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# Medical law reporter

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## CONSTITUTIONAL LIMITS ON FEDERAL LEGISLATION PRACTICALLY COMPELLING MEDICAL EMPLOYMENT: WONG v COMMONWEALTH; SELIM v PROFESSIONAL SERVICES REVIEW COMMITTEE

*A recent decision by the High Court of Australia (Wong v Commonwealth; Selim v Professional Services Review Committee (2009) 236 CLR 573) (the PSR case) has not only clarified the scope of the Australian constitutional prohibition on “any form of civil conscription” in relation to federal legislation concerning medical or dental services (s 51xxiiiA), but has highlighted its importance as a great constitutional guarantee ensuring the mixed State-federal and public-private nature of medical service delivery in Australia. Previous decisions of the High Court have clarified that the prohibition does not prevent federal laws regulating the manner in which medical services are provided. The PSR case determined that the anti-overservicing provisions directed at bulk-billing general practitioners under Pt VAA of the Health Insurance Act 1973 (Cth) did not offend the prohibition. Importantly, the High Court also indicated that the s 51(xxiiiA) civil conscription guarantee should be construed widely and that it would invalidate federal laws requiring providers of medical and dental services (either expressly or by practical compulsion) to work for the federal government or any specified State, agency or private industrial employer. This decision is likely to restrict the capacity of any future federal government to restructure the Australian health care system, eg by implementing recommendations from the National Health and Hospitals Reform Commission for either federal government or private corporate control of presently State-run public hospitals.*

### INTRODUCTION

On 2 February 2009, the High Court delivered judgment in two cases concerning the scope of one of the few rights guarantees enshrined in the Australian *Constitution*. That guarantee is the s 51(xxiiiA) prohibition on federal laws purporting to authorise medical or dental services in a manner involving “any form of civil conscription”. The decision, *Wong v Commonwealth; Selim v Professional Services Review Committee* (2009) 236 CLR 573 (the *PSR case*) is significant not only due to its decisive and broad articulation of the scope of guaranteed protection from civil conscription, but further because it provided one of the first opportunities to evaluate how the newly appointed Chief Justice French would approach rights issues in relation to the *Constitution*. The decision also incorporates the final judgment of Kirby J, who has long proved himself a supporter of enforceable human rights as a means of providing citizens with protections against government.<sup>1</sup> This has become a particularly important issue due to political difficulties in creating an Australian Bill of Rights and the reluctance of the High Court to embrace any general theory for the implication of common law restraints upon the legislative powers of the Commonwealth.<sup>2</sup> The decision in the *PSR case* has important long-term ramifications

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<sup>1</sup> Freckelton I and Selby H, *Appealing to the Future: Michael Kirby and His Legacy* (Law Book Co., Sydney, 2009).

<sup>2</sup> Gummow, Justice WMC, “The Constitution: Ultimate Foundation of Australian Law?” (2005) 79 ALJ 167 at 177.

with regard to federal or private corporate (managed care) control of medical services in Australia. In the short term it will impact on federal implementation of recommendations from the National Health and Hospitals Reform Commission (NHHRC).<sup>3</sup>

### THE HIGH COURT'S ARTICULATION OF CIVIL CONSCRIPTION IN THE PSR CASE

The *PSR case* concerned litigation involving Dr Wong and Dr Selim, general practitioners who were accused of inappropriate practice by a Professional Services Review (PSR) committee. The doctors had billed Medicare for a high volume of services, but allegedly did not provide the appropriate quality of clinical input into those services. As a consequence, Drs Wong and Selim faced potential sanctions, including reprimand, counselling and disqualification from participation in the Medicare scheme for up to three years. In their defence, the doctors contended that, among other things, the PSR scheme under Pt VAA of the *Health Insurance Act 1973* (Cth) (the Act) (including the mechanism for paying Medicare benefits under ss 10, 20 and 20A) offended the s 51(xxiiiA) constitutional prohibition on any form of civil conscription.

Section 51(xxiiiA) was inserted into the *Constitution* after a referendum in 1946. It reads (emphasis added):

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

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.

This prohibition on "any form of civil conscription" had previously been tested by a number of High Court challenges concerning federal legislation attempting to control various aspects of medical practice. In 1949, the *British Medical Association case* held that the bracketed words of the amendment, "(but not so as to authorize any form of civil conscription)", related only to the provision of medical and dental services rather than to the entirety of s 51(xxiiiA).<sup>4</sup> Subsequently, the *General Practitioners case* held that federal legislation involving the practical, economic compulsion of medical practitioners would offend the prohibition, but suggested that a compulsion which merely relates to the manner in which non-conscripted work should be done would not breach s 51(xxiiiA).<sup>5</sup> In other words, a doctor who freely volunteers to perform a medical service does not become a conscript simply because federal legislation requires her or him to perform that service in a way that is safe or complies with other widely accepted professional standards.

The Federal Court had earlier held in *Selim v PSR Committee* (2008) 167 FCR 61 at [50]:

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 majority of the High Court in the *PSR case* upheld that view of the Federal Court. Heydon J dissented on the facts but agreed with the majority's interpretation of the civil conscription guarantee.

### FRENCH CJ AND GUMMOW J: BROAD INTERPRETATION

In their joint judgment French CJ and Gummow J expressed the view (at [20]) that where questions of constitutional construction are concerned, no "all-embracing and revelatory theory or doctrine" should be adopted. Some might view this as a disappointing start by a new Chief Justice with a background in theoretical physics confronted with the normative revolution implicit in the expanding importance of international human rights to domestic legal systems. Any act of constitutional interpretation that is robust must emerge from some judicial theory: it is really only a question of whether that theory is

<sup>3</sup> National Health and Hospitals Reform Commission, <http://www.nhhrc.org.au> viewed 15 February 2009.

<sup>4</sup> *British Medical Association v Commonwealth* (1949) 79 CLR 201.

<sup>5</sup> *General Practitioners Society v Commonwealth* (1980) 145 CLR 532.

fully developed and transparently articulated. There is, for instance, surely a theoretical position behind asserting, as French CJ and Gummow J did, that the earlier High Court decisions on the civil conscription guarantee emerged “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*” (at [18]). French CJ and Gummow J went on to say that the character of s 51(xxiiiA) must particularly take into account its origin in the 1946 referendum (through s 128) emphasising, as Sir William Harrison Moore considered, three great principles implicit in s 128: those of parliamentary government, of democracy and of federalism. As will be discussed subsequently, the task of locating just such foundational and emerging principles of the rule of law in not just s 128, but every such rights guarantee in the Australian *Constitution*, and applying them to the complexities of current disputes, is perhaps the most critical ongoing theoretical task of our High Court justices.

In determining the meaning of “any form of civil conscription”, French CJ and Gummow J endorsed remarks made by Aickin J in *General Practitioners Society v Commonwealth* (1980) 145 CLR 532 in which he stated (at 571):

“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.

Yet, through their discussion of legislative history and the genesis of s 51(xxiiiA), French CJ and Gummow J ultimately support a construction which treats civil conscription as involving some form of legal or practical compulsion or coercion. This construction extends to prohibiting any compulsion to carry out work or provide services for the Commonwealth itself, a statutory body which is created by the Parliament for the purposes of the Commonwealth, or a third party (whether private or governmental in nature) if at the direction of the Commonwealth (at [60]). In this case, the provisions of the *Health Insurance Act* challenged by Drs Wong and Selim were held only to condition the enjoyment of membership, rather than amounting to practical compulsion to perform a professional service (at [68]) and French CJ and Gummow J dismissed their appeal.

## **KIRBY J: PATIENT GUARANTEE**

In one of his final judgments, Kirby J rejected the presumptively historicist approach to constitutional interpretation apparently advocated by French CJ and Gummow J. He stated (at [96]-[97]):

I adhere to the opinion I expressed in *Grain Pool*: “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 and other contemporary historical and legal understandings and presuppositions, these cannot impose unchangeable 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.”<sup>6</sup>

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.

Kirby J, in applying that theory of the need to interpret the *Constitution* as a reflection (and protection) of the living and evolving will of the Australian people, held (at [99]-[101]):

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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<sup>6</sup> *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479 at 523.

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. 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.

Nor could the law-makers of 1946 (or the electors who approved the insertion of para (xxiiiA) in s 51 of the *Constitution*) have foreseen the advances in the “regulatory state”; the collapse of the command economies; the spread of governmental notions of “economic rationalism”; 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.

Kirby J used this interpretive approach to hold that the words “medical and dental services” in s 51(xxiiiA) “also include, of necessity, the patients who are the recipients of the provision of such services” (at [124]). He continued (at [125], [126]-[127]):

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.

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.

... [T]he 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.

The fact that the *Constitution* has taken the trouble to afford such a guarantee, Kirby J held (at [128]), “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.” He held (at [132]):

[T]he wide ambit of “any form of” was recognised in the *BMA case* both by Latham CJ and by Williams J. If the opinion of Gibbs J in *General Practitioners* were correct, 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.

For Kirby J the “context” for contemporary Australian constitutional interpretation must include due consideration of international human rights, particularly those human rights Conventions which the Australian federal government has signed and ratified. Reinforcement for a broad reading of the prohibition in s 51(xxiiiA) of the *Constitution* thus could also be found, in the view of Kirby J, in relevant provisions of international law. These included 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 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.

Kirby J held (at [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.

Kirby J took a very broad view of the type of contemporary arrangements promotion of which would lead to federal legislation contravening the s 51(xxiiiA) guarantee (at [150]):

[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”.

Kirby J stated that the natural meaning of “any form of civil conscription”, its constitutional history, contemporary context and purpose all supported its application as a guarantee against any federal intrusion into what was in effect the small business option for the provision of medical and dental services in Australia (at [151]-[152]):

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.

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.

Kirby J concluded by holding (at [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.

Though his interpretation of civil conscription was considerably broader than that of French CJ and Gummow J, Kirby J agreed with his colleagues that the challenged provisions of the Act did not amount to any form of civil conscription. Kirby J held that the provisions of the Act did no more than ensure the lawfulness and integrity of the provision of medical and dental services and thus did not constitute a form of civil conscription.

## **HAYNE, CRENNAN AND KIEFEL JJ: NOT RESTRICTED BY WORLD WAR II MANPOWER ARRANGEMENTS**

In their joint judgment (at [174]-[191]), Hayne, Crennan and Kiefel JJ discussed the use of the term “civil” as opposed to “industrial” conscription in the *Constitution*, particularly because the form of the words in s 51(xxiiiA) was borrowed from the *National Security Act 1939* (Cth) and related manpower regulations, which allowed the federal government in wartime to require citizens to work for private employers. They held (at [187]), [188]):

As is sufficiently apparent from the text of s 51(xxiiiA) (but is confirmed by what was said 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. 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”.

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).

Hayne, Crennan and Kiefel JJ held that the prohibition “is not to be understood narrowly” (at [194]) and (at [192]) quoted Dixon J in *British Medical Association v Commonwealth* (1949) 79 CLR 201 at 262:

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.

The guarantee, they held, would be breached by federal legislation requiring doctors to treat a particular class of patients or to perform a particular service (whether or not on behalf of the Commonwealth) (at [209]). These three judges held that federal legislation requiring doctors to meet a particular standard of professional behaviour determined by peer opinion did not breach the civil conscription prohibition (at [224]-[226]). They held (at [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 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 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 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”.

### HEYDON J: NOT LIMITED TO WORK FOR THE COMMONWEALTH

Heydon J, in dissent on the facts, allowed the appeals of Drs Wong and Selim, as he decided some of the impugned sections of the Act (ss 82 and 106U) did create a practical compulsion for the doctors to operate under the Medicare scheme. In coming to his conclusion, however, Heydon J agreed with the other members of the High Court that civil conscription “is not limited to ideas about compelling doctors to work for the Commonwealth” (at [278]):

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.

### THE PSR DECISION AND ITS IMPLICATIONS

One of the most detailed descriptions of the types of federal legislation prevented by the guarantee in s 51(xxiiiA) was provided by Aickin J in *General Practitioners Society v Commonwealth* (1980) 145

CLR 532 at 565-566:

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. The imposition of such pressure by legislation would be just as effective as legal compulsion, and would, like legal compulsion, be a form of civil conscription. To regard such practical compulsion as outside the restriction placed on this legislative power would be to turn what was obviously intended as a constitutional prohibition into an empty formula, a hollow mockery of its constitutional purpose.

The concluding words of Aicken J pick up on the famous joint judgment of Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 580-582 where those justices protested against the majority’s excessively literalist interpretation of another constitutional rights guarantee. That restrictive interpretation (as one eminent commentator has stated, “bereft of any real analysis”<sup>7</sup>), reduced the pivotal rule of law guarantee in s 80 (concerning “trial by jury” and all the common law principles and rules required to make that effective<sup>8</sup>) into “a procedural solecism ... a cynic might, perhaps, suggest the possibility that s 80 was drafted in mockery; that its language was carefully chosen so that the guarantee it appeared on the surface to give should be in truth illusory”. Yet, in *Brown v The Queen* (1986) 160 CLR 171 at 194-197 and 201-202 respectively, Brennan and Deane JJ gave examples of how evidentiary originalism might be stretched into a richer analysis of the normative arrangements governing the Australian community, referring respectively to foundational principles such as “liberty under the law” and “a deep-seated conviction of free men and women”.

It may be instructive in this context to further consider the difference between the approach to interpretation of constitutional rights of the above judges and the method adopted here by French CJ and Gummow J. The disavowal here by the latter judges of interpretive theory in favour of allegedly atheoretical historical accuracy might appear to support a type of narrow, pragmatic focus on justice only between the litigants.

In a famous article, however, entitled “From Principles to Principles”, Julius Stone convincingly argued that

the very emergence of principles to meet new problems and the competition between available principles to cover them, are usually preceded by a phase which *looks like* individualisation (that is, of deciding each case “on its own merits”). This “pragmatism” (if such it can be called at all) is the womb from which “principles” in their due time will spring.<sup>9</sup>

If this incremental development of principle be acknowledged, it is hardly a matter to be ignored when interpreting a health-related constitutional guarantee such as this, that Australia has signed and ratified and so has acquired an obligation under international law to give effect to the human right to health as specified in Art 12 of the United Nations *International Covenant on Economic, Social and Cultural Rights*. Neither is it entirely irrelevant that many traditional sources of common law jurisprudence such as the United Kingdom, New Zealand and Canada now require their judiciary to engage, when interpreting their respective national constitutions, in a process of fundamental human rights-oriented review of the entire legal system.<sup>10</sup> These contemporary challenges require the judiciary to develop principles ensuring that constitutional norms continue to effectively operate to prohibit contemporary variations of the conduct originally impugned. Failure to develop such principles makes a constitution moribund and imperils the liberties and freedoms of its citizens in the vast periods of time that elapse before amendment through referendum takes place.

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<sup>7</sup> Zines L, *The High Court and the Constitution* (5th ed, Federation Press, Sydney, 2008) p 571.

<sup>8</sup> *R v Snow* (1915) 20 CLR 315 (Griffith CJ).

<sup>9</sup> Stone J, “From Principles to Principles” (1981) 97 LQR 224 at 253.

<sup>10</sup> Fredman S, “From Deference to Democracy: The Role of Equality under the Human Rights Act 1998 (UK)” (2006) 122 LQR 53.

Lawyers for the Commonwealth argued in the Federal Court stage of the *PSR case* (*Selim v PSR Committee* (2008) 167 FCR 61) that the impugned sections of the Act were all laws with respect to sickness and hospital benefits. They did so, the Federal Court noted (at [28]),

because it also submitted, formally, in case an opportunity to argue the point before the High Court should arise, that the prohibition on civil conscription does not apply to a law with respect to sickness and hospital benefits, even if medical and dental services are provided in the course of providing those benefits.

The Federal Court declined to formally consider the merit of that submission and it was not considered by the justices of the High Court in the *PSR case*. Had that point been considered in this case, the federal government may have had a clear answer as to whether a federal takeover of public hospitals in Australia (presumably based on the s 51(xxiiiA) “hospital benefits” power) would offend the s 51(xxiiiA) guarantee. It appears likely that it would so offend. The guarantee in s 51(xxiiiA) probably operates like the “just terms” guarantee in s 51(xxxi). In *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 202 the High Court held that the “just terms” guarantee “is to be given the liberal construction appropriate to such a constitutional provision”. Such guarantees cannot be circumvented by attempts to base federal legislation nominally on other heads of power (such as the s 51(xxiiiA) power to pass laws with respect to “hospital benefits”), unless the constitutional expression of that latter power expressly exempts it from the operation of the guarantee.<sup>11</sup>

Following the 2007 federal assumption of control over Tasmania’s Mersey Community Hospital, fears arose as to whether this could provide a template for more widespread federal control over public hospitals, and thereafter, the outsourcing of control to the private sector. Were the federal government, eg, ever to assume control of public hospitals, then the politically powerful United States Coalition of Service Industries (CSI) is likely to lobby the Australian Government to “liberalise” such public hospital services. This would involve subjecting hospital services to Arts XVI, XVII and XV of the World Trade Organisation’s *General Agreement on Trade in Services* (GATS) which prohibit limitations on the number of service suppliers, require equal treatment for foreign corporations and prevent service subsidies. However, on 1 September 2008, control of the Mersey Hospital was returned to Tasmania (with federal funding for three years with a renewal option for a further three years).<sup>12</sup>

The High Court decision in the *PSR case* supports the view that the civil conscription prohibition over federal legislation on medical and dental services in s 51(xxiiiA) of the federal *Constitution* provides (as then Opposition leader RG Menzies intended, on inserting it and as basic principles of contemporary constitutional interpretation confirm), a very broad guarantee against federal legislation practically compelling professionals to perform medical or dental services either for it or a private employer.<sup>13</sup> The provision thus operates in practical terms, according to the reasoning of all judges in the *PSR case*, as a guarantee that providers of Australian medical and dental services (a class of persons necessarily broader than registered medical practitioners and dentists) must be protected from federal legislation that erodes their choice of employment. As Kirby J most specifically identified, it ensures that providers of medical and dental services are entitled, if they wish, to become independent business people forming their own direct contracts with patients.

Could the guarantee in s 51(xxiiiA) restrict federal legislation aimed at requiring that those providing medical and dental services in Australia be employed without practical alternative in peace

<sup>11</sup> *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397; Zines, n 7.

<sup>12</sup> Faunce T, “*Selim v Lele* and the Civil (Industrial) Conscription Prohibition: Constitutional Protection Against Federal Legislation Controlling or Privatising Australian Public Hospitals” in “Medical Law Reporter” (2008) 16 JLM 36.

<sup>13</sup> Robert Menzies MHR, in introducing the motion to insert the words of the guarantee in question into the requisite Bill, stated that it was not intended to prevent all Commonwealth regulation of medical and dental services, but was designed to protect those providing such services from civil conscription in peace time, just as industrial workers were protected: *Commonwealth Parliamentary Debates* (HR) (1946) Vol 186, pp 1214-1215 (10 April 1946). See generally Neville W, “Healing the Nation: Access to Medicines Under the Pharmaceutical Benefits Scheme – The Jurisprudence from History” (PhD thesis, the Australian National University, Canberra, 2007) pp 214-215.



time in a United States-style managed care health system in Australia?<sup>14</sup> The current author has argued previously that it does.<sup>15</sup> Such a health care system practically compels doctors to be employed in “pools” of health care providers, primarily contracted to large health care corporations, to whom are then allocated patients under insurance contracts.<sup>16</sup> Managed care plans thus restrict patients to entering a contract with a health insurer which controls and gives access to panels of physicians who have agreed to accept lower reimbursements or who claim to have exhibited a history of practising (relatively) low-cost care.<sup>17</sup>

It is important to emphasise, as mentioned, that this guarantee applies to nurses and to the range of health care professionals who provide medical or dental services. It is necessarily not restricted (on an interpretation of its natural meaning, history, context and purpose) to registered medical practitioners or dentists.

The s 51(xxiiiA) guarantee appears to require that many fundamental reforming health care initiatives be instituted by State rather than federal governments. That State governments required junior doctors to train in public hospitals was an important context in which the guarantee was created. The reasoning of all judges in the *PSR case* thus indicates that the guarantee may restrict federal government capacity to implement recommendations of the NHHRC that require Commonwealth legislation imposing greater governmental or private corporate control over the initiation or cessation of employment (as opposed to regulation of its incidental features) by those providing medical or dental services in Australia.<sup>18</sup>

As a further, specific example, the constitutional guarantee against “any form of civil conscription” may also constrain federal laws seeking to require junior or overseas-trained medical practitioners who are Australian citizens to be trained in private hospitals or work for government or non-government entities in areas of need (such as rural environments). In 1996, eg, the federal government introduced an amendment to the *Health Insurance Act 1973* (Cth), s 19AB. This prohibited a subgroup of Australian medical professionals from accessing Medicare benefits “for services rendered” for a period of 10 years following the time they become registered with a State or Territory Medical Board. Currently, the medical professionals restricted by this section include Australian citizens who, as doctors, are former overseas medical students (ie not permanent residents or Australian citizens when first enrolled at a medical school located in Australia), New Zealand trained or overseas trained. To overcome this problem, many urban hospitals have created a “staff specialist” position to allow those affected by s 19AB to work without personally claiming Medicare benefits.<sup>19</sup> For general practitioners, however, it is not so simple. General practitioners have to claim Medicare benefits for services rendered on an individual patient basis, and thus it prevents those who are restricted by ss 19AA and 19AB from claiming any benefits in Australia. The restrictions of the Act can be waived by the Federal Health Minister for a person or a group of people at the Minister’s discretion. This usually occurs when the medical professional agrees to work in a “District of Workforce Shortage” for the 10-year period when they are restricted by s 19AB. This may be in a

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<sup>14</sup> Mendelson D, “Devaluation of a Constitutional Guarantee: The History of Section 51(xxiiiA) of the Commonwealth Constitution” (1999) 23 MULR 308.

<sup>15</sup> Faunce, n 13.

<sup>16</sup> Waitzkin H and Iriart C, “How the United States Exports Managed Care to Third World Countries” (2000) 52(1) *Monthly Review* 21.

<sup>17</sup> Council of Ethical and Judicial Affairs, “American Medical Association. Ethical Issues in Managed Care” (1995) 273(4) *JAMA* 330.

<sup>18</sup> Penington DG, *Does the National Health and Hospitals Reform Commission Have a Real Answer for Public Hospitals?*, eMJA Rapid Online Publication (14 September 2009), [http://www.mja.com.au/public/issues/191\\_08\\_191009/pen10940\\_fm.html](http://www.mja.com.au/public/issues/191_08_191009/pen10940_fm.html) viewed 15 September 2009.

<sup>19</sup> Frahm-Jensen G, “Section 19AB of the Health Insurance Act 1973 (Cth) – Civil Conscription in Practice?” (unpublished MS in possession of the author, Canberra, 2009).

rural location, and may require the general practitioner and her or his family to move to a location where they would otherwise not choose to live or work.<sup>20</sup>

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<sup>20</sup> Loy CS, Warton RB and Dunbar JA, "Workforce Trends in Specialist and GP Obstetric Practice in Victoria" (2007) 186(1) MJA 26.