifice of the whole or a substantial part of the means of his livelihood would, I think, be to subject him to practical compulsion amounting to conscription in the case of services required by Parliament to be rendered to the people. If Parliament cannot lawfully do this directly by legal means it cannot lawfully do it indirectly by creating a situation, as distinct from merely taking advantage of one, in which the individual is left no real choice but compliance."

108 In *General Practitioners* there was a departure from this expansive view which had led to the outcome in *BMA*. That outcome had been unfavourable to the validity of

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130 (1949) 79 CLR 201 at 278 per Dixon J; cf at 283 per McTiernan J.

131 (1949) 79 CLR 201 at 253.

132 (1949) 79 CLR 201 at 292-293. See also at 290 per Williams J.

the medical prescription writing obligation that was struck down in that case. While several of the judges in *General Practitioners* acknowledged that practical compulsion could, in particular circumstances, afford examples of "civil conscription"[133], there is little doubt that the Court embraced an understanding of "civil conscription" that was closer to the dissenting reasons of Dixon J in the *BMA* case and less favourable to the broad ambit of the prohibition upheld there.

109 The clearest illustration of the narrowing of the view of the prohibition on "civil conscription" may be found in the reasons of Gibbs J in *General Practitioners*, although his Honour considered that his opinion was consistent with what he took to be the *ratio decidendi* in the *BMA* case. Specifically, Gibbs J said[134]:

> "[I]t could not properly be said that it would be a form of civil conscription to require a person who had voluntarily engaged in civilian employment to perform the duties of that employment in accordance with the instructions given to him by his employers … There is nothing in the Constitution that would indicate that the expression 'any form of civil conscription' where it appears in s 51(xxiiiA) should be given an enlarged meaning which its words do not naturally bear. The words 'any form of' do not, in my opinion, extend the meaning of 'conscription', and that word connotes compulsion to serve rather than regulation of the manner in which a service is performed."

110 As a matter of textual interpretation of the language in which the prohibition is stated, I find it impossible to accept that the words "any form of" in s 51(xxiiiA) do not enlarge the concept of "civil conscription"[135]. They are part of the ambit of the prohibition, which is to be read as a whole. On their face, the words are clearly intended to signal that no narrow view should be taken of the form of "civil conscription" that is prohibited. It is unpersuasive to me to draw a distinction between "compulsion to serve" and "regulation of the manner in which a service is performed", if such a distinction is intended to deny the fact that particular forms of regulation can, at a certain point, amount, in practice, to a "form of civil conscription". Both as a matter of textual interpretation and as a matter of practical commonsense, there is much to be said for the more ample view of the prohibition on "civil conscription" stated in the majority reasons in the *BMA* case[136].

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133 (1980) 145 CLR 532 at 549 per Gibbs J. See also at 537-538 per Barwick CJ, 563-564 per Stephen J, 565 per Murphy J, 565-566 per Aickin J. Mason J at 564 and Wilson J at 571 reserved the question.

134 (1980) 145 CLR 532 at 557.

135 Reasons of Heydon J at [264].

136 Reasons of Heydon J at [259].

111 *Supposed need for leave to reargue*: A question then arises (and was raised by the submissions of the appellants) as to whether they required the leave of this Court to suggest (as they did in their arguments) that the approach adopted by the Court in *General Practitioners* was incorrect and that this Court should revert to the approach explained by the majority in *BMA*. In this connection, reference was made to the supposed requirement of leave and to the considerations that would then enliven provision of such leave[137].

112 I do not accept that any procedural requirement of leave (necessarily potentially limited to a majority of judges of this Court) could impede the right and duty of a judge of the Court to state his or her belief concerning the true meaning and application of the Constitution. The judge's obligation derives from the Constitution itself. No procedural rule, devised by judges, could impede its exercise[138]. The right and duty of a judge of this Court to state the law prevails, particularly in matters of constitutional interpretation[139].

113 If, contrary to my belief, leave is required, I would certainly grant it to the appellants. This would not be the first time that a significant (and potentially useful or convenient) federal legislative scheme would have fallen, where, for constitutional reasons, that scheme was held invalid[140]. Such decisions can arise most especially when a federal law, relying on earlier decisions of the Court, seeks to erect too large an edifice of regulation, incapable of being supported by the constitutional text[141].

114 *The appellants' complaints*: The appellants argued that, when the edifice of Pt VAA of the Act was examined, it was excessive to the power, especially after the change from regulation of practitioner conduct by reference to a criterion of "excessive services"[142] to one by reference to the broader notion of "inappropriate practice"[143].

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137 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; [1989] HCA 5.

138 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316; [1984] HCA 18.

139 *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 673; [1996] HCA 58; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 56 [77]; [2003] HCA 72.

140 See eg *New South Wales v The Commonwealth* (*The Incorporation Case*) (1990) 169 CLR 482; [1990] HCA 2; *Re Wakim* (1999) 198 CLR 511.

141 As in *Ha* (1997) 189 CLR 465 at 502-503.

142 The Act as formerly provided in s 79(1B). See reasons of Hayne, Crennan and Kiefel JJ at [211].

143 The Act, ss 82, 81. See reasons of Hayne, Crennan and Kiefel JJ at [212].

According to the appellants, the result of this change was the imposition of an impermissible "form" of "civil conscription". A coercive intrusion had been introduced into the lives of the healthcare professionals who provided "medical and dental services"[144]. It took the legislation into conflict with the prohibition in s 51(xxiiiA). This required invalidation of the impugned provisions and their severance, if possible, from other provisions of the Act.

115 The introduction of the criterion of practical coercion of health professionals, effectively to conform to perceptions of "appropriate practice", beyond those enforceable by the State and Territory disciplinary bodies applicable to registered medical practitioners and dental surgeons, subjected such professionals to severe restrictions and regulations. The subject provisions, which were introduced in 1994, were not in force at the time of the decision in *General Practitioners*. Moreover, at that time (amongst other things) the Court's restriction on access to historical and other materials would have prevented the presentation of many of the arguments advanced by both sides in these appeals.

116 It follows that it is appropriate to recognise the uncertainty that exists in the meaning of the prohibition contained in s 51(xxiiiA) of the Constitution; to acknowledge the arguable shift in the approach between the *BMA* case and *General Practitioners*; and to accept that there are difficulties in adopting at face value some of the reasoning expressed in *General Practitioners.* What, then, does the prohibition in the paragraph entail, with particular relevance to the statutory provisions that the appellants impugn?

The meaning of civil conscription

117 *Starting with the constitutional text*: The meaning of the prohibition in s 51(xxiiiA) is to be derived by an orthodox process of analysis addressed to the contested phrase of the Constitution. That mode of reasoning does not surrender the analysis either to the supposed enlightenment now afforded by available historical material or to an uncritical acceptance of the unadorned criterion expressed by Dixon J in the *BMA* case[145] and reflected in the reasons of Gibbs J in *General Practitioners*[146].

118 The starting point for analysis is always the language of the provision itself. Several points need to be noticed. First, each of the social security benefits stated in the paragraph is governed by the opening phrase "the provision of". Thus, laws with

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144 By the *Health Legislation (Professional Services Review) Amendment Act* 1994 (Cth).

145 (1949) 79 CLR 201 at 278.

146 (1980) 145 CLR 532 at 559-560.

respect to "medical and dental services" at large are not assigned to the Federal Parliament by the added head of power. What is authorised are laws with respect to "the provision of" both "medical and dental services". That is also the context in which the prohibition has to be understood.

119 Moreover, the provision of the applicable services needs to be understood by reference to the accompanying services, all of which contemplate payments or facilities of various kinds: "maternity allowances", "widows' pensions", "child endowment", "unemployment, pharmaceutical, sickness and hospital benefits" and "benefits to students and family allowances". It is in this context that "medical and dental services" appear with their attached prohibition on "civil conscription". It is difficult to imagine that the mere payment of the various forms of allowances, pensions, endowment and benefits could turn into a form of "civil conscription". Hence, the bracketed words have generally been assumed to govern only the provision of "medical and dental services". With their reference to nominated professions those words are conceivably susceptible to a form of "civil conscription". Were it otherwise, it might have been expected that the words now appearing within brackets would have appeared either at the beginning or at the end of the paragraph, so as to govern expressly all of the nominated services.

120 *Dictionary meanings of conscription*: Contrary to the suggestion of Gibbs J in *General Practitioners*, the inclusion within brackets of the reference to "any form of" civil conscription seems designed to expand the concept of "conscription" itself. Normally, in contemporary English, that word is used to refer to compulsory military enlistment in the defence forces. In fact, this is the sole definition provided in the *Macquarie Dictionary*[147], namely "compulsory enrolment in the armed forces".

121 In the *Shorter Oxford English Dictionary*, the primary relevant meaning given is "[e]nrolment or enlistment (of soldiers)"[148]. However, in Dr Samuel Johnson's original *Dictionary of the English Language*[149], the author, by reference to the Latin source of the word (*conscriptio*), describes "conscription" as "[a]n enrolling or registering". He explains "conscript" by reference to a non-military example: "A term used in speaking of the Roman senators, who were called *Patres conscripti*, from their names being written in the register of the senate." The military use of "conscription" in England is ascribed by the *Shorter Oxford English Dictionary* to the 1650s.

122 A wider application of the word "conscription" to non-military activities is also recognised in other modern dictionaries but still with primary reference to compulsory

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147 Federation Edition (2001), vol 1 at 413.

148 3rd ed (1973), vol 1 at 403.

149 (1755). See also *Chambers English Dictionary*, (1988) at 302.

service in the armed forces[150]. Clearly, the usual denotation of the word in Australia, at least when expressed in the form of the noun "conscription", involves compulsory enrolment in the armed forces. This fact helps to explain the importance of the parenthetical prohibition on "civil conscription" and the inclusion of the indication that what was being prohibited was "any form" of such "conscription" which, in this instance, was expressly to be "civil", not military, in character.

123 As a textual matter, the inclusion of the indication of the breadth of the concept ("any form of") suggests that the imperfection of the metaphorical phrase was recognised by the drafters[151]. It was not "military" (or even "industrial") conscription, as in the failed accompanying proposal envisaging enlarged legislative powers with respect to industrial employment. All of these considerations place emphasis on the width of the stated prohibition, considered by reference to the terms in which it is expressed.

124 *A special and limited protection*: A further feature, derived from the text, that lends support to the foregoing propositions is that the protection afforded by the words in brackets is special, limited and necessarily restricted to those involved in the provision of "medical and dental services". Such persons comprise the healthcare professionals who provide the designated services. They also include, of necessity, the patients who are the recipients of the provision of such services.

125 Normally, in our society, the provision of "medical and dental services" occurs pursuant to a private contract entered into between the healthcare provider and the patient[152]. The purpose of incorporating a prohibition on "civil conscription" in the provision of such services is thus to preserve such a contractual relationship between the provider and the patient, at least to the extent that each might wish their relationship to be governed by such a contract.

126 In this sense, the prohibition is expressed for purposes of protection, including a protection extending to the patient. It is designed to ensure the continuance in Australia of the individual provision of such services, as against their provision, say, entirely by a government-employed (or government-controlled) healthcare profession.

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150 eg *Encarta World English Dictionary*, (1999) at 404; *The Random House Dictionary of the English Language*, (1983) at 312; *Webster's Third New International Dictionary*, (1976) at 482.

151 See, for example, Mendelson (1999) 23 *Melbourne University Law Review* 308 at 328.

152 *Breen v Williams* (1996) 186 CLR 71 at 123; [1996] HCA 57; cf Mendelson (1999) 23 *Melbourne University Law Review* 308 at 319.

127 This does not mean that there cannot be the provision of "medical and dental services" otherwise than by individual suppliers, including for example public hospitals and private insurers. However, the prohibition on "any form of civil conscription" is designed to protect patients from having the supply of "medical and dental services", otherwise than by private contract, forced upon them without their consent.

128 *A rare constitutional guarantee*: Because of its character as a guarantee or protection, both for the healthcare professionals identified and for the patients affected by the provision of their services, the exclusion of any form of "civil conscription" must be seen as one of the rare instances of an individual guarantee and protection spelt out in the Australian Constitution. The fact that the Constitution has taken the trouble to afford such a guarantee is a strong reason for upholding a broad ambit for the prohibition, to the full extent that the words permit. It is a reason for rejecting an unduly narrow reading.

129 Such an approach also conforms to the view taken about analogous questions arising in other paragraphs in s 51 of the Constitution, where a grant of power is made subject to a "safeguard, restriction or qualification"[153]. This was the expression employed by Dixon CJ in explaining the approach that is to be taken when deciding the meaning of a grant of power expressed as subject to a limitation.

130 In *Attorney-General (Cth) v Schmidt*[154], Dixon CJ explained the proper approach with the concurrence of the four other judges participating in that case[155]. The principle there stated has been applied by this Court on many occasions[156]. Although commonly considered in the context of the power to make laws with respect to the acquisition of property, subject to the "guarantee" of "just terms"[157], the present is an even clearer occasion for the application of the stated rule. This is because of the way in which the limitation on the exercise of the power is expressed within the very grant of legislative power itself – emphatically and within parentheses.

131 *The broad approach to constitutional words*: The established approach of this Court to the ascertainment of the meaning of constitutional words, affording a grant of

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153 See *Work Choices Case* (2006) 229 CLR 1 at 215 [515].

154 (1961) 105 CLR 361 at 372; [1961] HCA 21.

155 (1961) 105 CLR 361 at 373 per Fullagar, Kitto and Taylor JJ and at 377 per Windeyer J.

156 See eg *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; [1994] HCA 27; see also *Work Choices Case* (2006) 229 CLR 1 at 211-213 [502]-[507].

157 Constitution, s 51(xxxi). See also s 51(xxxiii).

legislative power to the Parliament, is to insist that such words should be given a broad application. This approach is adopted out of recognition of the purposes of the Constitution; the democratic accountability of the repository of the power; and the vast array of circumstances to which, over time, the power will have application[158]. Although this rule is normally stated in the context of a *grant* of power, the same principle applies to a *limitation* upon such a grant, at least where that limitation has been adopted, as here, to afford protection to an identified class. This is especially so where it is recognised that that class includes not merely the providers of "medical and dental services" but also the recipients, namely patients, and citizens generally, as potential recipients of such services.

132 *Express textual enlargement of exemption*: In the present case, the foregoing rule receives specific endorsement from the use of the expression "*any form of* civil conscription". Correctly, in my view, the wide ambit of "any form of" was recognised in the *BMA* case both by Latham CJ[159] and by Williams J[160]. If the opinion of Gibbs J in *General Practitioners* were correct[161], that phrase was basically redundant. This is not a view that I could accept. In a comparatively sparse constitutional text, containing comparatively few express, protective guarantees, it is an approach to the interpretation of the Constitution that is unsupported by any other instance of which I am aware[162].

133 *Fundamental human rights*: To the extent that it is permissible to construe a contested provision of the Constitution by reference to the contextual consideration of emerging norms of fundamental human rights as expressed in international law[163], some

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158 *Jumbunna* (1908) 6 CLR 309 at 367-368; cf *Betfair* (2008) 234 CLR 418 at 454 [20].

159 (1949) 79 CLR 201 at 250.

160 (1949) 79 CLR 201 at 287.

161 (1980) 145 CLR 532 at 557.

162 Unless it be the *Work Choices Case* (2006) 229 CLR 1, assuming (as I there held) that the provision for the resolution of industrial disputes stated in s 51(xxxv) of the requirement for the prevention and settlement to be by procedures of conciliation and arbitration was such a guarantee. See (2006) 229 CLR 1 at 214-216 [510]-[518].

163 Upon which see *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657; [1997] HCA 38; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 617-630 [152]-[191] of my own reasons; cf at 583-595 [42]-[73] per McHugh J; [2004] HCA 37; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 177-180 [13]-[19] per Gleeson CJ, 203-204 [100] per Gummow, Kirby and Crennan JJ, 220-223 [163]-[173] per Hayne J, 224-225 [181] per Heydon J; [2007] HCA 43.

reinforcement for a broad reading of the prohibition in s 51(xxiiiA) of the Constitution can also be found in relevant provisions of international law.

134 These include the provisions of the Universal Declaration of Human Rights, including Art 23.1 which guarantees that "[e]veryone has the right to work [and] to free choice of employment" and of Art 25.1 which provides: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family … and medical care and necessary social services, and the right to security in the event of … sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."[164]

135 To the extent that the interpretation of the prohibition on "civil conscription" urged by the appellants finds support in the international expression of fundamental rights, and in the international law that states those rights, the wider view of the phrase should be preferred to a view that would fail to uphold such fundamental rights in the Australian context. It is important to recognise that the fundamental human rights referred to in the instruments of international law preceded the inclusion of reference to them in such instruments. All that international law has done is to express the rights that inhere in human beings by virtue of their humanity. There is therefore no inconsistency in giving a meaning to the Australian Constitution by reference to declarations of fundamental rights that were adopted after the initial acceptance of the Constitution or, in this case, after the 1946 amendment of the Constitution by the addition of the provisions of s 51(xxiiiA).

136 *The necessity of detailed implementation*: So far, the analysis of the content of the power in s 51(xxiiiA) has laid emphasis upon the wide ambit both of the grant to make laws with respect to the "provision" of "medical and dental" services and of the exclusion from that grant of a law that would authorise "any form of civil conscription". However, s 51(xxiiiA) must also be read in the context of the Constitution viewed as a whole. It is therefore necessary to refer to express and implied contextual considerations that throw light on the scope of the particular power and of the express exclusion from it.

137 Specifically, both the express and implied constitutional provisions for the making of laws incidental to the execution of any power vested in the Parliament[165]

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164 See also International Covenant on Economic, Social and Cultural Rights (1966), Art 7 (work rights), Art 9 (right to social security), Art 12 (right to the enjoyment of the highest available standard of physical and mental health). See esp Art 12.2(d) referring to conditions that will assure to all medical services and medical attention in the event of sickness. See as well International Covenant on Civil and Political Rights (1966), Art 8.3(a) (prohibition on forced or compulsory labour).

165 See eg Constitution, s 51(xxxix).

envisage the enactment of detailed laws to carry into force a head of power such as that in par (xxiiiA). In the nature of modern government, such provisions are bound to involve considerable detail, both of a substantive and procedural kind. Especially so in the context of a paragraph of the Constitution, such as s 51(xxiiiA), with its wide variety of provisions for differing kinds of allowances, pensions, endowment and sundry benefits.

138 It would be impossible to bring such a head of power into effect, in the form of a comprehensive law on social security such as the Act, without enacting provisions of very considerable detail. This is especially so because the addition of par (xxiiiA) to s 51 supplements a power to make laws on "invalid and old-age pensions" included in the original list of powers afforded to the Federal Parliament in 1901[166]. Thus par (xxiiiA) expanded greatly the powers of the Federal Parliament and its potential functions and duties with respect to social services for all Australians.

139 The history of the introduction of the legislation based upon s 51(xxiiiA), and the complexity of the scheme as it grew and expanded, is explained in other reasons[167]. In the nature of such a substantial grant of legislative power; the wide variety of the services specifically nominated; the individuality of the beneficiaries affected; and the specificity of the transactions to be provided for, federal legislation of considerable detail was necessary, addressed both to the rights and obligations of the providers of "medical and dental services" and also to the rights and obligations of the recipients of those services.

140 It follows that, in arriving at an understanding about the express prohibition on "any form of civil conscription", stated in s 51(xxiiiA), it is necessary to accept that detailed provisions for the implementation of the services, and for their regulation and proper deployment, would not, of themselves, amount to "any form of civil conscription"[168]. In so far as such regulation is necessary to, and inherent in, the provision of a wide range of "medical and dental services", and reasonably proportionate to the grant of power for that purpose, the stated constitutional prohibition would not, without more, be breached.

141 *Constitutional regulation of finances*: There is a further contextual consideration which must be taken into account, for it lies deep in the language, history and principles of the Constitution, in relation to which s 51(xxiiiA) must find its place and be understood. I refer to the central constitutional doctrine that the imposition of

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166 Constitution, s 51(xxiii).

167 See esp reasons of Hayne, Crennan and Kiefel JJ at [203]-[210].

168 Reasons of Heydon J at [277].

taxation and the raising of moneys from people, constituting as they do a "burden on the people"[169], have to be effected as the Constitution expressly provides.

142 Thus, the expenditure of moneys must be approved by Appropriation Bills that conform to the constitutional design[170] and that observe the requirements of the Constitution for the levying of moneys from the people; the payment of such moneys into the Consolidated Revenue Fund; and the expenditure of all such moneys in accordance with, or under, appropriations made by law[171].

143 The foregoing are fundamental postulates of the Constitution. They impose severe practical requirements. These are reflected in all federal measures involving the expenditure of moneys. The requirements ensure that such moneys are lawfully and properly expended, and not otherwise. In the context of the Constitution, no reading of the prohibition on "any form of civil conscription" could be adopted that in any material way limited or restricted the due observance of these other constitutional norms designed to ensure the lawfulness and integrity of the expenditures of the Commonwealth.

144 Self-evidently, the provision of social services in the many forms described in s 51(xxiiiA) would necessarily involve both very large *aggregate* expenditures and very small *individual* expenditures made payable (relevantly) to the providers of "medical and dental services" or their agents, or to patients or other persons on their behalf. No view could be adopted of the prohibition in s 51(xxiiiA) on the enactment of "any form of civil conscription" which involves a departure from, or limitation upon, the proper regulation of the expenditures to ensure their lawfulness and financial integrity.

145 The enactment of general and particular provisions of federal law to safeguard such considerations was expressed by, or implied in, the constitutional provisions governing taxation, appropriations, the Consolidated Revenue Fund and the expenditures to which I have referred. If any aspect of the federal law, enacted in a proportionate way to conform with such constitutional provisions, involved a burden (even a coercive burden) on the providers of "medical and dental services" (or their patients who received such services) this could not, of itself, constitute a form of "civil conscription". That is so because of the need to reconcile the prohibition expressed in s 51(xxiiiA) with the provisions elsewhere contained in the Constitution, or implied by necessity and constitutional convention, to uphold the lawfulness and integrity of each expenditure of federal funds raised ultimately as a "burden on the people".

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169 Constitution, s 53.

170 Constitution, ss 54, 55. See also *Combet v The Commonwealth* (2005) 224 CLR 494; [2005] HCA 61.

171 See Constitution, ss 81, 82, 83.

146 Also of necessity, because of the very great aggregate sums of federal moneys involved and the multitude of very small payments for the provision of individual services arising in the case of particular recipients, a high degree of particularity in monitoring, supervising and checking such payments is inescapable. The prohibition on "any form of civil conscription" must accommodate to that degree of particularity. An intrusion to some degree into the private contractual arrangements between the provider of "medical and dental services" and the recipient of such services is inescapable, so long as there is any payment of moneys out of the Consolidated Revenue Fund.

147 *Defining the permissible regulation*: The question in these appeals thus becomes how to define the point where the necessary, proper and inescapable intrusion into the private arrangements between the provider of "medical and dental services" and a recipient of such services passes beyond legitimate scrutiny for reasons of upholding the lawfulness and integrity of such payments and is converted, by its sheer detail and intrusiveness, into a prohibited "form of civil conscription". No easy formula is available to identify that point.

148 In recognition of the primary grant of power to the Parliament to enact laws for a wide range of social services, including the provision of "medical and dental services"; the adoption of the power to do so, exceptionally, by amendment of the Constitution; and the importance and necessity of detailed provisions (including machinery laws) to ensure the lawfulness and integrity of both aggregate and individual payments, the courts will generally respect and uphold the means adopted by the legislature.

149 So long as the machinery provisions are proportionate to the grant of power and do not aggregate to a "form of civil conscription", this Court would not invalidate a measure, or combination of measures, properly characterised as laws enacted to give effect to constitutional requirements designed to uphold the lawfulness and integrity of federal financial expenditures. In particular, the Court would not ordinarily second-guess the legislature in such specific provisions, so long as they appeared reasonably appropriate and adapted ("proportionate") to the fulfilment of the power afforded by s 51(xxiiiA).

150 There must, however, be exceptions to such deference. Thus, a law pretending to be one to uphold the lawfulness and integrity of financial expenditures but which, instead, was properly to be characterised as one intruding into the individual relationship between providers of "medical and dental services" and recipient patients, might attract constitutional invalidation. So might a law which was so detailed and intrusive as to impose coercive requirements and restrictions on the provider of such services, disproportionate to any legitimate federal interest, financial or otherwise. Similarly, to enact laws imposing blanket rules affecting the individual relationship between providers of "medical and dental services" and their recipients, whether for reasons of cost minimisation or for the achievement of particular administrative outcomes in terms of medical or dental practice, could risk invalidation. They might do

so either as falling outside the primary grant of legislative power or as falling within a prohibited "form" of "civil conscription".

151 *Test for the prohibition*: The test for attracting the prohibition contained in s 51(xxiiiA) is whether the impugned regulation, by its details and burdens, intrudes impermissibly into the private consensual arrangements between the providers of "medical and dental services" and the individual recipients of such services. It is this consensual feature of those arrangements which the head of power postulates will be undisturbed.

152 Most obviously, any such disturbance would happen in the unlikely event of an attempt by the Parliament to revive the nationalisation of the healthcare professions or to force their members into full-time or part-time work for the federal government or its agencies. It would also occur where a conclusion was reached that the true purpose of the law was not the regulation of the legality and financial integrity of such benefits but an unjustifiable intrusion into the conduct of medical and dental practice, inconsistent with, or travelling significantly beyond, the ordinary standards generally observed by such professions in Australia.

153 Obviously, cases could arise at the borderline. Views might sometimes differ as to whether particular provisions exceed the grant of power or attract the broadly stated expression of the prohibition upon "any form of civil conscription". In performing the judgment that is enlivened by the prohibition, the decision-maker will not only be affected by the several considerations that I have listed, giving emphasis to the wide ambit of the prohibition. The decision-maker will also give due attention to the need, inherent in the nature of the power, for implementing laws of high particularity that include necessary provisions to ensure the lawfulness and financial integrity of all payments made, conformably with the Constitution.

Application of the principles to this case

154 When the foregoing approach is taken to the central issue in these appeals, the appellants' challenges fail. But they fail for reasons of textual and legal analysis, not for reasons of the historical intentions that lay behind the amendment of the Constitution to insert par (xxiiiA) into s 51.

155 The provisions of the Act which the appellants impugn do not compel the provider of "medical and dental services" to perform any service for or on behalf of a recipient, whether legally or practically, whether on behalf of the Commonwealth or (least of all) as its employee or agent. The scheme of the Act, and specifically the impugned provisions, carefully respect the individual and personal character of the relations between the healthcare professional, as the provider of services, and the individual patient, as recipient. True, many detailed obligations are cast on the provider. By the standards of earlier times, they potentially intrude, to some extent, into the professional relationship. However, the provisions that the appellants challenge in

these appeals do not demonstrate disproportionality in the regulation nor do they constitute an intrusion that attracts the prohibition on "any form of civil conscription".

156 Central to my opinion in this respect is a conclusion similar to that expressed by Hayne, Crennan and Kiefel JJ[172]. After the adoption of the defined criterion of "inappropriate practice", proper care has to be taken in the provisions of the Act, to limit the conduct that will attract that description. In part, the phrase is still defined by reference to the provision of excessive services, which is of proper and legitimate concern to the Commonwealth and its agencies as guardians of public moneys raised from the people. So far as wider considerations of "unprofessional conduct" are concerned, two provisions in s 82 (which the appellants challenge) save the legislation from invalidity. The first is the adoption of a criterion that the supervising committee's conclusion must be "reasonable". The second is the requirement that the committee must ask itself whether the conduct of the healthcare professional "would be unacceptable to the general body" of relevant practitioners involved in supplying the "medical and dental services" concerned[173].

157 These criteria, in combination, necessarily require that committee opinions are determined not by considerations attractive to federal officials, as such, or supposed overall health-management objectives. Instead, in every case, the committee must reach a reasonable conclusion by reference to the standards of the general body of the profession concerned, judged in a therapeutic context. That conclusion is, in turn, susceptible (as in the appellants' cases) to procedures for judicial review, further appeal to the courts and ultimately a constitutional appeal to this Court.

158 I am unconvinced that any of the provisions of the Act impugned by the appellants constitute an illicit attempt, in either of their cases, to force them into forms of medical practice that are imposed for unstated bureaucratic reasons of cost saving, health policy or other purposes inconsistent with the proper conduct of the individual arrangements between the patient and the healthcare professional concerned. In so far as benefits are provided, the scheme of the legislation gives primacy to the individual arrangements between the healthcare professional and the patient but with appropriate protections to both which are consistent with that relationship. Even "bulk billing" is only possible by consent of both parties to that relationship. In these ways, the legislation avoids impermissible forms of "civil conscription" which the grant of power was thought otherwise possibly to entail.

159 Specifically, I agree with what Hayne, Crennan and Kiefel JJ have written about the analogy between the statutory criteria expressed in the Act and the long-established law on professional standards stated in such decisions as *Allinson v General Council of*

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172 Reasons of Hayne, Crennan and Kiefel JJ at [211].

173 Reasons of Hayne, Crennan and Kiefel JJ at [217].

Medical Education and Registration[174] with the elaboration now afforded by Lord Hoffmann in *McCandless v General Medical Council*[175]. The concept of "inappropriate practice" is not exactly the same as "unprofessional conduct" existing in the 1890s when *Allinson* was decided[176]. The statutory criterion today, in a modern regulatory state with a universal, national health scheme, contemplates detailed record-keeping to comply with basic constitutional and statutory principles. Poor book-keeping might not have been "unprofessional conduct" in the century before last[177]. However, in the contemporary Australian context, where what is involved is overcharging, overservicing or inadequate clinical care in the nominated time, it could well be so. In any case, the close similarity of the two concepts is plain.

160 In consequence of the foregoing conclusions, the regulation imposed on the appellants by the Act, in the provisions impugned by them, are no more than measures proportionate to ensure the lawfulness and integrity of the provision of "medical and dental services" in a manner conforming to the Constitution. They do not constitute a "form of civil conscription". It follows that the impugned provisions of the Act are valid.

Orders

161 I agree in the orders proposed by Hayne, Crennan and Kiefel JJ.

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174 [1894] 1 QB 750 at 760-761, 763, 766. See reasons of Hayne, Crennan and Kiefel JJ at [220]-[223].

175 [1996] 1 WLR 167 at 169 (PC). See reasons of Hayne, Crennan and Kiefel JJ at [222].

176 cf reasons of Heydon J at [234]-[241].

177 Reasons of Heydon J at [241].

162 HAYNE, CRENNAN AND KIEFEL JJ. The appellant in each of these matters is a general medical practitioner. Each has been found by a Professional Services Review Committee set up under Pt VAA (ss 80-106ZR) of the *Health Insurance Act* 1973 (Cth) to have engaged in "inappropriate practice". Each appellant submits that certain provisions of the *Health Insurance Act*, namely ss 10, 20 and 20A and some or all of the provisions of Pt VAA[178], amount to a "form of civil conscription" within the meaning of s 51(xxiiiA) of the Constitution and are therefore beyond the legislative powers of the Commonwealth and invalid.

163 The impugned provisions do not amount to a form of civil conscription. Each appeal should be dismissed with costs.

The proceedings

164 In May 2006, Dr Wong and Dr Rifaat George Dimian commenced an action in this Court seeking declarations that certain provisions of the *Health Insurance Act* are not valid laws of the Commonwealth. They alleged that certain provisions of the *Health Insurance Act* "as a practical matter compel general practitioners to participate in the scheme provided for by [those provisions] in order to carry on practice as a general practitioner" and thus amount to "civil conscription". They further alleged that s 106U of the *Health Insurance Act*, a provision dealing with the form and content of determinations of "inappropriate practice", purported to confer part of the judicial power of the Commonwealth on persons who had not been appointed pursuant to s 72 of the Constitution and was on that account invalid. This latter contention is not maintained in the appeal to this Court. It may be put aside from further consideration.

165 In October 2006, the action was remitted to the Federal Court of Australia. Before describing the subsequent proceedings in the Federal Court it is convenient to describe the proceedings that led to the second appeal in this Court: the appeal in which Dr Selim is appellant.

166 In November 2003, Dr Selim applied to the Federal Court for an order of review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act") and for relief under s 39B of the *Judiciary Act* 1903 (Cth) in respect of steps allegedly taken under Pt VAA of the *Health Insurance Act*. In October 2004, Dr Selim's application to the Federal Court was amended to add grounds alleging invalidity of some or all of the provisions of Pt VAA of the *Health Insurance Act* on the basis that

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178 Unless otherwise indicated, references to provisions of the *Health Insurance Act* 1973 (Cth) are to the legislation in the form it took at 14 October 2002, which the parties accepted was the relevant version of the Act.

the Part, or provisions in it, authorise or provide for a form or forms of civil conscription.

167 Dr Selim's application was heard by a single judge of the Federal Court (Stone J) and in February 2006 the application was dismissed[179]. Dr Selim appealed to the Full Court of the Federal Court.

168 The appeal in Dr Selim's matter was heard together with questions referred to the Full Court of the Federal Court in the proceedings in which Dr Wong and Dr Dimian were plaintiffs. Those questions were referred pursuant to s 25(6) of the *Federal Court of Australia Act* 1976 (Cth) and were referred on an agreed statement of facts.

169 The Full Court (Black CJ, Finn and Lander JJ) dismissed[180] Dr Selim's appeal, and answered the questions referred in the other matter in terms upholding the validity of the impugned provisions.

170 By special leave, Dr Wong and Dr Selim appeal to this Court. Dr Dimian did not join in the appeal by Dr Wong. He was named as a respondent to the proceedings in this Court, and filed a submitting appearance.

Section 51(xxiiiA)

171 Section 51(xxiiiA) gives the Parliament power to make laws with respect to:

> "the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances".

172 In *British Medical Association v The Commonwealth* ("the *BMA Case*")[181], Dixon J said that the expression "civil conscription" used in s 51(xxiiiA) was not "an expression which has gained general currency or has acquired a recognized application". Consideration of some aspects of the history of events leading to the amendment of the Constitution by insertion of s 51(xxiiiA), coupled with a consideration of some earlier usages of the cognate expression "industrial conscription", does assist, however, in construing the parenthetical expression: "but not so as to

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179 *Selim v Lele* (2006) 150 FCR 83.

180 *Selim v Lele* (2008) 167 FCR 61.

181 (1949) 79 CLR 201 at 262; [1949] HCA 44.

authorize any form of civil conscription". The assistance provided by these matters of history and usage lies chiefly in what they show about the issue (or issues) to which the reference to civil conscription was directed[182].

173 It is convenient to take up the account of that history in 1944.

Health and social services benefits in the 1940s

174 The *Pharmaceutical Benefits Act* 1944 (Cth) provided (s 8) that, subject to the Act, "every person ordinarily resident in the Commonwealth shall be entitled to receive pharmaceutical benefits", and those benefits were identified (s 7) as medicines, medicinal compounds, and materials and appliances identified in the Commonwealth Pharmaceutical Formulary or an addendum to the Formulary. In the following year, provision was made by the *Hospital Benefits Act* 1945 (Cth) for the Commonwealth to make payments to States, by way of financial assistance, in respect of beds occupied by qualified persons in public and non-public wards in public hospitals, and for regulations to be made in relation to payments by the Commonwealth of hospital benefits in respect of patients in private hospitals.

175 In November 1945, this Court held in *Attorney-General (Vict) v The Commonwealth* ("the *Pharmaceutical Benefits Case*")[183] that the *Pharmaceutical Benefits Act* 1944 was beyond power. The Commonwealth's submissions, that the Act was authorised under s 81 of the Constitution as an appropriation from the Consolidated Revenue Fund "for the purposes of the Commonwealth", or was supported by the incidental power in s 51(xxxix), were rejected.

176 Four months later, on 26 March 1946, the then Attorney-General, Dr Evatt, introduced the Constitution Alteration (Social Services) Bill 1946 with the object, as he put it[184], of placing "Australian social service legislation on a sound legal footing". As the Attorney-General went on to say[185], "[w]hen the Constitution was adopted in 1900, the idea of even invalid and old-age pensions was new", but the Parliament was given power to make laws with respect to that subject matter by s 51(xxiii). And although

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182 *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 494-496 [20]-[23]; [2000] HCA 14.

183 (1945) 71 CLR 237; [1945] HCA 30.

184 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 647.

185 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 647.

Parliament had power in relation to insurance other than State insurance (s 51(xiv)) "[a]ny other social service payments made by the Commonwealth must, therefore, rest on some other foundation"[186]. And that was seen as extending to other social services such as child endowment, widows' pensions, and medical and hospital benefits.

177 The Bill, as first introduced in the House of Representatives, expressed the relevant head of legislative power as "[t]he provision of maternity allowances, widows' pensions, child endowment, unemployment, sickness and hospital benefits, medical and dental services, benefits to students and family allowances".

178 Two other Bills for constitutional alteration were introduced into the Parliament at the same time as the proposal about social services. The Constitution Alteration (Industrial Employment) Bill 1946 proposed the addition of par (xxxivA) to s 51 to give power to the Parliament to make laws with respect to "[t]erms and conditions of employment in industry, but not so as to authorize any form of industrial conscription". The third proposal was to provide legislative power with respect to the "[o]rganized marketing of primary products" but the detail of this proposal need not be further considered.

179 During the Attorney-General's second reading speech in support of the Constitution Alteration (Social Services) Bill 1946 a member of the Opposition asked[187] whether the power, if granted, would enable the Parliament to nationalise medical and dental services. The Attorney-General expressed[188] the opinion that the proposed alteration would not enable the Commonwealth to say "[w]e shall make all practitioners in the medical and dental professions members of the service of the Commonwealth". But examination of the subsequent debates in the House of Representatives reveals that the possible "nationalisation" of the medical and dental professions remained a live issue, albeit without any precise definition of what would constitute "nationalisation".

180 At the end of debate in the House of Representatives about the Constitution Alteration (Social Services) Bill, the then Leader of the Opposition, Mr Menzies,

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186 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 647.

187 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 648.

188 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 648-649.

proposed[189] that after the word "services" there be inserted "(but not so as to authorize any form of civil conscription)". The amendment was at once accepted[190] by the Government and it was in this form that the proposal went to the Senate, and subsequently to electors in a referendum.

181 The pamphlet setting out the case for and against the proposal, provided to electors in accordance with the *Referendum (Constitution Alteration) Act* 1906 (Cth), asserted, in the case for the amendment, that there was "[n]o question of socializing medical and dental services". It was said that the express safeguard against civil conscription "means that doctors and dentists cannot be forced to become professional officers of the Commonwealth under a scheme of medical and dental services".

182 This view of the effect of the words precluding any form of civil conscription is not at odds with, and may even have been based upon, written advice given on 9 April 1946 by the then Solicitor-General of the Commonwealth and others to the Government, about the amendment which Mr Menzies had proposed to the Bill. It was said in that advice that:

> "The only kind of legislation which the amendment would preclude would be such as compelled doctors or dentists in effect to become servants of the Commonwealth, or to have the whole of their professional activities controlled by Commonwealth direction."

183 It will be observed that the authors of the advice focused attention upon compulsion. In so far as they directed attention to compulsion to become servants of the Commonwealth, there would be little debate that such a law would very likely amount to a form of civil conscription. And it was this point that was made in the pamphlet setting out the case for the proposal to amend the Constitution.

184 By contrast, there may well be some difficult questions raised by the reference in the written advice to doctors or dentists having "the whole of their professional activities controlled by Commonwealth direction".

185 It is, however, not fruitful to explore those questions. The advice is of use only as one of a number of different sources which disclose the issue (or issues) to which the

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189 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 April 1946 at 1214.

190 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 April 1946 at 1215.

amendment proposed by Mr Menzies was directed, and which offer some indication of then current usages of the language that was ultimately incorporated in s 51(xxiiiA).

186 For present purposes, what emerges from both the pamphlet given to electors, and the written advice given to government, is no more than that the issue being addressed by adding the qualification about civil conscription was seen as having at its centre compulsion to become, in effect, servants of the Commonwealth. Neither the pamphlet nor the advice goes any great distance towards resolving how far the idea of civil conscription travels beyond that core idea.

Civil conscription

187 As is sufficiently apparent from the text of s 51(xxiiiA) (but is confirmed by what was said[191] in the House of Representatives in connection with the Bill for the constitutional amendment) the form of words "but not so as to authorize any form of civil conscription" was borrowed from the Constitution Alteration (Industrial Employment) Bill, and its reference to "[t]erms and conditions of employment in industry, but not so as to authorize any form of industrial conscription". The use of the expression "civil conscription" in the proposed s 51(xxiiiA), rather than "industrial conscription", reflected then current understandings of the need to distinguish between the professions and industry[192]. Today, the term "civil conscription" may therefore be seen as a genteelism, but at the time the expression was evidently adopted as cognate with, and not materially different in content from, the expression "industrial conscription".

188 The expression "any form of industrial conscription" was borrowed from s 5(7)(a) of the *National Security Act* 1939 (Cth), an Act to which assent was given on 9 September 1939, six days after the commencement of World War II. Section 5(7) of the *National Security Act* limited the power in s 5(1), to make regulations "for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth", by providing that the power did not extend to authorise "the imposition of any form of compulsory naval, military or air-force service, *or any form of industrial conscription*" (emphasis added).

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191 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 April 1946 at 1215.

192 cf Wilde, "Serendipity, Doctors and the Australian Constitution", (2005) 7 *Health and History* 41 at 42 and the description of the course of events given by Sir Henry Newland, President of the British Medical Association's Australian Federal Council at the time, in "Two Men of Years and Honour", *The Medical Journal of Australia*, 31 October 1964, 715 at 717.

189 But the use in the *National Security Act* of the expression "industrial conscription" was not novel. "Industrial conscription" was an expression found in other legislation, both in Australia and in England, between the two World Wars. In 1920, the Parliament at Westminster enacted the *Emergency Powers Act* 1920 to make what the long title of the Act described as "exceptional provision for the Protection of the Community in cases of Emergency". Wide regulation-making powers were conferred, but there were two provisos. First, it was said[193] that nothing in the Act should be construed "to authorise the making of any regulations imposing *any form of compulsory military service or industrial conscription*" (emphasis added). Secondly, it was provided[194] that no regulation should make it an offence "for any person or persons to take part in a strike, or peacefully to persuade any other person or persons to take part in a strike".

190 In Victoria, in 1923, at the time of a police strike, legislative provision was made for that particular emergency and for later cases of emergency. The *Public Safety Preservation Act* 1923 (Vic) provided various powers on proclamation declaring that a state of emergency exists. But s 7 provided that nothing in the Act should be construed "to authorize the making of any regulations imposing any form of industrial conscription". The Act was subsequently consolidated in the course of the general Victorian statutory consolidations of 1929 and 1958, and has been amended in some respects, but remains in force in substantially the same terms[195].

191 The most notable form of industrial conscription in Australia occurred in World War II and was effected by regulations made under the *National Security Act* 1939. Although that Act, as originally enacted, had expressly provided that the regulation-making power it conferred did not authorise the imposition of any form of industrial conscription, the Act was amended, in 1940[196], to provide power to make regulations:

> "making provision for *requiring persons to place themselves*, their services and their property *at the disposal of the Commonwealth*, as ... necessary or expedient for securing the public safety, the defence of the Commonwealth and the Territories of the Commonwealth, or the efficient prosecution of any war in which His Majesty is or may be engaged". (emphasis added)

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193 s 2(1).

194 s 2(1).

195 See *Public Safety Preservation Act* 1958 (Vic), s 7.

196 *National Security Act* 1940 (Cth).

And pursuant to this power, regulations were made[197] permitting the Director-General of Man Power to "direct any person resident in Australia to engage in employment under the direction and control of the employer specified in the direction, or to perform work or services (whether for a specified employer or not) specified in the direction". That is, the regulation required all persons resident in Australia "to place themselves ... at the disposal of the Commonwealth". The validity of the regulation was upheld by this Court in *Reid v Sinderberry*[198].

192 Against this background[199], the meaning to be given to "civil conscription", when used in s 51(xxiiiA), begins to emerge more clearly. It is evident that it connotes compulsion. As Dixon J pointed out in the *BMA Case*[200], the analogy with compulsory enlistment in the armed forces is readily drawn. Because the analogy with military conscription is so readily available it is apparent that the forms of compulsion which were referred to during World War II as manpower direction, or "requiring persons to place themselves ... at the disposal of the Commonwealth", lie at the centre of the notion conveyed by the expression "industrial conscription" and the cognate expression "civil conscription". But the example of civil or industrial conscription provided by World War II manpower arrangements cannot be seen as marking the metes and bounds of either expression.

193 We doubt that it is possible to provide any general definition of what is meant by "civil conscription". Rather, as Dixon J also pointed out in the *BMA Case*[201], the meaning of an indefinite expression like "civil conscription" "cannot often be determined in the abstract [and it] is only by settling what application an expression like 'civil conscription' has to definite situations that its exact scope can be worked out".

194 Of course, it is to be noticed that s 51(xxiiiA) speaks of "any form of civil conscription". The words "any form of" emphasise that the prohibition is not to be understood narrowly, but nothing in the present matters was said to turn upon giving those words a particular application or operation.

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197 National Security (Man Power) Regulations 1942 (Cth) as amended by National Security (Man Power) Regulations 1943 (Cth).

198 (1944) 68 CLR 504; [1944] HCA 15.

199 cf *General Practitioners Society v The Commonwealth* ("the *General Practitioners Case*") (1980) 145 CLR 532 at 571 per Aickin J; [1980] HCA 30.

200 (1949) 79 CLR 201 at 262.

201 (1949) 79 CLR 201 at 262.

195 This Court held in the *BMA Case* that s 7A of the *Pharmaceutical Benefits Act* 1947 (Cth), which required a medical practitioner not to write a prescription in respect of certain medicines or appliances otherwise than on a prescription form supplied by the Commonwealth, imposed a form of civil conscription. The more broadly expressed opinions stated by some members of the Court in the *BMA Case*, to the effect that "civil conscription" extends to "any compulsion of law requiring that men ... perform work in a particular way"[202], have since been rejected[203]. Rather, the dissenting opinion of Dixon J in the *BMA Case* has come to be regarded[204] as better expressing the construction and application of s 51(xxiiiA). In the *BMA Case*, the determinative question for Dixon J was[205] "whether the isolation of an incident in medical practice and the imposition of a duty in reference to what is done can fall within the conception described by the words 'any form of civil conscription', or whether on the other hand *compulsory service or the compulsory performance of a service or services* is not connoted" (emphasis added).

196 Dixon J concluded[206] that s 7A (and an associated regulation) amounted to "no more than a regulation of the manner in which prescriptions shall be given" and that "[t]he end in view [was] not medical but financial and administrative". Noting[207] that "[t]here is no compulsion to serve as a medical man, to attend patients, to render medical services to patients, or to act in any other medical capacity, whether regularly or occasionally, over a period of time, however short, or intermittently", Dixon J concluded that s 7A was valid. While the section made obligatory "an act in the course of medical practice"[208] it did not amount to "a compulsory medical service"[209].

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202 (1949) 79 CLR 201 at 249 per Latham CJ. See also at 290 per Williams J, 294 per Webb J; cf at 255 per Rich J.

203 *General Practitioners Case* (1980) 145 CLR 532 at 556-557 per Gibbs J, 563 per Stephen J, 564 per Mason J, 571-572 per Wilson J; cf at 537 per Barwick CJ, 571 per Aickin J.

204 *General Practitioners Case* (1980) 145 CLR 532 at 558 per Gibbs J, 563 per Stephen J, 564 per Mason J, 571-572 per Wilson J.

205 (1949) 79 CLR 201 at 262.

206 (1949) 79 CLR 201 at 278.

207 (1949) 79 CLR 201 at 278.

208 (1949) 79 CLR 201 at 278.

209 (1949) 79 CLR 201 at 277.

197 Subsequently, in *General Practitioners Society v The Commonwealth* ("the *General Practitioners Case*")[210], the relevant question was expressed[211] by Gibbs J, with whose reasons in this respect Stephen, Mason and Wilson JJ agreed, in terms that reflected the inquiries made by Dixon J in the *BMA Case*. That is, it was said to be necessary to distinguish between regulating the manner in which some of the incidents of medical practice are carried out and compelling any medical practitioner to perform any medical services.

198 So expressed, the distinction may be thought to sound echoes of a distinction of the kind that had been made in connection with s 92 of the Constitution between "reasonable regulation" and prohibition[212]. The difficulties and incoherence of that distinction contributed[213] to the Court's taking a new path in relation to s 92 in *Cole v Whitfield*[214]. But what Dixon J said in the *BMA Case* and what Gibbs J said in the *General Practitioners Case* does not direct attention to a distinction of the kind attempted in connection with the application of s 92, where the focus fell upon whether the regulation was reasonable, in the sense of necessary for the needs of "a free and civilized society"[215]. Rather, what was said by Dixon J in the *BMA Case* and by Gibbs J in the *General Practitioners Case* focuses attention upon what it is that the impugned law compels. Hence the question which Dixon J framed in the *BMA Case*[216] was whether the isolation of an incident in medical practice, and the imposition of a duty in reference to what is done in that practice, comes within the ambit of either "compulsory service" or "the compulsory performance of a service or services", for if it fell within

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210 (1980) 145 CLR 532.

211 (1980) 145 CLR 532 at 559 per Gibbs J.

212 See, for example, *Samuels v Readers' Digest Association Pty Ltd* (1969) 120 CLR 1; [1969] HCA 6; *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559; [1975] HCA 45. See also Zines, *The High Court and the Constitution*, 5th ed (2008) at 167-171.

213 See, for example, *Finemores Transport Pty Ltd v New South Wales* (1978) 139 CLR 338; [1978] HCA 16.

214 (1988) 165 CLR 360; [1988] HCA 18.

215 *Samuels v Readers' Digest Association Pty Ltd* (1969) 120 CLR 1 at 15 per Barwick CJ; cf *The Commonwealth v Bank of New South Wales* (1949) 79 CLR 497; [1950] AC 235; *Hughes and Vale Pty Ltd v The State of New South Wales [No 2]* (1955) 93 CLR 127 at 218 per Kitto J; [1955] HCA 28.

216 (1949) 79 CLR 201 at 262.

either of those descriptions, it would amount to a form of civil conscription. As Dixon J said[217]:

> "It is difficult indeed to say with confidence what is essential to the meaning of the expression 'any form of civil conscription', to ascribe to the expression any definite requirement as part of its connotation. But compulsion to serve seems to be inherent in the notion conveyed by the words. No doubt the service may be irregular or intermittent. A duty to give medical attention to outpatients at a hospital for two hours once a fortnight if imposed by law would no doubt be a form of civil conscription. It need not involve the relation of employer and employee. A law imposing an obligation to perform medical services for patients at a practitioner's own rooms would doubtless be bad as involving a form of civil conscription. But I cannot escape the conviction that a wide distinction exists between on the one hand a regulation of the manner in which an incident of medical practice is carried out, if and when it is done, and on the other hand the compulsion to serve medically or to render medical services. The former does not appear to me within the conception; the latter does."

199 This view of civil conscription may well be understood as encompassing practical as well as legal compulsion[218]. If that is so, the view expressed by Dixon J was wider than that expressed by the other dissentient in the *BMA Case*, McTiernan J, who held[219] that "[a]ny form of civil conscription does not mean any form of compulsion or control of conduct" and that the condition in par (xxiiiA) "with respect to civil conscription is aimed at the passing of a law which by any form conscribes a person into the service of the Commonwealth". McTiernan J denied[220] that practical necessity or moral duty could amount to conscription.

200 In the *General Practitioners Case*, Mr M H Byers QC, then Solicitor-General of the Commonwealth, urged[221] the adoption of the dissenting opinions of Dixon and McTiernan JJ in the *BMA Case*. The differences between the two opinions were not then said to be of significance. Rather, in the *General Practitioners Case*, the

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217 (1949) 79 CLR 201 at 278.

218 cf *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 349 per Dixon J; [1948] HCA 7.

219 (1949) 79 CLR 201 at 283.

220 (1949) 79 CLR 201 at 283.

221 (1980) 145 CLR 532 at 536.

Commonwealth submitted that the laws then in question directed no statutory compulsion to the doctor, that there was no compulsion to do the service, that the doctor could treat or not treat the patient, and that civil conscription was to be understood as a compulsion to service analogous to military conscription. The Commonwealth repeated these submissions in the present matters.

201 The Court divided in the *General Practitioners Case* about whether it was necessary to decide whether practical compulsion could amount to civil conscription. Five members of the Court concluded[222] that in at least some circumstances practical compulsion could amount to a form of civil conscription; two members of the Court expressly reserved[223] the question. All members of the Court held that provisions of the *Health Insurance Act* which provided that certain conditions be satisfied before medical benefits became payable to eligible persons to whom pathology services had been rendered and imposed obligations on some providers of services (with the object of ensuring that unnecessary or excessive pathology services were not rendered) did not amount to a form of civil conscription. Although the sections then impugned compelled medical practitioners to perform certain duties in the course of practice, the provisions did not go beyond regulating the manner in which some of the incidents of practice were performed. The provisions did not compel a practitioner to perform any medical service.

The appellants' case

202 The appellants made two submissions in these matters. First, they submitted that "practical compulsion for a general practitioner to participate in the Medicare Scheme is sufficient for the provisions of the [*Health Insurance Act*] to offend the prohibition against civil conscription". Secondly, they submitted that the requirement of the *Health Insurance Act* "for medical practitioners not to engage in 'inappropriate practice' is an impermissible intervention in the professional delivery of clinical medical services and care and offends the prohibition against civil conscription".

The Medicare scheme

203 In support of their first submission, that practical compulsion to participate in the Medicare scheme sufficed to offend the prohibition against civil conscription, the appellants submitted that ss 10, 20 and 20A of the *Health Insurance Act* are invalid. These three provisions, together, were identified as providing the essential framework

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222 (1980) 145 CLR 532 at 537-538 per Barwick CJ, 550 per Gibbs J, 563 per Stephen J, 565 per Murphy J, 571 per Aickin J.

223 (1980) 145 CLR 532 at 564 per Mason J, 571 per Wilson J.

for "the Medicare scheme". Section 10 provides an entitlement to a Medicare benefit; s 20 identifies who is entitled to a Medicare benefit; and s 20A provides for assignment of Medicare benefits.

204 So far as now relevant, s 10 provides:

> "(1) Where, on or after 1 February 1984, medical expenses are incurred in respect of a professional service rendered in Australia to an eligible person, medicare benefit calculated in accordance with subsection (2) is payable, subject to and in accordance with this Act, in respect of that professional service.
>
> ...
>
> (2) A benefit in respect of a service is:
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> (a) in the case of a service of the kind referred to in subparagraph (a)(ii) and paragraph (b) of the definition of ***applicable benefits arrangement*** in subsection 5A(1) of the *National Health Act 1953* (not being a service, or a service in a class of services, that, under the regulations, is excluded from this paragraph)—an amount equal to 75% of the Schedule fee; or
>
> (b) in any other case—an amount equal to 85% of the Schedule fee."

The "Schedule fee" in relation to a service is defined in s 8(1A) of the *Health Insurance Act* as "the fee specified in the table in respect of the service". The "table" referred to in that definition is defined in s 3 as a table composed of three parts: the "general medical services table", the "diagnostic imaging services table" and the "pathology services table". Provision is made by ss 4, 4AA and 4A of the *Health Insurance Act* for the making of regulations prescribing each of those tables. Taken together, the tables cover most forms of medical consultation, examination, procedure and treatment.

205 Sections 20 and 20A provide for payment of Medicare benefits. Section 20(1) provides that, subject to Pt II of the *Health Insurance Act*, "medicare benefit in respect of a professional service is payable by the Commission on behalf of the Commonwealth to the person who incurs the medical expenses in respect of that service". The entitlement for which s 20(1) provides is qualified by subsequent sub-sections of s 20. In particular, s 20(2) provides, in effect, that if a person to whom a Medicare benefit is payable under s 20(1) has not paid the medical expenses that he or she has incurred in respect of the particular service:

> "he or she shall not be paid the medicare benefit but, if he or she so requests, there shall, in lieu of that payment, be given to him or her personally, or sent to him or her by post at his or her last-known address, a cheque for the amount of

the medicare benefit drawn in favour of the person by whom, or on whose behalf, the professional service was rendered".

Section 20(3) and (4) deal with the case where a cheque is issued pursuant to s 20(2), in respect of a professional service rendered by or on behalf of a general practitioner, but the cheque is not presented for payment. In that event, the Commission may pay the amount of the relevant Medicare benefit to the general practitioner, and the person otherwise entitled to claim a Medicare benefit may no longer do so.

206 Section 20A provides for assignment of Medicare benefits. It is the provisions of s 20A which underpin the practice known as "bulk-billing". Where a Medicare benefit is payable to an eligible person, that person and the practitioner providing the service may enter into an agreement in accordance with an approved form under which[224]:

"(a) the first-mentioned eligible person assigns his or her right to the payment of the medicare benefit to the practitioner; and

(b) the practitioner accepts the assignment *in full payment* of the medical expenses incurred in respect of the professional service by the first-mentioned eligible person". (emphasis added)

An assignment of a Medicare benefit may not be made except in accordance with s 20A[225] and it follows that a practitioner cannot take an assignment of a Medicare benefit except in full payment of the medical expenses incurred. Where an assignment takes effect or an agreement is made under s 20A, the Medicare benefit is payable in accordance with the assignment or the agreement[226].

207 It may be accepted that an inevitable consequence of these provisions for payment of Medicare benefits is that it is very unlikely that a medical practitioner could establish or maintain practice as a general practitioner in a way that did not give patients any access to those benefits. Whether a practitioner could establish or maintain a practice without agreeing to accept assignments of the Medicare benefits in full payment for some or all of the services the practitioner renders to patients would be determined by many considerations. But even if it is possible to practise as a general practitioner without bulk-billing at least some patients, it may be accepted that there is little if any practical alternative to practising in a way that gives most patients the right

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224 s 20A(1).

225 s 20A(5).

226 s 20A(3).

to claim whatever Medicare benefits are lawfully available. In that sense there is practical compulsion to participate in the Medicare scheme.

208 It may also be accepted, as Aickin J said[227] in the *General Practitioners Case*, that:

> "No doubt a legal obligation to perform particular medical or dental services, or to perform medical or dental services at a particular place, or to perform such services only as an employee of the Commonwealth would be clear examples of civil conscription. An equally clear example would be the prohibition of the performance of medical or dental services by particular qualified practitioners other than in some designated place, though no punishment was attached to failure to practise in that place. Other *forms of 'practical compulsion' are easy enough to imagine, particularly those which impose economic pressure such that it would be unreasonable to suppose that it could be resisted*." (emphasis added)

209 Contrary to the appellants' submissions, however, to observe that there is a practical compulsion to participate in the Medicare scheme does not conclude whether the impugned provisions of the *Health Insurance Act* provide for a form of civil conscription. In answering that question, it is necessary to begin by noticing what the impugned provisions do not compel, either legally or practically. The impugned provisions do not compel, legally or practically, a medical practitioner to perform any service, whether on behalf of the Commonwealth or at all. They do not compel, legally or practically, a medical practitioner to treat or not treat any particular patient or group of patients. The impugned provisions do not, in the words of Dixon J in the *BMA Case*[228], provide for "compulsory service" or "the compulsory performance of a service or services". The impugned provisions do not, in the terms used in the Commonwealth's argument in the *General Practitioners Case*[229], direct any statutory compulsion to a doctor. There is no compulsion to do any service. A doctor can treat or not treat a patient. There is no compulsion to service analogous to military conscription. And there is neither a legal nor a practical compulsion, in the words of Aickin J in the *General Practitioners Case*, "to perform particular medical ... services, or to perform medical ... services at a particular place, or to perform such services only as an employee of the Commonwealth".

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227 (1980) 145 CLR 532 at 565-566.

228 (1949) 79 CLR 201 at 262.

229 (1980) 145 CLR 532 at 536.

210 The appellants did not submit to the contrary. Rather, the appellants drew attention to the consequence that follows from the need, as they put it, to "participate" in the Medicare scheme: the consequence that the medical practitioner is subject to the Professional Services Review Scheme provided for by Pt VAA of the *Health Insurance Act*. As s 80(1) of that Act records, Pt VAA "creates a scheme under which a person's conduct can be examined to ascertain whether inappropriate practice ... is involved. It also provides for action that can be taken in response to inappropriate practice." This the appellants characterised as requiring a practitioner to "conform to whatever it takes to remain in the scheme, even in matters going to the mode or manner of provision of medical services".

Inappropriate practice

211 The concept of "inappropriate practice" was introduced into the *Health Insurance Act* by the *Health Legislation (Professional Services Review) Amendment Act* 1994 (Cth) ("the 1994 Amendment Act"). Before the amendments made by the 1994 Amendment Act, the *Health Insurance Act* provided[230] for a Medical Services Committee of Inquiry to examine whether a practitioner had rendered or initiated "excessive services", defined[231] as "services in respect of which medicare benefit has become or may become payable and which were not reasonably necessary for the adequate medical or dental care of the patient concerned". If satisfied that a practitioner had rendered or initiated excessive services, the Committee could recommend[232] the imposition of any of a number of sanctions, ranging from reprimand to a requirement for repayment to the Commonwealth of amounts that had been paid as benefits.

212 Section 82 of the *Health Insurance Act* as amended by the 1994 Amendment Act defines "inappropriate practice". Both s 81 and the heading to s 82 treat the provisions of s 82 as assigning a number of meanings to the expression, but for present purposes it is sufficient to notice three particular features of the provisions of s 82.

213 First, and most importantly, "inappropriate practice" is confined to a practitioner's "conduct in connection with rendering or initiating services". For this purpose, "service" means[233]:

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230 s 94.

231 s 79(1B).

232 s 105.

233 s 81.

> "(a) a service for which, at the time it was rendered or initiated, medicare benefit was payable; or
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> (b) a service rendered by way of a prescribing or dispensing of a pharmaceutical benefit by a medical practitioner or a dental practitioner".

That is, inappropriate practice is confined to conduct "in connection with rendering or initiating" services for which a Medicare benefit is payable under the *Health Insurance Act* or a pharmaceutical benefit is payable under Pt VII of the *National Health Act* 1953 (Cth).

214 The Explanatory Memorandum for the Bill for what was to become the 1994 Amendment Act recorded[234] that the concept of inappropriate practice would encompass "the existing concepts of excessive rendering and excessive initiating but also [introduce] the concept of excessive prescribing". It continued[235]:

> "In addition, it will allow a Committee to examine, where relevant, aspects of a practitioner's practice *broader than purely the excessive servicing of patients*. A Committee will have the capacity to consider the conduct of the person under review in his or her practice and determine whether that conduct is acceptable to the general body of his or her profession or specialty." (emphasis added)

The breadth of what has since been asserted to be the reach of the provision is indicated by a report[236], made in 1999, following a review of the operation of the provisions of Pt VAA. That report identified[237] the categories of conduct which involved inappropriate practice. Those categories included such matters as "issues of professional concern in relation to clinical competence and performance", "aberrant professional behaviour or beliefs", "physical or mental impairment", "substance abuse" and "[o]rganisational issues which affect patient safety", as well as matters going more directly to the number and types of services said to have been performed by a practitioner.

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234 Explanatory Memorandum for the Health Legislation (Professional Services Review) Amendment Bill 1993 (Cth) at 4.

235 Explanatory Memorandum for the Health Legislation (Professional Services Review) Amendment Bill 1993 (Cth) at 4.

236 Australia, *Report of the Review Committee of the Professional Services Review Scheme*, (1999).

237 Australia, *Report of the Review Committee of the Professional Services Review Scheme*, (1999) at 15-16.

215 At least some of these categories of conduct assume a very large meaning of, and application for, the expression "conduct in connection with rendering or initiating services". There may be room for debate about whether issues like general questions about a practitioner's physical or mental competence or a practitioner's substance abuse will come within the expression "conduct in connection with rendering or initiating services". There may also be room for debate about whether all questions about clinical competence and performance, or all organisational issues affecting safety, will come within that expression. No doubt the expression "in connection with" is not to be given a narrow or confined construction. But the provision requires that a connection be demonstrated between identified conduct and rendering or initiating services for which benefits are payable. It is not necessary to examine further the nature of, or limits to, that connection.

216 The *Health Insurance Act* recognises that examining a practitioner's conduct in connection with rendering or initiating services may reveal conduct that does not fall within the statutory concept of inappropriate practice but which may fall within some other definition of unprofessional practice. Provision is therefore made by s 106XA for referring to an appropriate regulatory body any significant threat to life or health that comes to light "in the course of the performance of functions or the exercise of powers" under Pt VAA of the Act. And s 106XB provides for reference to an appropriate regulatory body of any non-compliance by a practitioner with professional standards. These provisions show that it is neither necessary nor appropriate to attempt to stretch the concept of "inappropriate practice", or its definition as "conduct in connection with rendering or initiating services", to embrace all forms of conduct by a practitioner that would merit professional condemnation. Rather, the focus of Pt VAA must remain fixed upon conduct in connection with rendering or initiating services for which benefits are payable.

217 And it was no doubt with just such a focus in mind that provision was made in 1999, by the *Health Insurance Amendment (Professional Services Review) Act* 1999 (Cth), for a Committee considering whether a practitioner has engaged in inappropriate practice to have regard to only samples of classes of services[238] before finding that a practitioner has engaged in inappropriate practice in relation to services of the relevant class; for a Committee to make a finding of inappropriate practice[239] if it is established that a practitioner's conduct in rendering or initiating services constitutes a "prescribed pattern of services"; and for a Committee to make a generic finding of inappropriate

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238 s 106K.

239 s 106KA.

practice[240] where it cannot make a finding by reference to samples of services provided or to prescribed patterns of services because clinical or practice records are insufficient.

218 The second point to notice about s 82 is that it requires that the conduct be "such that a Committee could *reasonably* conclude that ... the conduct would be unacceptable to the general body" of relevant practitioners (emphasis added). The addition of the word "reasonably" reinforces the conclusion that might otherwise have been drawn in any event that the standard against which conduct is to be measured is an objectively determined standard. Moreover, the use of the word "reasonably" may take on particular significance in the application of the ADJR Act. In particular, it may bear upon whether a decision to which the ADJR Act applies was "authorized by the enactment in pursuance of which it was purported to be made"[241], whether the decision "involved an error of law"[242], as well as whether "the decision was otherwise contrary to law"[243] or involved an "improper exercise of ... power"[244]. It is not necessary to explore in any further detail these questions about the application of the ADJR Act.

219 Thirdly, the references in s 82(1) to a conclusion that "the conduct would be unacceptable to the general body" of relevant practitioners cannot be understood divorced from some aspects of the history of legislative regulation of the medical profession.

220 For many years, both in England and in Australia, medical practitioners would be struck off the register if found "to have been guilty of infamous conduct in any professional respect"[245]. In *Allinson v General Council of Medical Education and Registration*[246], the Court of Appeal of England and Wales identified *one* form of conduct amounting to "infamous conduct in a professional respect" as a medical practitioner, in the pursuit of that profession, doing "something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional

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240 s 106KB.

241 *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 5(1)(d).

242 s 5(1)(f).

243 s 5(1)(j).

244 s 5(1)(e).

245 *Medical Act* 1858 (UK), s 29.

246 [1894] 1 QB 750 at 760-761 per Lord Esher MR, 763 per Lopes LJ, 766 per Davey LJ.

brethren of good repute and competency". Proof of conduct of that kind resulted in striking the offender's name from the register of practitioners. No lesser punishment could be imposed. Not surprisingly, then, there was much litigation over the years about what was "infamous conduct in a professional respect". In particular, much attention was given to whether it was necessary to establish moral turpitude, fraud or dishonesty.

221 For the most part these issues were put to rest in Australia by this Court's decision in *Hoile v The Medical Board of South Australia*[247] holding that what amounts to "infamous conduct" is "best represented by the words 'shameful' or 'disgraceful'; and it is as conduct of a medical practitioner in relation to his profession that it must be considered shameful or disgraceful"[248].

222 More recent legislation regulating the conduct of professional practitioners such as medical and legal practitioners has moved away from the notion of "infamous conduct" and has provided for a much greater range of punishments for professional default than termination of the right to practise by striking off the appropriate register[249]. And as Lord Hoffmann, delivering the opinion of the Judicial Committee of the Privy Council in *McCandless v General Medical Council*[250], pointed out, "the public has higher expectations of doctors and members of other self-governing professions [and] [t]heir governing bodies are under a corresponding duty to protect the public against the genially incompetent as well as the deliberate wrongdoers".

223 But from *Allinson's Case* to today, a common thread can be identified running through most statutes regulating the conduct of what Lord Hoffmann referred to as the "self-governing professions". The standard of conduct expected of practitioners is an objective standard and is often identified, at least in part, by reference to the opinion of

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247 (1960) 104 CLR 157 at 162; [1960] HCA 30.

248 See also, *R v The Medical Board of Victoria; Ex parte Epstein* [1945] VLR 60; *Epstein v The Medical Board of Victoria* [1945] VLR 309; *Re Appeals of Johnson and Anderson* [1967] 2 NSWR 357; *Mercer v Pharmacy Board of Victoria* [1968] VR 72; *Basser v Medical Board of Victoria* [1981] VR 953.

249 See the provisions relating to "professional misconduct" or cognate expressions in, for example, *Medical Practice Act* 1992 (NSW), s 36; *Health Professions Registration Act* 2005 (Vic), s 3; *Medical Practice Act* 2004 (SA), s 3; *Health Practitioners (Professional Standards) Act* 1999 (Q), s 3; *Medical Practitioners Registration Act* 1996 (Tas), s 45; *Health Practitioners Act* (NT), s 56(2); *Health Professionals Act* 2004 (ACT), s 18; cf *Medical Act* 1894 (WA), s 13.

250 [1996] 1 WLR 167 at 169.

members of the profession, or members of the profession "of good repute and competency"[251]. Hence, the reference in s 82(1) to conduct that "would be unacceptable to the general body" of relevant practitioners can be seen as maintaining the thread common to many earlier forms of professional discipline and regulation, by which the standards of conduct are set by reference to prevailing professional opinion. And in particular, the conduct which may be identified as "inappropriate practice", as defined in s 82 of the *Health Insurance Act*, is conduct which has two features. First, the conduct must be "in connection with rendering or initiating services" for which a Medicare benefit or a pharmaceutical benefit is payable. Secondly, the conduct must be such as a Committee could reasonably conclude would be unacceptable to the general body of relevant practitioners.

224 As noted earlier, it may be accepted that the *Health Insurance Act* has the practical effect of requiring those medical practitioners who wish to practise as general practitioners to participate in the Medicare scheme. The Act requires those practitioners not to engage in inappropriate practice. It therefore follows that the *Health Insurance Act* practically compels those practitioners to abide by a particular standard of professional behaviour in connection with rendering or initiating services. Even if the definition of inappropriate practice in s 82 is as broad in its application as has been asserted (and as noted earlier, it is not necessary to decide whether it is) the standard of conduct that is thus imposed is framed by reference to professional opinion. It is, therefore, not different in kind from the standard of professional conduct that, since *Allinson's Case*, has been expected of medical practitioners in the conduct of their profession.

225 Whether such a broad view of s 82 could present any question about whether, in some of its applications, the law, so construed, was a law with respect to medical and dental services was not explored in argument. It is neither necessary nor appropriate to express any opinion about whether any such question would be presented, or about how such a question should be answered. The only attack mounted on the provisions of the *Health Insurance Act* which are impugned in these proceedings was that they provided for a form of civil conscription.

226 Assuming, without deciding, that s 82 does require medical practitioners to conform to the standard thus prescribed in relation to what the appellants called "matters going to the mode or manner of provision of medical services", the requirement to

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251 *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 at 761. See also, for example, *In re A Solicitor; Ex parte Law Society* [1912] 1 KB 302 at 312; *R v The Medical Board of Victoria; Ex parte Epstein* [1945] VLR 60; *Epstein v The Medical Board of Victoria* [1945] VLR 309; *Re Appeals of Johnson and Anderson* [1967] 2 NSWR 357.

comply with that standard does not constitute a form of civil conscription. Section 82 and the other provisions which the appellants alleged to be invalid do not deny that a medical practitioner is free to choose whether to practise. A practitioner may choose whether to practise on his or her own account, or as an employee. The impugned provisions do not confine a practitioner's freedom[252] to choose where to practise. If the practitioner practises on his or her own account, the practitioner may decide when to be available for consultation and who to accept as a patient. The practical compulsion to meet a prescribed standard of conduct when the practitioner does practise is not a form of civil conscription. To adopt and adapt what Dixon J said[253] in the *BMA Case*, "[t]here is no compulsion to serve as a medical [practitioner], to attend patients, to render medical services to patients, or to act in any other medical capacity, whether regularly or occasionally, over a period of time, however short, or intermittently".

227 Each appeal should be dismissed. In Dr Wong's appeal the appellant should pay the costs of the Commonwealth. In Dr Selim's appeal, the appellant should pay the costs of the first, third and fourth respondents.

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252 Reference was made in passing during oral argument to arrangements made under s 19ABA of the *Health Insurance Act* with respect to agreements to work in rural or remote areas. Reference may also be made to s 19AB and arrangements made with respect to certain overseas trained doctors. Neither the operation of any of these arrangements nor their validity was examined in argument.

253 (1949) 79 CLR 201 at 278.

228 HEYDON J. The background circumstances and the principal constitutional and legislative provisions are set out in other judgments.

The legislative scheme in outline

229 *Sections 9, 10, 20 and 20A*. What the Full Court called the "Medicare Scheme" operates in relation to general practitioners in the following way.

230 Subject to s 20A of the Act, medical practitioners who participate in the Medicare Scheme may charge their patients what they wish, but, in relation to the vast majority of professional services, the patient is entitled to a "Medicare benefit" in relation to each professional service: ss 9, 10(1) and (2) and 20[254]. Section 20A deals with the practice known as "bulk billing". It authorises the entry into an agreement between medical practitioner and patient under which the patient assigns to the medical practitioner that patient's right to payment of a Medicare benefit in full payment of the medical expenses incurred in respect of the professional service in question. But it is not all medical practitioners who may participate in the Medicare Scheme – only those not disqualified from doing so. Disqualification is regulated by Pt VAA.

231 *Part VAA*. Part VAA was introduced in 1994. The responsible Ministers were Senator Graham Richardson as Minister for Health and Dr Andrew Theophanous as Parliamentary Secretary to the Minister for Health. Part VAA may thus be called the "Richardson-Theophanous scheme". About that scheme the Full Court made[255] the following finding (partly challenged by the respondents, but not successfully)[256]:

> "[I]f patients cannot claim medical benefits in relation to the services that a doctor provides … a doctor will have few, if any, opportunities to practise as a general practitioner in private practice. The Act thus imposes a practical compulsion on those who wish to practise as general practitioners in private practice to participate in the Medicare Scheme and, as a result of Pt VAA, to

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254 The Medicare benefit is calculated by reference to a table of medical services prescribed in regulations made each year setting out items of medical services, the amount of fees applicable in respect of each item, and rules for interpreting the table. The table is published annually in a "Medicare Benefits Schedule Book". The table covers most services likely to be provided by a general medical practitioner. Sometimes the services are described specifically and sometimes they are described in general terms, for example, "brief", "standard", "long" or "prolonged" consultations.

255 *Selim v Lele* (2008) 167 FCR 61 at 75 [35].

256 See below at [256]-[259].

> conduct their practice in such a way as to avoid committing inappropriate practice."

232 The reference to "inappropriate practice" is a reference, relevantly, to s 82 of the Act. Section 82(1)(a) provides:

> "A practitioner engages in inappropriate practice if the practitioner's conduct in connection with rendering or initiating services is such that a Committee could reasonably conclude that:
>
> (a) if the practitioner rendered or initiated the referred services as a general practitioner – the conduct would be unacceptable to the general body of general practitioners …"

Section 81(1) provides that the reference in s 82(1)(a) to "Committee" is a reference to a Professional Services Review Committee set up under s 93 ("a Committee"). At the relevant time s 86(1)(a) empowered the Health Insurance Commission to refer to the Director of Professional Services Review ("the Director") the conduct of a person relating to the question whether that person had engaged in inappropriate practice in connection with the rendering of services for which Medicare benefit was payable. This was known as "investigative referral": s 81(1). Section 93(1) empowered the Director to set up a Committee of three relevantly qualified medical practitioners (s 95) and make an "adjudicative referral" to it to consider whether conduct by the person under review constituted engaging in inappropriate practice. The Committee was obliged to prepare "a written draft report of preliminary findings" (s 106KD) and a "final report" (s 106L). The final report was to be given to the "Determining Authority" (s 106L(4)). Where the Committee found that the person under review had engaged in inappropriate practice, the Determining Authority was to make draft determinations and final determinations (ss 106T, 106TA, 106U and 106V). Those determinations had to contain one or more of a series of directions which included reprimand, counselling, non-payment of Medicare benefits, repayment of Medicare benefits, and full or partial disqualification (pursuant to s 106U(1)(h)) for up to three years: s 106U(1).

233 A Medicare benefit is not payable in respect of a professional service rendered by a practitioner in relation to whom a final determination contained a direction under s 106U(1)(h) that the practitioner be disqualified: s 19B(2). The consequence of the Full Court's finding quoted above[257] about the Richardson-Theophanous scheme is that if a final determination directs disqualification, the doctor in question will have few, if any, opportunities to practise as a general practitioner in private practice.

What is "inappropriate practice"?

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257 At [231].

234 Before examining whether legislation is beyond Commonwealth legislative power, it is necessary to establish what it means. It is plain that the concept of "inappropriate practice" is central to the Richardson-Theophanous scheme. It confronts the parties with a dilemma. The more narrow s 82(1) is, the less likely it is that it will be invalid (although the more likely it is that a particular Committee may act beyond its powers). The wider it is, the more likely it is that it will be invalid (although if it is valid it is less likely that a particular Committee will act beyond its powers).

235 *Four possible meanings of "inappropriate practice".* What, then, is "inappropriate practice"? There are at least four possibilities.

236 The first is that the expression refers only to excessive servicing – the supply of medical services unnecessarily.

237 The second is that it refers to unprofessional conduct of the kind discussed in the line of cases associated with *Allinson v General Council of Medical Education and Registration*[258] and dealt with in legislation to a similar effect – that is, misconduct which includes not only some forms of excessive servicing but other kinds of professional misconduct.

238 The third is that the expression refers to failures to attain proper standards of care and skill in the conduct of medical practices, both in relation to particular forms of advice and treatment and in relation to practice organisation.

239 The fourth is that the expression extends beyond the first three meanings in such a way as to permit control of conduct even though it is honest, careful and skilful.

240 *Excessive servicing?* Contrary to the submissions of the Commonwealth, the first view – that "inappropriate practice" refers only to excessive servicing – tends to be negated by the Second Reading Speech on the Health Legislation (Professional Services Review) Amendment Bill 1993, which, on enactment, amended the Act by inserting Pt VAA. Dr Theophanous said[259]:

> "Whereas excessive servicing is currently defined as the rendering or initiation of services not reasonably necessary for the adequate care of the patient, the concept of inappropriate practice goes further."

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258 [1894] 1 QB 750 at 760-761. See [64] and [220]-[222] above.

259 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 30 September 1993 at 1551.

And the Explanatory Memorandum circulated by authority of Senator Richardson said[260]:

> "Section 82 defines a new concept, to be known as 'inappropriate practice'. It encompasses the existing concepts of excessive rendering and excessive initiating but also introduces the concept of excessive prescribing. In addition, it will allow a Committee to examine, where relevant, aspects of a practitioner's practice broader than purely the excessive servicing of patients."

The proposition that Pt VAA extends beyond excessive servicing is also now supported by an amendment to Pt VAA made in 2003 to introduce s 79A. It provides:

> "The object of this Part is to protect the integrity of the Commonwealth medicare benefits and pharmaceutical benefits programs and, in doing so:
>
> (a) protect patients and the community in general from the risks associated with inappropriate practice; and
>
> (b) protect the Commonwealth from having to meet the cost of services provided as a result of inappropriate practice."

Paragraph (b) corresponds with a purpose directed against "inappropriate practice" viewed as excessive servicing. But par (a) reflects other and wider purposes.

241 *Allinson conduct?* The second view – that "inappropriate practice" refers to unprofessional conduct – is negated by various provisions in Pt VAA.

(a) One is s 82(3), which makes the keeping of adequate and contemporaneous records a relevant factor. Inefficiency in record keeping is not unprofessional conduct as traditionally and generally understood. The same applies to s 106KB(1)(a) which widens the Committee's powers if there are no, or no adequate, clinical or practice records.

(b) Sections 89A and 106N give respectively the Director and the Committee certain powers if fraud is suspected: this specific provision for a particular type of malpractice suggests that s 82(1) ranges much more widely.

(c) Section 106K permits the Committee to have regard to samples of the services supplied by the relevant medical practitioner within a class of services: this suggests that Pt VAA is not concerned only with particular serious incidents but routine repeated instances of unacceptable conduct. The same is true of s

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260 Explanatory Memorandum to the Health Legislation (Professional Services Review) Amendment Bill 1993 (Cth) at 4.

106KA, which deals with services constituting a "prescribed pattern of services" over a particular period.

(d) There is a wide range of directions which may be contained in a draft or final determination: s 106U. There would be little point in having directions as painless as a reprimand or counselling or a non-payment of a single Medicare benefit otherwise payable or a repayment of whole or part of a single Medicare benefit if the conduct which resulted in that outcome was not capable of extending to very minor failings in the conduct of a practice.

242 *Want of due care and skill?* Hence it is likely that "inappropriate practice" extends at least to the conduct encompassed within the third view. That was the view of the Full Court[261] and of Davies J[262], who thought that "unacceptable" conduct concerned departures from due care and skill. However, the *Report of the Review Committee of the Professional Services Review Scheme* to the Minister for Health and Aged Care[263] went further.

243 *More detailed regulation? The Report.* The Report concluded that the conduct identified by the Committees under the Richardson-Theophanous scheme as involving inappropriate practice fell into three categories. One, under the heading "General professional issues", related to "clinical competence and performance; aberrant professional behaviour or beliefs; lack of meaningful continuing medical education; physical or mental impairment; and substance abuse." Under that heading the Report also referred to organisational issues "which affect patient safety, such as equipment and staffing deficiencies" as also sometimes being evident. The second, under the heading "Particular identifiable unacceptable conduct", was described as "high number of services per patient; unusual incidence of specific types of services; inappropriate prescribing; inappropriate ordering of diagnostic imaging and pathology; and inappropriate use of Medicare item numbers when making claims." The third, under the heading "High volume services per day", referred to "high numbers of services per day with low rates of consultation services per patient."[264]

244 If the Richardson-Theophanous scheme gives a Committee, given the task of adjudicating on "inappropriate practice", the power to identify as aberrant – years after the supply of the medical services being investigated – certain "professional behaviour"

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261 *Selim v Lele* (2008) 167 FCR 61 at 80-81 [50].

262 *Yung v Adams* (1997) 80 FCR 453 at 459.

263 Australia, *Report of the Review Committee of the Professional Services Review Scheme*, (1999) at 15-16.

264 Australia, *Report of the Review Committee of the Professional Services Review Scheme*, (1999) at 15-16.

or "professional beliefs", it gives a very wide power of control. The same is true in relation to the mode of "performance" within a practice; to "unusual incidence of specific types of services"; and to "inappropriate prescribing". In each case there is a possibility of particular sanctions for the past and of preventing or hindering or dissuading the supply by doctors of particular types of services, medications or treatments – types which might not command majority support within the profession but may be thought bona fide and on reasonable grounds by a particular doctor to be suitable for a particular condition in a particular patient, and which, though unorthodox, may one day come to be regarded as wholly legitimate. For almost every one of the striking advances in medical treatment over the last 250 years was at the time when it was developed and introduced not favoured by the majority of the profession. The Report thus indicates a very wide view of what the expression "inappropriate practice" can include. So do the final reports of the Committees which investigated Dr Selim and Dr Wong.

245 *More detailed regulation? The Committees' findings against Dr Selim and Dr Wong.* A Committee found in a final report made under s 106L that Dr Selim's conduct constituted "inappropriate practice" in relation to the quality of clinical input into his servicing, the failure to provide "professional services", the failure to maintain adequate records, and the failure to meet the requirements for providing item 23 and item 36 services[265].

246 Another Committee found in a final report made under s 106L that Dr Wong's conduct constituted "inappropriate practice" in connection with item 23 services[266]: he had not provided an appropriate level of clinical input; he had managed patients

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265 An item 23 service was:

> "Professional attendance involving taking a selective history, examination of the patient with implementation of a management plan in relation to 1 or more problems, OR a professional attendance of less than 20 minutes duration involving components of a service to which item 36, 37, 38, 40, 43, 44, 47, 48, 50 or 51 applies."

An item 36 service was:

> "Professional attendance involving taking a detailed history, an examination of multiple systems, arranging any necessary investigations and implementing a management plan in relation to 1 or more problems, and lasting at least 20 minutes, OR a professional attendance of less than 40 minutes duration involving components of a service to which item 44, 47, 48, 50 or 51 applies."

266 The definition in the period relevant to Dr Wong was in substance the same as the definition relevant to Dr Selim: see n 265 above.

episodically rather than pursuant to a clinical management plan; his use of therapeutic drugs demonstrated poor clinical acumen; and he had provided services that were not clinically necessary.

247 Taking the findings against the two doctors together, many adverse findings did not concern unsatisfactory treatment as such. They concerned the failure to record, or record in detail or legibly, events which may have happened – histories given on particular visits, observations made during particular visits, explanations of the dosages in which and the frequencies with which medications were to be given, and the setting of time frames for follow-up treatment. Some adverse findings concerned the prescription of medications or tests which were not clinically indicated; episodic treatment rather than treatment regulated by a clinical management plan or strategy; incorrect usages of technical terms; incorrect prescriptions of drugs for viral as opposed to bacterial illnesses and vice versa; and incorrect prescriptions of drugs which might interact adversely with other medications being taken.

248 The point is not that these conclusions of the Committees are necessarily unsound. Rather it is that the legislative expression "inappropriate practice" is seen as warranting extremely detailed examination of the contacts between the doctors and the patients in their most minute aspects. The extreme breadth of the expression suggests that that construction of it, which the Report assumed and on which the Committees appear to have been acting, is correct. Even though s 82(1) contains the words "reasonably conclude that … the conduct would be unacceptable to the general body of general practitioners", a very great deal is left to the opinion, judgment and discretion of three people. Is a disciplinary scheme, backed by many sanctions, some severe, involving so detailed a level of management and regulation, a form of "civil conscription"?

The Commonwealth's submissions

249 The Commonwealth submitted that the following test stated by Gibbs J in *General Practitioners Society v The Commonwealth*, which was concurred in by at least five other members of the Court, was correct[267]:

> "[The] expression ['any form of civil conscription'], used in its natural meaning, and applied, as the context of par (xxiiiA) requires, to medical and dental services, refers to *any sort of compulsion to engage in practice as a doctor* or a dentist *or to perform particular medical* or dental *services*. However, in its natural meaning *it does not refer to compulsion to do, in a particular way, some act* in the course of carrying on practice or performing a service, *when there is no compulsion to carry on the practice or perform the service*." (emphasis added by the Commonwealth)

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267 (1980) 145 CLR 532 at 557 (cf at 565-566 and 571 per Aickin J); [1980] HCA 30.

Hence even if it could be said that there was practical compulsion on medical practitioners to conduct their practices in such a way as to avoid committing inappropriate practice, there was no compulsion to perform particular medical services. All that Pt VAA did was to compel doctors to do, in a particular way, some act in the course of carrying on practice or performing a service where there was no compulsion to carry on the practice or perform the service.

250 The Commonwealth further submitted that to overrule that test and include within "civil conscription" provisions compelling an act done in the course of performing a service to be done in a particular way even though there was no compulsion to perform the service would be to depart from the meaning of "civil conscription" as understood at the time when s 51(xxiiiA) was inserted into the Constitution in 1946.

Three preliminary matters

251 Three preliminary matters are to be remembered.

252 *Constitutional guarantee.* First, the phrase "any form of civil conscription" operates to confer a type of constitutional guarantee. It creates a deliberate constitutional restraint on a head of Commonwealth legislative power. It relates to individual freedom. It should thus be treated as a matter of substance. It should be read purposively. It should not be construed narrowly. The Commonwealth accepted this, but submitted that it did not follow that it should "automatically … be read up": it should be read as operating within the field which its proper construction carves out.

253 *Relevance of practical operation.* Secondly, in *Ha v New South Wales*[268] Brennan CJ, McHugh, Gummow and Kirby JJ said:

> "When a constitutional limitation or restriction on power is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – must be examined as well as its terms in order to ensure that the limitation or restriction is not circumvented by mere drafting devices. In recent cases, this Court has insisted on an examination of the practical operation (or substance) of a law impugned for contravention of a constitutional limitation or restriction on power."

254 *Sufficiency of practical compulsion.* Thirdly, it is clear that the meaning of "compulsion" in the *General Practitioners* test includes legal compulsion, ie a command backed by a sanction or enforceable by mandatory injunction. Two members of this Court in the *General Practitioners* case (Mason J[269] and Wilson J[270]) left open

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268 (1997) 189 CLR 465 at 498 (footnote omitted); [1997] HCA 34.

269 (1980) 145 CLR 532 at 564.

the question whether practical compulsion as distinct from legal compulsion is enough to satisfy the constitutional conception of "civil conscription", but the other five members considered that it was[271], although Barwick CJ thought that "to make out such a case would need an extremely strong set of circumstances which, in real terms, left the individual with no choice but to submit to what the statute required, though it did not command it."[272] In particular Gibbs J appears to have included "practical compulsion" within his references to "compulsion". That is because he said[273]:

> "The question whether a law imposes civil conscription cannot be answered in the negative simply because the law does not create any legal liability to perform any medical or dental service; the effect of the law in the economic and other circumstances must be considered, and practical compulsion is enough".

There are also dicta from three Justices to the same effect in *British Medical Association v The Commonwealth*[274]. In these proceedings the Commonwealth accepted that practical compulsion would suffice. An example of practical compulsion would arise where benefits are given to medical practitioners who comply with a certain condition (eg to treat a particular patient or give a particular patient a particular service), but where benefits are not given to those who do not, in circumstances where failure to obtain those benefits will be economically fatal to the medical practitioner in question.

The reasoning of the Full Court

255 The Full Court concluded, first, that the Act imposed a practical compulsion not to do anything which would be unacceptable to the general body of practitioners[275]. But it also concluded, secondly, that the second sentence of the *General Practitioners* test applied: neither s 10, nor s 20, nor s 20A, nor Pt VAA created any compulsion on a medical practitioner to perform any professional service[276].

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270 (1980) 145 CLR 532 at 571.

271 (1980) 145 CLR 532 at 537-538 per Barwick CJ, 550 per Gibbs J, 563 per Stephen J, 565 per Murphy J and 565-566 per Aickin J.

272 (1980) 145 CLR 532 at 538.

273 (1980) 145 CLR 532 at 550.

274 (1949) 79 CLR 201 at 252-253 per Latham CJ, 256 per Rich J and 292-293 per Webb J; McTiernan J was of the contrary opinion at 283-284; [1949] HCA 44.

275 *Selim v Lele* (2008) 167 FCR 61 at 75 [35], quoted above at [84].

276 *Selim v Lele* (2008) 167 FCR 61 at 79-81 [45]-[50].

256 The Commonwealth denied that the Full Court was correct to reach its first conclusion. It said:

> "If I choose to be a general practitioner in private practice, then the economic incentives facing my clients [sic] are such that I am unlikely to be able to earn a living as a general practitioner in private practice unless I participate to some extent in the Medicare system and, to that extent, conduct my practice in a way that avoids committing inappropriate practice within the meaning of Part VAA."

It then said: "[T]o characterise the indirect economic effect of the Act on the patient and through the patient on the practitioner as practical compulsion imposed by the Act is going too far". But it did not explain why it was going too far. It is practical compulsion not merely because of indirect economic effects, but because of the way the statutory structure operates on general practitioners considered as professionals.

257 The following is a conventional path for a person educated in New South Wales who wishes to become a general practitioner. Normally a very high result must be achieved in the last year of secondary school. A university degree must then be obtained, and usually is obtained in a medicine-related field, for example the degree of Bachelor of Medical Science. It is then necessary to gain admission to a university medical school. This entails the passing of quite difficult examinations: many are called to sit, not all that many are chosen. Four years of study for a medical degree then follow. Not all survive them. A year's training in a teaching hospital as an "intern" then takes place. Since 1996 it has been necessary to undertake a minimum of three years supervised clinical practice and to pass the examinations prescribed by the Royal Australian College of General Practitioners. By the time general practitioners have reached that stage they are aged about 30. There may be heavy financial pressures on them. They may well have funded their studies and their accommodation by borrowing. Most persons in that position have to take any medical work they can. They will not obtain any significant amount of medical work unless they are participants in the Medicare Scheme, for if they are not their patients will not be eligible for Medicare benefits. This creates a practical necessity to treat patients who come forward on the conditions of detailed regulation inherent in the Richardson-Theophanous scheme.

258 The Commonwealth attempted to negate this conclusion by pointing to the capacity of general practitioners to pursue various forms of occupational activity open outside the Medicare Scheme and hence outside the controls of the Richardson-Theophanous scheme. These range from various forms of employment by the Commonwealth or the States or by trading corporations, to work on cruise ships, in gaols or for professional sports teams; conducting medical examinations for the purpose of insurance, drivers' licences and other licences; working in specialty clinics dealing with obesity or cosmetic problems or weight reduction; attending to overseas visitors not eligible for Medicare benefits; dealing with patients who qualify for benefits under the *Veterans' Entitlements Act* 1986 (Cth); treating patients whose treatment is covered by a workers' compensation scheme or other compensation scheme or by insurance; and working in pharmaceutical companies, tertiary institutions, journalism or medical

administration. With the greatest respect to all medical practitioners who provide medical services, or engage in paramedical activities, of these doubtless worthwhile kinds, many general practitioners may not view them as forming a desirable or satisfactory career path.

259 The Full Court's first conclusion was correct. Medical practitioners have the strongest pressures of self-interest to earn their living and they have a moral obligation to support those dependent on them by earning their living. The effect of ss 10, 20 and 20A and Pt VAA is that unless medical practitioners are prepared to act in the way Pt VAA requires, they will not readily be able to earn their living in the way, and possibly the only way, in which they are qualified to earn it. As Latham CJ said in the *British Medical Association* case[277], there could be no more effective means of compulsion.

The *General Practitioners* test

260 A difficulty with the *General Practitioners* test is that Gibbs J said that in some circumstances it could be civil conscription for Parliament "to provide that a doctor … should carry on his practice at a particular place, or at a particular time, or only for a particular class of patients."[278] But, on the *General Practitioners* test, why? For Gibbs J also said that if doctors are not compelled "to perform services generally as such, or to perform particular medical … services", there is no civil conscription[279]. There is no compulsion to attend to any *particular* patient at that place or time or among that class.

261 Further, the *General Practitioners* test is the product of analysis resting on the "natural meaning" of words[280]. Thus Gibbs J said[281]:

> "The word 'conscription', in the sense that seems to be most apposite for present purposes, means the compulsory enlistment of men (or women) for military (including naval or air force) service. The expression 'civil conscription' appears to mean the calling up of persons for compulsory service other than military service."

The type of analysis described in *Cole v Whitfield*[282] was not then permitted, and was not engaged in. It is necessary to engage in it before considering whether the *General*

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277 (1949) 79 CLR 201 at 253. See also Webb J to the same effect at 292-293. The passages are quoted at [106]-[107] above.

278 (1980) 145 CLR 532 at 558.

279 (1980) 145 CLR 532 at 558.

280 (1980) 145 CLR 532 at 557.

281 (1980) 145 CLR 532 at 555. See also at 557.

Practitioners test is correct. It will be concluded that it is not. It is undesirable to seek to devise a better test which will answer all possible circumstances. It is better to confine attention to the circumstances of these particular proceedings[283].

Cole v Whitfield

262 In the course of argument the Commonwealth, in particular, but not only the Commonwealth, referred to the legislative and historical background to s 51(xxiiiA). For example, the Commonwealth relied on the fact that the "Yes" case at the referendum approving s 51(xxiiiA) claimed that it would give the power to provide the benefits then being provided in New Zealand, and the Commonwealth relied on the terms of the New Zealand legislation. Leaving aside the rather important point that the "Yes" case did not say what the terms of the New Zealand legislation were, and that it would be extremely difficult for the voters to find out the terms for themselves, this reasoning must be questioned. The Commonwealth contended that this course was justified by *Cole v Whitfield* because it assisted in identifying "the subject to which [the] language was directed". Those words from the joint judgment in *Cole v Whitfield* appeared as part of the following passage[284]:

> "Reference to the history of s 92 may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged."

Of these three purposes, the third does not arise: s 51(xxiiiA) did not emerge from the movement towards federation. The first purpose can be pursued, but only to a limited extent. The limit to the extent to which it can be pursued stems from the fact that it is not possible to adopt one standard approach: to take the constitutional words, locate usages of those words before or soon after they entered the Constitution, and ascertain their meaning at that time in that light. In the case of "civil conscription", that approach is not possible. According to Dixon J, writing three years after s 51(xxiiiA) was introduced, "any form of civil conscription" was a "vague and figurative expression [which] carries with it no clear conception."[285] He said: "[I]t is not an expression

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282 (1988) 165 CLR 360 at 384; [1988] HCA 18. See below at [262].

283 See *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 262 per Dixon J, quoted above at [193].

284 (1988) 165 CLR 360 at 385.

285 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 261.

which has gained general currency or has acquired a recognized application."[286] Rich J called the expression "somewhat of a novelty."[287] Williams J said that the "words 'civil conscription' have no ordinary meaning in the English language."[288] And Webb J said that he could not "remember hearing or seeing the term used" until he saw it "in the proposed law in the terms of par (xxiiiA) passed by Parliament and subsequently submitted to the electors under s 128 of the Commonwealth Constitution."[289] However, the first purpose can be pursued to the extent to which "civil conscription" covers at least the same ground as "industrial conscription". That it does so is evident from the linguistic similarity between the two expressions and the contemporary materials[290].

263 It can be seen from the contemporary materials analysed above[291], and from other contemporary materials, that among the things which in 1946 were seen as examples of "industrial conscription" were the following:

(a) a law compelling an individual to work[292];

(b) a law compelling a worker to work in a particular industry[293];

(c) a law compelling a worker to work for a particular employer, or compelling a particular employer to accept a particular worker[294];

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286 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 262.

287 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 255.

288 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 287.

289 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 292.

290 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 April 1946 at 1215 (last two sentences of Mr Menzies' speech and third sentence of Dr Evatt's).

291 See above at [27]-[51].

292 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 April 1946 at 927-928.

293 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 9 March 1944 at 1159-1160.

294 Chief Electoral Officer for the Commonwealth, *Referendums to be taken on the Proposed Laws, Constitution Alteration (Social Services) 1946, Constitution Alteration (Organized Marketing of Primary Products) 1946, Constitution Alteration (Industrial Employment) 1946: The Case For and Against*, 20 July 1946 at 17.

(d) a law compelling a worker to work in a particular place[295]; and

(e) a law preventing a worker from leaving his employment (ie a law compelling a worker not to leave his current employment)[296].

This is unlikely to be an exhaustive list. There are indications that compulsory unionism was thought to be within the expression "industrial conscription"[297]. The range of these examples suggests that "industrial conscription" was not a narrow conception, although it is unnecessary for present purposes to seek to identify what it is which connects the examples[298].

264 The analogue for doctors of example (d) would arise if under a Commonwealth enactment a doctor was told: "Your patients will receive no Medicare benefits unless you are qualified to participate in the Medicare Scheme, and you cannot participate in the Medicare Scheme unless you live in Coonamble." If an employee were exposed to an enactment of that kind, it would be industrial conscription, because it has the

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295 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 9 March 1944 at 1159-1160; Australia, Senate, *Parliamentary Debates* (Hansard), 22 March 1944 at 1708-1709; Australia, Senate, *Parliamentary Debates* (Hansard), 23 March 1944 at 1838, 1860-1861 ("under [industrial conscription] a man must go where he is sent") and 1891-1892 ("to stipulate that a worker shall accept employment in one place and not in another").

296 Chief Electoral Officer for the Commonwealth, *Referendums to be taken on the Proposed Laws, Constitution Alteration (Social Services) 1946, Constitution Alteration (Organized Marketing of Primary Products) 1946, Constitution Alteration (Industrial Employment) 1946: The Case For and Against*, 20 July 1946 at 17 ("He cannot be 'pegged' in his job").

297 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 April 1946 at 906; Australia, Senate, *Parliamentary Debates* (Hansard), 19 June 1946 at 1537.

298 See, for example, Chief Electoral Officer for the Commonwealth, *Referendum to be taken on the Proposed Law Constitution Alteration (Post-war Reconstruction and Democratic Rights) 1944*, 20 April 1944 at 13 (industrial conscription involved removing "your right to choose your own way of living and [taking] orders to go to the job selected for you"); Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 April 1946 at 906 (industrial conscription was "industrial compulsion by the authority of law"); Australia, Senate, *Parliamentary Debates* (Hansard), 12 April 1946 at 1425 (protection against industrial conscription negativing the power to make laws "in regard to the relation between employer and employee – its commencement, its continuance and its termination").

practical effect of compelling the doctor not to practise medicine in any place the doctor would otherwise have chosen and of compelling the doctor to practise medicine in Coonamble. If "civil conscription" includes at least all forms of "industrial conscription" the enactment would amount to civil conscription. Gibbs J said that an enactment "having [the] result" that "a doctor … should carry on his practice at a particular place … might well be regarded as imposing a form of civil conscription." He said[299]:

> "It is necessary in every case to consider the true meaning and effect of the challenged provisions, in order to determine whether they do compel doctors … to perform services generally as such, or to perform particular medical … services; if so, they will be invalid."

In the example under discussion, there is no compulsion to perform services "generally as such", for the doctor could practise without supplying his services "generally"; and there is no compulsion to perform particular medical services. Hence on the *General Practitioners* test the enactment would be valid even though it was analogous to industrial conscription. That suggests that the *General Practitioners* test is too narrow even if civil conscription does not extend beyond industrial conscription.

Cole v Whitfield: subject to which "civil conscription" directed

265 But the contemporary materials relating to "industrial conscription" leave open the question whether, in the medical field, "civil conscription" had a wider meaning. That inquiry can be pursued by examining the contemporary materials with a view to identifying the second of the three matters listed in *Cole v Whitfield* – the subject to which the constitutional language was directed. While in 1946 almost all industrial workers were employees, hardly any of those who supplied medical and dental services, namely medical and dental practitioners, were employees. And, in 1946, the relationships of medical and dental practitioners with their patients were quite different from the relationships between industrial workers and those for whom they worked. In short, it is necessary to bear in mind the character of the persons whose services are said to be conscripted in relation to the character of the persons who are to receive them.

266 The Commonwealth submitted that "the s 51(xxiiiA) prohibition was intended to prevent the nationalisation of medical and dental services". Although no attempt was made to define "nationalisation", counsel for the Commonwealth, in oral argument, with reference to the referendum case sent to electors in 1946, submitted that the "essential concern" was ensuring that doctors and dentists were not "forced to become professional officers of the Commonwealth under a scheme of medical and dental services."

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299 *General Practitioners Society v The Commonwealth* (1980) 145 CLR 532 at 558.

267 That concern did not centre on the existence of a *formal* relationship of employer and employee between the Commonwealth and the medical practitioner, but on a matter of substance – the nature and degree of control exercisable by the Commonwealth. Medical practitioners employed by the Commonwealth would be subject to control over the occasion, time and place of work. And they could be subject also to control over their medical and professional activities – the time to be spent with the patient, the kind of tests to be performed, the drugs to be prescribed and the medical records to be kept.

268 Bearing in mind the professional character of the work performed by medical practitioners, it is not apparent why, in 1946, a scheme containing the latter controls, even though they were not imposed as part of an employer-employee relationship, would be unobjectionable. For the reasons given below[300], a Commonwealth legislative scheme that controlled a practitioner's medical and professional activities would have been inconsistent with the nature of the doctor-patient relationship as understood in 1946. And it would have been inconsistent with contemporary understandings of medical practice. These inconsistencies point to the conclusion that the language employed in s 51(xxiiiA) was not directed solely to the prevention of Commonwealth control over the occasion, time and place of work of medical practitioners.

269 *Rich J's view of the doctor-patient relationship.* In the *British Medical Association* case, three years after s 51(xxiiiA) entered the Constitution, Rich J said[301]:

> "An extremely important consideration which cannot be disregarded is the confidential relationship of doctor and patient, a relationship akin to that of solicitor and client and priest and penitent. To disregard this relationship compels a doctor to abandon his normal duties and obligations to his patient."

The cure which a doctor may offer, as Rich J said a little earlier[302]:

> "is the result of the practitioner's examination and overhaul of the patient, diagnosis of the complaint and the choice of the treatment, drugs, materials and appliances which his knowledge and skill dictate."

270 Although the connotations of the expression "doctor-patient relationship" may be different now, at the time when s 51(xxiiiA) was introduced, the notion of the doctor-

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300 See [269]-[278].

301 (1949) 79 CLR 201 at 256.

302 (1949) 79 CLR 201 at 256. Even *National Service for Health: The Labour Party's Post-war Policy*, (1943) at 17, discussed below at [274], recognised this: "The confidential relation between doctor and patient is an indispensable part of a satisfactory health service."

patient relationship was heavily infused with a perception of its confidential, even friendly, character; of the importance of individual practitioners – who then had high community status – having autonomy in their treatment of particular patients; and of the consequential need for doctors to give treatment not mandated by outside influences or commands in any absolute or universal way, but devised by reference to the particular needs of the particular patient in the light of the doctor's personal perception of the problem. That that was so can be seen from five other pieces of material.

271 *Sir Earle Page's view of the doctor-patient relationship.* The first is that ideas of that kind received significant expression in a speech delivered only seven years after s 51(xxiiiA) entered the Constitution. It was the Second Reading Speech delivered by the Minister for Health, Sir Earle Page, a self-described "truant surgeon", in introducing the Bill which became the *National Health Act* 1953 (Cth). He said[303]:

> "Restoration of health and prolongation of life is the task of the physician, who must be dedicated to the practice of the healing art, just as the priest is dedicated to the saving of souls. The work of both those dedicated professions is essentially personal and individual. It is the person with his idiosyncrasies, allergies and family heredity and personal and financial problems who must be cured. It is the individual with his physical and mental disease and his own peculiar symptoms who must be treated. It is the personal, continuous contact of the doctor, with an interest in the patient and his family, that must be maintained. These results can best be obtained by maintaining the position, prestige and fullest usefulness of the general medical practitioner …
>
> In recent reports on the British service, the great complaint of that system relates to the deterioration of the general medical practitioner, due to inadequate hospital contacts and lack of time for proper examination owing to the panel system under which each doctor often has several thousands of patients …
>
> The most important point in medical treatment is complete and early examination and diagnosis, whether the treatment is later given by a general medical practitioner or a specialist. It is imperative to preserve this cardinal feature of complete and early examination and diagnosis … [I]t is absolutely necessary for the doctor to have time to be the friend and confidant of the patient and his family, because illness is not only physical. It is frequently psychological."

272 *Dr Evatt on controlling doctors.* Secondly, thinking similar to that of Sir Earle Page was evidently shared by Dr Evatt. On 27 March 1946 Dr Evatt informed the House of Representatives that the proposed s 51(xxiiiA) would not affect the State laws regulating the right to practise medicine or dentistry and would not affect "the right of a

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303 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 12 November 1953 at 154-155.

doctor or a dentist as an individual to practise his profession." Dr Evatt also said that under s 51(xxiiiA) "no authority will be vested in the Commonwealth to control health generally or the general practice of medicine or dentistry"[304]. Underlying these statements is an assumption that in the context of doctors and dentists the words of s 51(xxiiiA) did not mean regulation or control of their rights to practise as they saw fit: any regulation or control would be the province of State law only[305].

273 *Dixon J's view on employment.* Three years after s 51(xxiiiA) entered the Constitution, Dixon J said: "No one would doubt that an attempt to impose upon a medical practitioner or a dentist an obligation to serve in the employment of the Government would fall within the words."[306] The reason why no contemporary would doubt that a compulsorily established relationship of employment fell within civil conscription was because of the types of control characteristic of an employment relationship, and the antithesis between them and contemporary perceptions of the doctor-patient relationship. It is also likely that contemporaries saw those types of control, compulsorily imposed, as equally falling within civil conscription even if the doctor was not placed in an employment relationship.

274 *Nationalisation of medicine in the United Kingdom.* A fourth item arises from contemporaneous events in relation to the development of the United Kingdom National Health Service by the *National Health Service Act* 1946 (UK). Those events were followed closely in Australia. In 1942 the Beveridge Report had recommended "the setting up of a comprehensive medical service for every citizen, covering all treatment and every form of disability under the supervision of the Health Departments"[307]. But in this respect the Beveridge Report did not descend to much detail, and said that it "is not necessary to express an opinion on the terms of service and remuneration of doctors

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304 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 March 1946 at 649.

305 As is discussed above at [48]-[50], Mr Menzies moved his amendment to the proposed s 51(xxiiiA) to include a reference to civil conscription on 10 April 1946, but he had given prior notice of it to Dr Evatt: the Solicitor-General and two of his colleagues advised on it in writing on 9 April 1946. It is not clear, then, whether on 27 March 1946 Dr Evatt had in mind s 51(xxiiiA) without Mr Menzies' amendment or with it. If he had in mind s 51(xxiiiA) without the amendment, it may explain why he accepted the amendment readily: he saw the meaning of the language of both the unamended and the amended versions as not affecting individual rights of practice and as not giving power to enact legislation to control them.

306 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 261-262.

307 Sir William Beveridge, *Social Insurance and Allied Services*, (1942) Cmd 6404 at [30].

of various kinds, of dentists and of nurses"[308]. In April 1943 the Labour Party published one of its "Reconstruction Pamphlets" entitled *National Service for Health: The Labour Party's Post-war Policy*. It stated: "In the Labour Party's opinion … it is necessary that the medical profession should be organised as a national, full-time, salaried, pensionable service."[309] After its decisive victory in the 1945 General Election, the Labour government presided over by C R Attlee nationalised various industries[310]. From October 1945 the Minister of Health, Aneurin Bevan, began dealing with the British Medical Association, and in particular with a committee negotiating on behalf of the medical profession, about the form which a National Health Service might take. In December 1945 the committee published seven "professional fundamentals". The first four have been summarised as follows[311]:

> "1 In the public interest, the profession is opposed to any form of service leading directly or indirectly to the profession as a whole becoming whole-time salaried servants of the State or of local authorities.
>
> 2 The profession should be free to exercise its skills, the individual doctor being fully responsible for the care of his patient, with freedom of action, speech and publication, and no interference with his professional work.
>
> 3 The citizen should be free to choose his family doctor and (in consultation with that doctor) his hospital, and to choose whether to use the service or not.
>
> 4 Doctors should be free to choose their form and place of work without government or other direction."

The most relevant of the "professional fundamentals" to questions of "civil conscription" short of rendering doctors, directly or indirectly, whole-time salaried servants of the State are the second and fourth. An historian of the process by which the National Health Service was created has said that "all except the first and the fourth were entirely in line with the government's own views."[312] It is notorious that in the years 1945 and 1946 the British Medical Association was influential in Australian

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308 Sir William Beveridge, *Social Insurance and Allied Services*, (1942) Cmd 6404 at [428].

309 Labour Party, *National Service for Health: The Labour Party's Post-war Policy*, (1943) at 18.

310 For example, *Bank of England Act* 1946 (UK); *Coal Industry Nationalisation Act* 1946 (UK); *Cable and Wireless Act* 1946 (UK).

311 Pater, *The Making of the National Health Service*, (1981) at 112-113.

312 Pater, *The Making of the National Health Service*, (1981) at 113.

medical affairs: there was no Australian Medical Association and most Australian doctors were members of the Australian branches of the British Medical Association[313]. It may safely be inferred that the understandings on which the "professional fundamentals" asserted by the British Medical Association rested were shared in Australia. The first three "fundamentals" were repeated by Sir Earle Page in the House of Representatives on 17 March 1949[314].

275 *Senator McKenna's Second Reading Speech in 1949.* A fifth piece of evidence suggesting that the Richardson-Theophanous scheme would have been regarded as beyond s 51(xxiiiA) because of the words "civil conscription" may be found in the Second Reading Speech of the Minister for Health, Senator McKenna, introducing the Pharmaceutical Benefits Bill 1949. That Bill introduced the amendment to the *Pharmaceutical Benefits Act* 1947 (Cth) which was held partially invalid in the *British Medical Association* case. He said that under the 1947 Act "there was to be no regimentation of doctors, that … the doctor would have complete freedom of action."[315] He also said that the amendment:

> "neither proposes nor initiates any interference with the practice of medicine … The doctor will still diagnose and assess his patient's needs in the light of his medical knowledge and experience and in accordance with his own unfettered judgment."[316]

276 It is thus plain that around the time s 51(xxiiiA) was introduced into the Constitution legislation in the form of the Richardson-Theophanous scheme was not in contemplation. Legislation of that kind would have been regarded by contemporaries as completely alien to conventional ideas of the time about governmental control of the relationship between medical practitioners and their patients. It seems likely that any system creating practical compulsion to supply medical services on the conditions inherent in the Richardson-Theophanous scheme would have been seen as a form of civil conscription – a means of vesting authority in the Commonwealth, in Dr Evatt's words, "to control health generally or the general practice of medicine or dentistry".

277 That conclusion is supported by the advice given by Sir George Knowles, Mr Boniwell and Mr Comans on 9 April 1946 about Mr Menzies' amendment to the

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313 Ross-Smith, "The Evolution of a National Medical Association in Australia", [1962] 1 *Medical Journal of Australia* 746 at 751 (80-90% of the whole profession).

314 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 March 1949 at 1661-1662.

315 Australia, Senate, *Parliamentary Debates* (Hansard), 10 March 1949 at 1244.

316 Australia, Senate, *Parliamentary Debates* (Hansard), 10 March 1949 at 1247.

proposed s 51(xxiiiA)[317]. The question asked was whether the reference to civil conscription would prevent the Commonwealth from passing legislation to prevent medical practitioners from refusing to treat patients entitled to Commonwealth benefits. The answer given was in the negative. The correctness of that answer is highly questionable if the *General Practitioners* test is applied. The legislation postulated involves compulsion to treat a particular class of patient whether the doctor wants to or not. But putting aside the correctness of the answer to the precise question asked, the last 13 words of the advice reveal a contemporary understanding of the words "civil conscription" in the context of medical services as meaning control by the Commonwealth of the whole of a doctor's professional activities. The intensely detailed regime of control provided for in the Richardson-Theophanous scheme is control of that kind[318].

The *General Practitioners* test revisited

278 Dixon J said that the expression civil conscription "is described by a metaphor and therefore must rest upon analogy."[319] The most obvious analogy is with military service. Analogies can mislead, and the misleading character of that analogy is to align "civil conscription" too closely with "military conscription". The expression "civil conscription" used in relation to medical services is not limited to ideas about compelling doctors to work for the Commonwealth. While the legislation does not make medical practitioners servants of the Commonwealth, medical practitioners are engaged in the compulsory provision of services for third parties as directed by the Commonwealth. That is because the practical compulsion created by ss 10, 20 and 20A on medical practitioners to operate under the Medicare Scheme means that the Commonwealth is directing them, through its legislation, to comply with Pt VAA. The expression "civil conscription" extends to the very extensive intrusions effected by the Richardson-Theophanous scheme into the relationships between doctor and patient through which doctors supply their services in circumstances where it is not in a practical sense possible for doctors to decline to provide the services.

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317 See [50] above.

318 A "moderate originalist" has thoughtfully argued that only evidence of "the founders' intentions which … was readily available to their intended audience" may be examined – which would exclude private communications like that of Sir George Knowles and his colleagues: see Goldsworthy, "Originalism in Constitutional Interpretation", (1997) 25 *Federal Law Review* 1 at 20. However, if the correct approach is to search, not for the actual intention of the framers, but for what their words meant at the time they were used – and it is this which *Cole v Whitfield* seems to favour – the objection is not open. Even quite secret contemporary material could cast light on contemporary meaning.

319 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 262.

Conclusion

279 The appeals should be allowed. Dr Selim desires a declaration that because ss 10, 20 and 20A and Pt VAA amount to "civil conscription" within the meaning of s 51(xxiiiA) of the Constitution, they are invalid. Dr Wong desires an answer to the same effect in relation to the question referred into the Full Court of the Federal Court of Australia in relation to which special leave to appeal to this Court was granted. These desires caused the Commonwealth to contend that if the conclusion that ss 10, 20 and 20A were invalid depended on overruling the *General Practitioners* case, there would be much to be said against that course because of the extent to which the Medicare Scheme had been relied on by medical practitioners and the public, and by the legislature in amending the Act[320]. However, ss 10, 20 and 20A by themselves do not amount to "civil conscription". They generate, with other factors, an element of practical compulsion to comply with the Richardson-Theophanous scheme enacted in Pt VAA, but independently of that scheme they do not have the intrusive quality which renders it civil conscription.

280 However, some provisions in the Richardson-Theophanous scheme amount to civil conscription. It is not necessary to work out the full extent of the sections which are invalid in these dissenting reasons beyond saying that ss 82 and 106U are invalid. If so, the whole Richardson-Theophanous scheme becomes unworkable. The Commonwealth did not demonstrate that there had been so much legislation in reliance on the Richardson-Theophanous scheme as to render it wrong to overrule the *General Practitioners* test.

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320 Citing *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; [1989] HCA 5.