BARTON A.C.J. Question 1 being in our judgment one that we are not entitled to answer, the answer of the Court is:

To question 2—No.

We order that the case be remitted to the President with this opinion.

Questions answered accordingly.

Solicitors, for the claimants, *Sullivan Brothers.*

Solicitors, for the respondents who appeared, *Scroggie & Dunhill.*

B. L.

[HIGH COURT OF AUSTRALIA.]

FEDERATED ENGINE-DRIVERS AND FIREMEN'S ASSOCIATION OF AUSTRALASIA . . . . . } CLAIMANTS;

AND

THE BROKEN HILL PROPRIETARY COMPANY LIMITED AND OTHERS } RESPONDENTS.

[No. 3.]

Industrial Conciliation and Arbitration—Industrial agreement, meaning of—Agreement settling terms of employment—Commonwealth Conciliation and Arbitration Act 1904-1911 (*No.* 13 *of* 1904—*No.* 6 *of* 1911), *secs.* 4, 24, 73, *Part VI.—The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.).

Sec. 73 is the governing section in Part VI. of the *Commonwealth Conciliation and Arbitration Act*, and the only industrial agreement that is contemplated by that Part is an industrial agreement for the prevention and settlement of industrial disputes by conciliation and arbitration.

Held, therefore, that an agreement made by an organization and an employer purporting to settle the rates of wages and conditions of employ-

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ment which should apply to members of the organization who were then or might thereafter during the currency of the agreement be employed by the employer, was not an "industrial agreement" within the meaning of Part VI. of the Act, notwithstanding that in the agreement itself the agreement was described as "an industrial agreement made pursuant to" the Act, that the agreement provided for its being filed in the office of the Industrial Registrar under the provisions of the Act, and that it contained a provision for the reference of any dispute arising under the agreement to a conciliation board, and, if that board should not agree, then to the Deputy Industrial Registrar.

On the hearing of a plaint in the Commonwealth Court of Conciliation and Arbitration in respect of an industrial dispute extending beyond the limits of one State one of the respondent employers proved an agreement between him and the claimant organization covering all the subjects in dispute.

Held, that the Court was entitled before dismissing the employer from the plaint to inquire whether the agreement did in law and in fact settle the dispute.

CASE stated by the President of the Commonwealth Court of Conciliation and Arbitration.

The case was substantially as follows:—

"1. The claimant is an association of employés which was in fact registered as an organization of land engine-drivers and firemen under the Act on 7th March 1908.

"2. On 15th October 1910 the claimant submitted to this Court by plaint an industrial dispute which it had with a large number of employers including in its plaint (as alleged parties to the dispute) the following employers:—(*a*)" (Then followed the names of several individuals and companies) "all carrying on business in the neighbourhood of Newcastle, New South Wales, and hereinafter called 'the Northern Collieries.' (*b*)" (Then followed the names of several companies) "all carrying on business on the south coast of New South Wales, and hereinafter called 'the Southern Collieries.' (*c*)" (Then followed the names of several companies) "all carrying on business in or near Broken Hill, New South Wales, and hereinafter called 'the Broken Hill Companies.' (*d*)" (Then followed the names of several individuals and companies) "all carrying on business in or near Adelaide, and hereinafter called 'the Adelaide Employers.'

"3. No application was made to cancel the registration of the association.

"4. The dispute was heard in this Court in 1911 on 4 days in

February, on 8 days in March, on 12 days in April, and on 5 days in May; and on 12th May 1911 I delivered judgment, stating the award which I proposed to make, but I stated a case for the opinion of the High Court.

"5. Agreements headed 'This Industrial Agreement' were made between the claimant and the Northern Collieries at various dates on or before 12th May 1911 and were filed in the office of the Registrar but none of the agreements was submitted to me for a certificate or certified by me in pursuance of sec. 24.

"6. The High Court having heard and determined the questions in the case stated remitted the case with its opinion to me on 12th October 1911, and the opinion was to the effect that an association of land engine-drivers and firemen was not an association that could be registered under sec. 55 of the Act and that the objection was fatal to the claim when the case came on for hearing.

"7. By the *Commonwealth Conciliation and Arbitration Act* 1911, which became law on 23rd November 1911, the definition of 'industry' was enlarged so as to include handicrafts such as that of engine-drivers and firemen, and it was provided (sec. 4) as follows:—'The registration, as an organization under the Principal Act, of any association purporting to be registered before the commencement of this Act shall be deemed to be as valid to all intents and purposes and to have constituted the association an organization as effectually as if this Act had been in force at the date of the registration.'

"8. The case having come on again to be dealt with on 24th November 1911, I again stated a case for the opinion of the High Court on this question (amongst others):—

"Question 1.—Has this Court power now that the *Commonwealth Conciliation and Arbitration Act* 1911 has been passed to make an award at the instance of the claimant?

And the answer as remitted, dated 7th April 1913, is as follows:—

"Answer.—Yes on the basis that the plaint first came into valid existence on 24th November 1911.

"9. Application being made on 25th April 1913 to fix a date for further hearing of the plaint, it was urged on behalf of the Northern Collieries that the said so-called 'industrial agreements'

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had been made and filed under Part VI. of the Act and were of themselves a conclusive bar to all further proceedings against the Northern Collieries, and that the Northern Collieries should be forthwith struck out of the plaint.

"10. The hearing of the case was resumed on 12th May 1913, and on 13th May, objection being taken to the jurisdiction of this Court because of the said agreements and an immediate decision of some sort being necessary, I took the view that as the plaint is to be treated as not having 'come into valid existence' until 24th November 1911, and as the agreements were not made after the plaint or certified or filed under sec. 24 of the Act and would not operate as an award, it was my duty to leave the said respondents on the record at that stage. I had doubts also as to the said agreements being industrial agreements within Part VI. of the Act, and as to such industrial agreements being a conclusive bar to all further proceedings against the said respondents.

"11. I have not yet decided, nor do I mean to decide until I hear further evidence, that the Northern Collieries are parties to the dispute, or (if they are) to make any award as against the Northern Collieries, or as to the exercise of my discretionary powers under sec. 38 (*h*), (*o*) or (*p*).

"12. As regards the Southern Collieries, agreements (also called 'industrial agreements') were made on 13th December 1910 and filed in the office of the Registrar on 16th December 1910 between the claimant and each of the Southern Collieries.

"13. The said agreements with the Southern Collieries were filed in the office of the Registrar but no memoranda were certified by me or filed with the Registrar under sec. 24. On 16th December 1910 I made an order, by consent of the claimant, striking the Southern Collieries out of the plaint and/or further proceedings in the said dispute.

"14. The Southern Collieries having urged also on 12th and 13th May 1913 that they should, because of their agreements and the said order, be discharged from further proceedings, and the claimant having objected and having moved the Court to rescind the said order, it was rescinded on 13th May 1913 as the consent of the claimant had been given under the impression that it had secured agreements enforceable as an award under sec. 24.

"15. Nine of the Broken Hill Companies made an agreement with the claimant dated 17th February 1911. The said agreement is called 'This Industrial Agreement' and was filed in the office of the Registrar within one month, but no memorandum thereof was certified by me or filed under sec. 24.

"16. The other Broken Hill company, the Junction North Silver Mining Company No Liability, made an agreement with the claimant dated 23rd February 1911. The agreement is called an 'industrial agreement,' and it was filed in the office of the Registrar on 12th April 1911, but no memorandum thereof was certified by me or filed under sec. 24.

"17. The Adelaide Employers made an agreement with the claimant dated 9th February 1911. It is headed 'This Industrial Agreement' and was filed in the office of the Registrar within one month, but no memorandum thereof was certified by me or filed under sec. 24.

"18. The Broken Hill Companies and the Adelaide Employers also seek to be struck out of the proceedings, but I decline to strike them out unless under the guidance of the High Court.

"19. In the case of the Southern Collieries and of the Broken Hill Companies and of the Adelaide Employers as well as of the Northern Collieries, I have not yet decided, nor do I mean to decide until I hear further evidence, that they are parties to the dispute, or (if they are) to make any award against them, or as to the exercise of my discretionary powers under sec. 38 (*h*), (*o*) or (*p*).

"I have stated this case and submit it for the opinion of the High Court upon the following questions—which in my opinion are questions of law—

"1. On the facts stated were the said respondents, or any and if so which of them, entitled as of right to be struck out of the proceedings on 13th May 1913?

"2. On the facts stated is it the duty of this Court to proceed with the hearing of this plaint as regards the said respondents, or any and if so which of them, taking into consideration if and so far as this Court may see fit the fact, nature and circumstances of the said agreements?

"3. Are any, and if so which, of the said agreements 'industrial agreements' within Part VI. of the Act?

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"4. If so, are the provisions of Part VI. valid and enforceable under the Constitution?"

The nature of the agreements, which formed part of the case, is sufficiently stated in the judgments hereunder.

Arthur and *Ferguson*, for the claimants. None of the agreements was an "industrial agreement" within the meaning of Part VI. of the *Commonwealth Conciliation and Arbitration Act*, for none of them was an agreement "for the prevention and settlement of industrial disputes existing or future by conciliation and arbitration" as required by sec. 73. The Act provides for two distinct classes of agreements. First, the parties being in dispute and their dispute being before the Arbitration Court, they may come together and make an agreement which, under sec. 24, may be made the award or part of the award of the Court. Secondly, there being no dispute between the parties, or none that has been brought before the Court, they may agree that any dispute between them shall be settled by arbitrators to be appointed by themselves. For that case Part VI. makes provision. It cannot be contended that any of these agreements are within sec. 24. If they are within sec. 73, then Part VI. of the Act is unconstitutional: *J. C. Williamson Ltd.* v. *Musicians' Union of Australia* (1).

Campbell K.C. (with him *Starke*), for the respondent proprietors of the Northern Collieries and of the Southern Collieries respectively. The respondents do not contend that the first question should be answered in the affirmative, or the second question in the negative. As to the third question, these agreements are industrial agreements within the meaning of sec. 24 and Part VI. of the *Commonwealth Conciliation and Arbitration Act.* The primary meaning of "industrial agreement" is an agreement for the settlement of industrial matters. That is the sense in which that term is used in sec. 4. There is nothing in Part VI. to limit that meaning. Sec. 73 is not exhaustive as to what constitutes an industrial agreement. If the parties make a valid agreement covering the whole area of a dispute the Arbitration

(1) 15 C.L.R., 636.

Court has no jurisdiction in respect of that dispute. Assuming that the dispute is to be taken as first brought before the Arbitration Court when the registration of the claimant organization was validated (*Federated Engine-Drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* [No. 2] (1)), the dispute which was the subject matter of that plaint had then been terminated by the agreements, and it is admitted that there was no fresh dispute after the agreements were made. If these agreements had been made after the dispute had been brought before the Court they would have been industrial agreements within sec. 24. The intention of the Act being to bring about industrial peace, there is no reason why, when a dispute exists, Parliament should not offer to the disputants a certain sanction for agreements arrived at by negotiation between themselves. This is a form of conciliation. It would be an unnecessary limitation on the meaning of "conciliation" in sec. 51 (xxxv.) of the Constitution to limit it to conciliation by a third party. Sec. 73 is not limited to agreements providing for conciliation or arbitration: *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (2); and even if it is, these agreements fall within it by reason of the provision for reference to a conciliation board of any dispute arising under the agreements. Any mistake which the parties may have made as to the sanction attaching to the agreements is not a mistake in a matter of substance which would invalidate the agreements, especially in view of the fact that the parties have received the benefit of them for nearly three years.

Knox K.C. (with him *Flannery*), for the Commonwealth intervening. The fourth question should not be answered because it may never arise.

[BARTON A.C.J. We are all of opinion that these agreements are not industrial agreements within Part VI. of the Act, and so the fourth question need not be answered.]

Ferguson, in reply.

Cur. adv. vult.

(1) 16 C.L.R., 245.

(2) 6 C.L.R., 309, at pp. 339, 361.

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The following judgments were read:—

BARTON A.C.J. The questions for the consideration of this Court are framed as part of a case stated by the learned President of the Commonwealth Court of Conciliation and Arbitration, under sec. 31, sub-secs. 2 and 3, of the Principal Act. The original date of the plaint was 15th October 1910, but, under a decision of this Court on a special case stated by the learned President (1), it first came into valid existence on 24th November 1911. Between these dates agreements were made between the claimant organization and a number of parties respondents to the plaint. By sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1911 the registration of the claimant organization, which took place before the filing of the plaint, and which had been declared void by this Court (2), was validated as if that Act had been in force at the date of the registration. Hence the registration must be deemed to have been valid at the dates of the several agreements; and, therefore, in each instance, the organization must be taken to have been competent to contract as such (3), and the agreements preceded the valid existence of any plaint. Before the validity of the registration, and, consequently, of the plaint, was called in question, there were proceedings under the unauthorized plaint before the learned President in the Arbitration Court in February, March, April and May 1911, when they were suspended by resort to this Court upon a special case stated by the learned President as to the registration and other matters. The whole of the agreements were executed by that time. The hearing of the arbitration was re-commenced on 12th May in this year. The respondents represented on this special case, among others, objected to the jurisdiction of the Arbitration Court because of the agreements, which, they contend, settled the dispute as regards the respondents who were parties to them, and were a conclusive bar to the arbitration proceedings. The President has not yet made an award. He has not decided, and it is not his intention, until he hears further evidence, to decide, that the respondent signatories to these agreements are parties to the dispute, or to make any award against them.

(1) 16 C.L.R., 245.
(2) 12 C.L.R., 398.
(3) 15 C.L.R., 636.

It is convenient now to describe the agreements in question. They all begin with the words: "This industrial agreement made pursuant to the *Commonwealth Conciliation and Arbitration Act*;" and in them it is provided that the agreements "shall be filed in the office of the Industrial Registrar appointed under the *Commonwealth Conciliation and Arbitration Act* 1904." Each agreement purports to settle the conditions of employment, including the hours and wages, of the employés who were then, or might thereafter during the continuance of the agreement be, employed at the particular colliery. If, as the respondents contend, the then existing dispute was to be settled by the agreement itself, they are not agreements "for the prevention and settlement of industrial disputes existing or future by conciliation and arbitration": See sec. 73. It is true that, in respect of some consequential but not independent terms, they provide for a determination by a conciliation board consisting of two representatives of each party, and, if the board does not agree, a reference to the Deputy Registrar of the Sydney District, appointed under the Principal Act. But that fact does not of itself, in my judgment, bring them within sec. 73. They were all filed in the office of the Industrial Registrar after the original date of the plaint and before the date on which it came into valid existence. None of them were certified by the President as agreements under sec. 24; nor was it agreed that they should be so certified.

The agreements purported to bind the parties for three years from their dates; they were expressed to be executed—(*a*) as to the Northern Collieries, in pursuance of an agreement made between the organization of the one part and the Hunter River District Collieries Proprietary Defence Association of the other part, and (*b*) as to the Southern Collieries, in pursuance of an agreement between the organization and the Southern Colliery Proprietors' Association, and the Sydney Harbour Collieries Limited. It is the Northern and the Southern Collieries that were represented on the argument of this special case.

If the agreements were within Part VI. of the Principal Act, the certificate of the President was not necessary to their operation as industrial agreements. If, however, they were in fact agreements within sec. 24, they required the President's certificate,

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and a subsequent filing in the office of the Registrar, so as to have the same effect as, and be deemed to be, awards. If the documents operated either as industrial agreements or as agreements under sec. 24, their observance could be enforced by penalties. The respondents contended in the Arbitration Court that the agreements entitled them as of right to be struck out of the proceedings on 13th May 1913, on which date some of them made application to that effect.

Now, as to the questions arising on the special case. It is to be kept in mind that, having regard to the effect of the decisions of this Court above cited, there was at the time of the execution of the several agreements an industrial dispute as to which no industrial litigation was then pending. The plaint did not come into valid existence until 24th November 1911. But the claimants must be deemed to have been at the time of execution a duly registered organization. There being in point of law no valid plaint then in existence, the agreements cannot operate under sec. 24, which, when read with sec. 23, clearly refers only to agreements made during the hearing and before any award of the Court. But as, in the absence of a valid plaint, there was no industrial litigation between the parties at that time, it cannot be contended that there was anything to prevent the parties from making an industrial agreement. (In fact, it is doubtful whether there is anything in the words or purview of the Act to prevent parties from making an industrial agreement even during the pendency of an arbitration. I mention this because the parties evidently thought that an arbitration was duly proceeding at the time the documents were executed.) But the only industrial agreements which sec. 73 expressly enables an organization to make are "for the prevention and settlement of industrial disputes existing or future by conciliation and arbitration." Is, then, a document which does not follow the terms of the section in this respect capable of being an industrial agreement under Part VI.? If it is, and if the documents attached to the special case are industrial agreements in that sense, I think the dispute was settled by them, and therefore, *quoad* the respondents who signed them, there was no jurisdiction at the inception of the plaint, namely, 24th November 1911, or afterwards. If

however the documents, which, as we have seen, do not operate under sec. 24, were equally incapable of operating under Part VI., different considerations arise. I will take as a test the document of 5th May 1911, made with the Australian Agricultural Company, for if that is not an industrial agreement within Part VI. there is not any of the series that so operates. The question at this stage is whether sec. 73 governs Part VI.; whether it is exclusive; whether an agreement as to industrial matters which does not follow the terms of sec. 73 can be within that Part so as to settle an existing dispute. The question has been to some extent considered by this Court in the past. In the *Jumbunna Case* (1) *Griffith* C.J. expressed the view "that sec. 73, read according to the plain meaning of the words used, means that any registered organization may make an industrial agreement, using that term in the widest sense, ... for . . . . the purposes mentioned in Part VI., and this whether the subject matter of the agreement does or does not extend to operations beyond the limits of one State." He thought that sec. 73 authorized agreements for the prevention and settlement of industrial disputes by conciliation and arbitration. We cannot doubt that it does; but does it exclude agreements for the settlement of industrial disputes without resort to conciliation or arbitration? In the same case (2) I expressed the opinion that sec. 73 is the governing section, and that the remaining sections of Part VI. are ancillary to it, and pointed out that by the definition an industrial agreement means such an agreement "made pursuant to this Act," which, as to essentials, means pursuant to sec. 73. *O'Connor* J. (3) thought sec. 73 might be fairly construed as extending either to agreements made in the course of conciliation or arbitration proceedings, or to agreements for voluntarily settling matters in difference, which might result in disputes, by arbitration and conciliation under the Act. In the case of *J. C. Williamson Ltd.* v. *Musicians' Union of Australia* (4) a document purporting to be an industrial agreement and filed as such was considered. Like that in question, it did not provide for the prevention or settlement of existing or future disputes by con-

(1) 6 C.L.R., 309, at p. 339.
(2) 6 C.L.R., 309, at pp. 346 *et seq.*
(3) 6 C.L.R., 309, at p. 361.
(4) 15 C.L.R., 636.

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ciliation or arbitration. *Griffith* C.J. (1) was of opinion that the omission of such a provision did not prevent the document from being an industrial agreement; he thought that the provisions of sec. 73 were not exhaustive, and that it was merely an enabling section, not limiting the *primâ facie* meaning of the term "industrial agreement," but making clear that there should be included in that term an agreement for the prevention or settlement of future disputes by conciliation or arbitration. He was loth to think that the Federal Parliament might not, as ancillary to the prevention and settlement of industrial disputes by conciliation and arbitration, authorize the parties to come together out of Court and to agree to terms of settlement, and declare that an agreement so made should be binding on them. The coming together of delegates for such a purpose, followed by such an agreement, seemed to him to be not inaptly described as "conciliation." My learned brother *Isaacs* (2) held that sec. 73 was the governing section of Part VI., providing for an alternative mode of proceeding by conciliation and arbitration other than going to the Court, namely, voluntary conciliation and arbitration. He thought the other provisions of Part VI., such as secs. 77 and 78, did not militate against the governing effect of sec. 73. In the same case (3) I referred to my remarks in the *Jumbunna Case* (4), and said that they tended to the opinion that the industrial agreement to which the Act gave certain force and attributes was an agreement for the prevention and settlement of industrial disputes by conciliation or arbitration, and that the remaining sections of the Part were ancillary to sec. 73. I was unable to say that a perusal of the judgment of the Chief Justice, then just delivered, had altered the inclination of my opinion. Owing to the view which the majority took, it was unnecessary to decide the point in that case. It must now, however, be decided; and the argument in this case has confirmed the view which I expressed in the two cases cited, though I confess there is some difficulty in the way of either construction. I am, therefore, of opinion that the typical agreement of 5th May 1911 is not an industrial agreement within the meaning of Part VI.

(1) 15 C.L.R., 636, at p. 643.
(2) 15 C.L.R., 636, at pp. 658 *et seq.*
(3) 15 C.L.R., 636, at p. 647.
(4) 6 C.L.R., 309, at p. 346.

My answer to question 3 is, then, that none of the agreements are within Part VI. Question 4, in view of that answer, does not arise. Questions 1 and 2 remain. They are to be answered in the light of the conclusion that the agreements are not either within sec. 24 or Part VI. It was thus for the learned President to consider their effect and operation at common law, if any, having regard to the circumstances. It is impossible to say that his hands were tied as soon as the agreements were produced. If these respondents, or any of them, were entitled to be struck out of the proceedings at any stage, and I am far from saying that they were, it does not follow that such a right arose immediately upon the production of the agreements. It is conceded by the respondents, and I think rightly, that this is at any rate the case if the agreements were not within the Statute, as in my opinion they were not. I answer question 1 in the negative. And as to question 2 I think it is the duty of the Court to proceed with the hearing as regards the respondent signatories represented on the special case, and indeed any respondents who have made similar agreements, at least until his Honor can come to a conclusion upon the evidence as to their validity and effect, if any, at common law, and if he comes to the conclusion that in that respect the agreements did not settle the dispute *quoad* the signatories, it is his duty to proceed with and conclude the hearing upon the merits of the dispute. There are other considerations with respect to these documents which are not involved in this special case, but the chief of them arises on the motion for injunction next to be dealt with.

I answer the questions in the special case as follows:—

1. No.
2. Yes.
3. No, not any of them.
4. No answer.

The judgment of ISAACS, GAVAN DUFFY and RICH JJ. was read by

ISAACS J. The material facts are that during the progress of the proceedings before the learned President, the agreements referred to were produced by the respondents, and these are to

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be taken as formally executed by the persons and in the manner appearing on their face.

The present respondents claimed that the jurisdiction of the President, assuming it even to have attached, thereupon ceased, and that those respondents should be discharged from the proceedings. The several questions are to be answered with reference to these circumstances.

(1) With regard to the first question. As the binding nature of the agreement was contested by the claimants on the ground that the agreement was void *ab initio*, because it was in fact intended to be exclusively a statutory agreement and no such statutory agreement is known to the law, the respondents were not entitled to the order they asked until the contested facts had been fully investigated. The answer is therefore No.

(2) The second question may have, and has been argued as having, a twofold signification. First, it may mean to ask whether the President was bound to proceed to investigate the facts in order to satisfy his mind as to whether the parties intended to end the dispute by the agreement, irrespective of its ultimate effect, leaving that to the hazard of legal interpretation, or whether they intended to terminate the dispute only by substituting a binding statutory agreement for their then contractual relations. The answer to the question in this aspect is already furnished by what has been said with regard to the first question. In this aspect the answer is Yes.

The other possible aspect is to inquire as to the legal validity of such an agreement, and thereby to determine whether the President should proceed. In this aspect the answer is found in connection with the next question.

(3) In our opinion such an agreement is not an industrial agreement within Part VI. of the Act.

The governing section of that Part is sec. 73, which declares the nature of the agreements sanctioned by, and is the key to, the following provisions of the Part.

The legislative scheme is first by the preceding Parts to provide for official, and by Part VI. to provide for non-official, conciliation and arbitration for the prevention and settlement of industrial disputes. Sanctions are added to make the respective provisions

effectual, and so every section may and should be read. There is nothing in any of the sections which necessarily, or even probably, includes other terms. Reasons for this opinion are stated at length in the judgment of *Isaacs* J. in the *Musicians' Case* (1); and these we think correct. The formal answer, then, is No.

(4) The fourth question, in view of the previous answer, is not intended to be answered.

HIGGINS J. I concur with my learned brothers in the opinion that the first question should be answered in the negative, and the second question in the affirmative. In fact, no one urges a contrary opinion. There is no appearance in this case for the Broken Hill Companies or for the Adelaide Employers; and Mr. *Campbell* and Mr. *Starke*, who appear for the Northern and Southern Colleries, have declined to argue the two points. I asked the first question, are the respondents entitled to be struck out of the proceeding, because Mr. *Starke* and Mr. *Morley* put their demand in that way in the Conciliation Court; but it is now found that their contention cannot be supported. The answer to the second question involves, to my mind, more than appears at first sight. It involves this—that if a respondent is proved to be a party to an industrial dispute (extending beyond the limits of any one State), he cannot, by merely proving an agreement with the claimant covering all the subjects in dispute, insist on the plaint being dismissed as against him. The Court of Conciliation may still take into consideration the fact, nature and circumstances of the agreement, and find whether the dispute was really terminated or not by the agreement.

3 and 4.—We all concur in the view that these agreements are not, nor are any of them, "industrial agreements" within the meaning of Part VI. of the Act. They are called "industrial agreements"; they are expressed to be made pursuant to the Act; they follow, as to the preamble, the form prescribed by sec. 75. But they are not agreements "for the prevention and settlement of industrial disputes existing or future *by conciliation and arbitration.*" They are agreements to settle wages, and other conditions; the words (in the case of the Austra-

(1) 15 C.L.R., 636.

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lian Agricultural Co.) are "it is agreed that the rates of pay &c. shall be as follows." It may be also that they are also agreements for the settlement of a dispute with regard to wages and conditions; but they are not agreements for a system of preventing and settling "disputes . . . by conciliation and arbitration." Various State Acts provide machinery for the filing and enforcement by penalty of ordinary industrial agreements—collective agreements between unions and employers as to conditions of labour; but the draftsman of the Commonwealth Act evidently took the view that the Act had to be kept within the bounds of sec. 51 (xxxv.)—had to be an Act "with respect to . . . *conciliation and arbitration* for the prevention and settlement" &c. Sec. 73 is designed—clearly, to my mind—to enable parties voluntarily to provide for a method of conciliation and arbitration other than that of the Court created by the Act. This theory explains the phraseology of sec. 74—"no *proceedings under any industrial agreement* shall extend to affect any organizations or persons who are not bound by the agreement." It explains also the language of sec. 2 (VII.), which states one of the chief objects of the Act as being "to provide for the making and enforcement of industrial agreements . . . in relation to industrial *disputes*"—not in relation to industrial conditions. No one, I think, will deny that the agreements before us are industrial agreements in the usual sense—for they relate to industrial conditions. But they are not industrial agreements within Part VI.; and that is the question asked. Sec. 4 says that "in this Act . . . 'industrial agreement' means any industrial agreement made pursuant to this Act"; and Part VI., headed "Industrial Agreements," is the only place where industrial agreements are mentioned—providing, in sec. 73 for their nature, and in sec. 75 for the form of "every industrial agreement."

There was a view suggested by the learned Chief Justice in the case of *J. C. Williamson Ltd.* v. *Musicians' Union of Australia* (1), as follows:—"As at present advised, I am loth to think that the Federal Parliament may not, as ancillary to the prevention and settlement of industrial disputes by conciliation and arbitration, make provisions authorizing the parties to come

(1) 15 C.L.R., 636, at p. 643.

together out of Court and agree to terms of settlement, and declaring that an agreement so made shall be binding upon them. The coming together of delegates for such a purpose followed by such an agreement seems to me to be not inaptly described as 'conciliation.' I am therefore disposed to think that the agreement of 24th June is an industrial agreement within the meaning of the Act."

The Chief Justice was in a minority as to this view in a Court of three Justices; and his observations were not necessary for the decision, as the injunction was granted on other grounds. After careful consideration, I am unable to concur in the opinion which he has expressed. An agreement under Part VI. must be "*for* the prevention and settlement of industrial disputes existing or future by conciliation and arbitration." The agreement within Part VI. must precede and provide for the process of conciliation and arbitration. No proceedings, no meetings of the parties (with or without mediators), which end in an agreement for wages and conditions, can be treated as a process of conciliation and arbitration *provided for by the agreement.* Conciliation must be the aim of the agreement. The agreement under Part VI. comes first, and its prescribed process of conciliation afterwards. The strongest argument in favour of treating collective agreements which directly fix wages and conditions of labour as being within Part VI. is found in secs. 77, 78 and 80, which provide for penalties for breach of the agreement, recoverable even against the members of any organization party thereto, and for variation of the agreement so as to bring it into conformity with any common rule. How, it is asked, can such provisions be treated as applicable to any but agreements which fix wages and conditions? The answer is that the agreement providing for submission of a dispute to arbitration involves, expressly or by implication, a promise to abide by the award made: *Lievesley* v. *Gilmore* (1). The penalties are for breach of the agreement by disobeying the award.

An attempt has been made to bring some of these agreements under sec. 73 by virtue of the fact that in them there is a clause providing that "should any dispute arise under this agreement

(1) L.R. 1 C.P., 570, at pp. 573-574.

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it shall be referred to a conciliation board" (described). But the direct provisions for wages and conditions contained in the agreements do not constitute an agreement within Part VI. of the Act (as I have already pointed out); and this clause is merely ancillary to these direct provisions. The dispute referred to in the clause must arise "under this agreement." The distinction is obvious between a dispute "as to industrial matters," and a dispute merely as to the effect and application of a particular agreement; and that particular agreement is not an agreement under Part VI. Moreover, as there are separate agreements for each company, the disputes covered by the clause would not be "industrial disputes" within the words of sec. 73. For, under the interpretation section (sec. 4), an industrial dispute is one "extending beyond the limits of any one State."

4.—As the answer to the third question is in the negative, there is no need to consider the fourth question, which is expressed to be contingent on the answer being in the affirmative.

POWERS J. The facts of this case have been fully referred to by my learned brethren.

The questions submitted to this Court by the learned President were: [His Honor read the questions, and continued:]

In this case counsel for the respondents did not press for an affirmative answer to the first question, at the present stage. None of the respondents are, in my opinion, entitled, as of right, to be struck out of the proceedings. My answer to the first question is No.

As to the second question, I hold that the President is justified in proceeding with the hearing of the plaint as regards all the respondents, taking into consideration the fact, nature and circumstances of the said agreements; and in investigating the facts, to ascertain whether the parties intended to and did end the dispute by the agreement in question, or whether the dispute was only to be terminated by a binding statutory agreement under the *Commonwealth Conciliation and Arbitration Act*. The President is also justified, under the special circumstances, in proceeding on the plaint to see whether, at the date the plaint was validated, there was a dispute in fact. My answer to question 2 is Yes.

As to the third question, I agree with all my learned brethren that the agreement submitted is not an "industrial agreement" within the meaning of Part VI. of the Act. My answer to question 3 is, therefore, No.

The fourth question was only to be answered in the event of the third question being answered in the affirmative.

Questions answered accordingly.

Solicitors, for the claimants, *Sullivan Brothers.*

Solicitors, for the respondents, *Sparke & Millard,* Newcastle, by *Stuart Thom Brothers & Co.*

Solicitor, for the Commonwealth, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

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