Cons *R v Portus; Ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353

Cons *R v Cth Industrial Court Judges; Ex parte Cocks* (1968) 121 CLR 313

Cons *R v Kelly; Ex parte State of Victoria* (1950) 81 CLR 64

Dist *Alcan Australia Ltd, Re; Ex parte F I M E E* (1994) 68 ALJR 626

Dist *Alcan Australia Ltd, Re; Ex parte F I M E E* (1994) 123 ALR 193

Cons *Alcan Australia Ltd, Re; Ex parte F I M E E* (1994) 181 CLR 96

[HIGH COURT OF AUSTRALIA.]

THE FEDERATED CLOTHING TRADES OF THE COMMONWEALTH OF AUSTRALIA . . . . . } CLAIMANT;

AND

ARCHER AND OTHERS . . . . . RESPONDENTS.

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MELBOURNE, *May* 29; *June* 4, 20.

Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Industrial Arbitration—"*Industrial dispute*"—"*Industrial matter*"—"*Conciliation*"—"*Arbitration*"—*Claim*—*Jurisdiction of Commonwealth Court of Conciliation and Arbitration*—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.)—*Commonwealth Conciliation and Arbitration Act* 1904-1915 (*No.* 13 *of* 1904—*No.* 35 *of* 1915), *sec.* 4.

Held, by *Isaacs*, *Higgins*, *Powers* and *Rich* JJ. (*Barton* and *Gavan Duffy* JJ. dissenting), that a dispute in the clothing trade was an "industrial dispute" within the meaning of the Constitution and of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 so far as it was a dispute as to the following claims made by an organization of employees—that all garments should bear upon a label the name of the actual manufacturer; that an officer of the organization of employees should have power to inspect factories where breaches of the award are suspected to be occurring on notice by him, and should have access to wages-books and time-sheets; that reasonable facilities should be afforded in factories to members and officers of the organization for work necessary in connection therewith, and that the organization should be permitted to post notices on a board in factories; that no work should be done outside a workshop provided and controlled by the employer for whom the work is performed; and that out-door work should be given only to members of the organization, and then only on notice to the secretary of the organization: and also as to the following claims (as to which *Barton* and *Gavan Duffy* JJ. dissented to such extent only as the claims did not apply to the parties to the dispute)—that each employer should provide in his factory a time-book containing a correct record in ink of the hours worked and the wages received by each employee, such book to be signed weekly by the employer; and that out-door workers if employed should receive wages at rates 25 per cent. in excess of the rates claimed for piece-work, and should not themselves employ any labour.

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By *Barton* and *Gavan Duffy* JJ.: An "industrial dispute" within the meaning of sec. 51 (xxxv.) of the Constitution must have reference to matters directly affecting employees in the performance of their duties, and a dispute as to such matters is an "industrial dispute" within the definition of that term in sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904-1915.

By *Isaacs*, *Rich* and *Powers* JJ.: A dispute in order to come within the definition of an "industrial dispute" in sec. 4 of the *Commonwealth Conciliation and Arbitration Act* must, for the purpose of arbitration, be capable of being made the subject of an award, and therefore the claim made by the one party to the dispute must be a claim which the other party has power to grant.

By *Isaacs* and *Rich* JJ.: The term "conciliation" in the Constitution may possibly extend to "industrial disputes" to which the term "arbitration" does not apply.

By *Higgins* J.: It is impossible to give, and undesirable to attempt to give, a complete definition, applicable for all time to come, of the words "industrial disputes" contained in sec. 51 (xxxv.) of the Constitution.

Federated Municipal and Shire Council Employees' Union of Australia v. *Melbourne Corporation*, 26 C.L.R., 508, followed.

Clancy v. *Butchers' Shop Employees' Union*, 1 C.L.R., 181, distinguished.

CASE STATED.

On the hearing of an application to the High Court under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 for a decision on the question mentioned in that section, with relation to an alleged industrial dispute between the Federated Clothing Trades of the Commonwealth of Australia, claimant, and J. A. Archer and a number of other respondents, *Higgins* J. stated the following case for the opinion of the Full Court:—

1. An alleged industrial dispute has been submitted to the Commonwealth Court of Conciliation and Arbitration by plaint on the part of the above-named claimant organization. There are some 484 employers respondents to the plaint carrying on business in various States of the Commonwealth.

2. Application has been made by the claimant to me as a Justice of the High Court in Chambers under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 for a decision on the question whether an industrial dispute exists (or is threatened or impending or probable) between the claimant and the respondents,

as to the matters mentioned in the plaint, as an industrial dispute extending beyond the limits of any one State.

3. I have decided as to all the matters mentioned in the plaint, excepting three, that the industrial dispute alleged exists as an industrial dispute extending as aforesaid as between the claimant and about 483 respondents.

4. I have reserved my decision as to the said three matters, as it is contended by the A.N.A. Clothing Co. and some 227 other respondents that the dispute as to these matters is not a dispute as to industrial matters, and that it therefore is not an "industrial dispute" within the meaning of the Constitution or of the said Act. And the said respondents have requested me to submit their contention to the Full High Court.

5. As to the said three matters I find that a dispute extending as aforesaid exists in fact, but the question remains: Is it an industrial dispute?

6. The said three matters are:—

(I.) "67. All garments shall bear the name of the actual manufacturer on a label, such label to be sewn on a prominent part of the garment."

(II.) "71 (*a*). The registered officer of the association or a person duly authorized by him in writing shall have power to inspect any part of a factory, workshop or place where it is suspected or believed that a breach of the award or agreement based on this plaint is occurring or has occurred.

"71 (*b*). Such visit shall be notified by the officer prior to his actually going on the premises, and the employer shall provide the officer with the necessary facilities for the investigation of the breach or suspected breach of the award or agreement. Such facilities shall include access to the wages-book or time-sheet. The officer shall interfere with or inconvenience the work and the duties of the employees in so doing as little as possible.

"71 (*c*). Employers shall provide on each factory, workshop or place where work is carried on for him a time-book. Such time-book shall contain a correct account of the hours worked and wages received by each employee. Such book shall be kept correctly entered up in ink, and shall be signed each week by the employer

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verifying the accuracy of the hours worked and the amount of wages received.

"71 (*d*). On each works reasonable facilities shall be afforded members and officers of the association for the necessary work in connection therewith, and the association shall be permitted to post notices on a board at each works in a reasonable manner."

(III.) "74. No employer shall have work done and no employee shall do work outside a workshop provided and controlled by the original employer for whom the work is performed, and no work shall be performed in any premises occupied by an operative.

"74 (*a*). In the event of the claim in clause 74 for the total abolition of out-door work not being granted by the Court, out-door workers shall be employed and paid on the piece-work rates provided herein plus 25 per cent., and shall not employ any labour whatever.

"74 (*b*). Such out-door work shall be given only to members of the claimant organization, and notice of all applications under this clause shall be given to the secretary of the claimant organization."

7. The parties are to be at liberty to refer to the plaint.

I state this case for the consideration of the Full Court, asking these questions :—

(1) Is the dispute as to the matters set forth in par. 6 hereof, or any and what part of the said matters, a dispute as to industrial matters ?

(2) Is the dispute as to the said matters, or any and what part thereof, an industrial dispute (*a*) within the meaning of the Constitution ; (*b*) within the meaning of the said Act ?

Starke, for the claimant. The matters referred to in the case are "industrial matters" within the definition of that term in sec. 4 of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 (*Australian Tramway Employees' Association* v. *Prahran and Malvern Tramway Trust* (1)).

Sir Edward Mitchell K.C. and *Stanley Lewis*, for the respondents. The claims are in each case such that the granting of them would bring about an interference with the way in which employers shall

(1) 17 C.L.R., 680, at pp. 696, 704.

carry on their businesses. A dispute as to such a claim is not an "industrial dispute" either within the Constitution or within the Act. An interference with the way in which an employer is to carry on his business, except in so far as it relates directly to the work actually done by the employee or to the mutual rights and privileges of employers and employees, is not an "industrial matter" (*Clancy* v. *Butchers' Shop Employees' Union* (1)). Provisions for securing that an award, if one is made, shall be carried out are not claims as to industrial matters. None of the claims have anything to do with the conditions of employment, and the granting or withholding them will not effect any benefit or detriment to the employees in regard to their employment. (See *Jumbunna Coal Mine* v. *Victorian Coal Miners' Association* (2); *Australian Tramway Employees' Association* v. *Prahran and Malvern Tramway Trust* (3).) The term "industrial disputes" in sec. 51 (xxxv.) of the Constitution must be limited in some way. It does not cover everything that is demanded by employees from employers, or *vice versâ*, as a condition precedent to employment. It must be something referring to the conditions of labour. The test of an industrial dispute is whether the dispute is in reference to a matter which directly affects the conditions of employment, that is, the conditions of actual employment and not the conditions precedent to employment.

Starke, in reply. An "industrial dispute" within the Constitution is a dispute as to any matter which the party upon whom the demand is made has the capacity to grant.

Cur. adv. vult.

The following judgments were read:— June 20.

BARTON J. I agree with my learned brother *Gavan Duffy* that an "industrial dispute" within the meaning of sec. 51 (xxxv.) of the Constitution must have reference to matters directly affecting employees in the performance of their duties. I have expressed my opinion to that effect in *Federated Municipal and Shire*

(1) 1 C.L.R., 181, at p. 207. (2) 6 C.L.R., 309, at pp. 332, 341, 353.
(3) 17 C.L.R., at pp. 702, 705.

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Council Employees' Union of Australia v. *Melbourne Corporation* (1), and I answer the questions accordingly in the terms stated in his judgment.

I add that the matters which under those answers are within sec. 51 (xxxv.) of the Constitution are also in my opinion within the terms of the *Commonwealth Conciliation and Arbitration Act* 1904-1915.

Isaacs J. Rich J.

ISAACS AND RICH JJ. In the *Badge Case* (2) we stated with considerable detail our understanding of the expression "industrial matter." If that case is rightly decided, its principle covers this. Its correctness was not challenged, but further consideration has confirmed the views we there expressed. Instances of a "badge" dispute can be found recorded in English official reports (see, *e.g.*, *House of Commons Papers* 1895, vol. XCII., p. 382, Appendix I., p. 172; 1898, vol. LXXXVIII., p. 605, and 1910, vol. XXI., pp. 12-13 and 15).

The series of facts and the train of reasoning which led us to our conclusions in the *Municipalities' Case* (1), just determined, lead us also almost inevitably to hold that the claims here are "industrial matters." By that we mean, of course, only that they are within the ambit of the constitutional power and the language of the Act, and so within the power of the arbitrator if he sees fit to grant them. We do not say, and have no right to offer any opinion, whether they are, or any of them are, reasonable or right to grant. Adhering to our considered views as stated in the *Badge Case* (2), and particularly for this purpose at p. 704, they come within the arbitral jurisdiction. It must not be forgotten that that jurisdiction is limited not merely by the Constitution but also by the Act. The Act marks the limits within the legislative power to which Parliament has thought fit to go. And one limit is that no industrial disputes are within the Act except such as may be made the subject of an award. We have a special reason for referring to that. It will have been observed that among the recognized causes of "trade disputes" or "industrial disputes" or "labour disputes," as they

(1) 26 C.L.R., 508. (2) 17 C.L.R., 680.

are variously termed in the Report of 1894, are causes which employers are utterly unable by any concession on their part to avert or terminate. No award against them could possibly end that dispute. And the Commonwealth power of arbitration must be exercised by award "so as to settle" the dispute. But "conciliation" may not be so limited. We have not to decide it now. It may possibly be—we observe only to guard against misapprehension—that the constitutional power of conciliation may, on fuller examination than it has yet received, be found to extend to cases where persuasive reasoning, as distinguished from compulsive order, may induce industrial combatants to come to terms and end or avert a public danger even though the cause of quarrel is not one to be granted by either disputant.

Limiting ourselves, however, to the Act as it stands, an "industrial matter," that is, one that can be made the subject of an award, must be one that the party of whom it is demanded can accede to. Granting that, the claims are within the reason of the matter, and within the precedents or their analogy.

First, to quote some instances in the tailoring industry:—*House of Commons Papers* 1895, vol. XCII., pp. 306-307: Clothiers' operatives (females), London N., had a dispute, the cause being the refusal of the employer to negotiate with union officials upon certain questions of prices in his shops—40 women affected; employer agreed. *House of Commons Papers* 1895, vol. XCII., pp. 304-307:—Item 300, Leeds tailors and pressers, against introduction of piecework; successful. Item 306, Bradford tailors, for abolition of the outworking system; successful. Item 320, Rochdale tailors, against introduction of factory system; unsuccessful. *House of Commons Papers* 1898, vol. LXXXVIII., pp. 602-603: Aberdeen tailors disputed with employer, the cause being objection to garments being sent out to be made; employer agreed; 17 men directly affected. Then other trades:—*House of Commons Papers* 1897, vol. LXXXIV., pp. 424-425: Item 849, Edinburgh cordwainers, against jobbing work being done in factories at lower rates than in employers' own shops—73 men concerned; result—agreement signed between parties and a representative of the Board of Trade acting under the *Conciliation Act*. *House of Commons Papers* 1898, vol. LXXXVIII., pp.

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578-581 : Birmingham trades (several), to compel employers to join trade alliance ; result—in some cases employer joined, in others not. *House of Commons Papers* 1902, vol. XCVII., pp. 332-333 : To compel about 50 non-unionists to join the South Wales Miners' Federation ; they joined—2,500 miners at Merthyr, 850 at Pontypridd and others. *House of Commons Papers* 1910, vol. XXI., 7th Report of Board of Trade of Proceedings under *Conciliation Act* of 1896, at pp. 10-11 : Dublin carters, dock labourers, &c., to get recognition of trade union officials ; the Board of Trade undertook the task. At p. 35 : Similarly as to the railway servants of the United Kingdom. At pp. 12-13 and 15 : Londonderry carters and the railway servants of the United Kingdom had a "badge" dispute ; the Board of Trade acted in both, the President of the Board of Trade being the conciliator in the second.

The only claim now under consideration as to which any further observation need be made is the first, because it is the least obvious. But apart from the principle that it is a claim which the employer clearly has it in his power to grant, the reasonableness of it being for the arbitrator's consideration, it is clearly one which may conceivably affect the employees' wages. For instance, a customer gives an order for a garment to be made specially. Order garments are dearer to the customer, on the hypothesis that they mean higher wages. Suppose he is supplied with a garment not really specially made to measure, but given out to a sub-manufacturer and in fact paid for at lower working rates, the customer is defrauded, but also the workers are prejudiced. If the garment has the seller's name, the customer is satisfied ; if it has the name of the actual manufacturer, the customer is put on his guard, and the employees are to that extent protected. It is clear that the claim is not necessarily unreasonable. It all depends on the circumstances.

We answer both questions in the affirmative.

It may be added, though it is scarcely necessary, that *Clancy's Case* (1) cannot be regarded as having any application to the Commonwealth Act.

HIGGINS J. For the reasons which I have stated in the *Municipalities' Case* (2), I think it impossible to give, and undesirable

(1) 1 C.L.R., 181. (2) 26 C.L.R., 508.

to attempt to give, a complete definition, applicable for all time to come, of the words " industrial disputes " contained in sec. 51 (xxxv.) of the Constitution. The Courts have always refused to define fraud. The varieties of fraud increase with the complexity of civilization—*crescit in orbe dolus*; and so also the varieties of industrial disputes. It was suggested here by Mr. *Starke* that an industrial dispute must be about some matter which it is within the capacity of the parties to grant or refuse; and it is said that this definition would exclude from the class of " industrial disputes " a dispute such as that which I dealt with, in compulsory conference, in *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association*; *Ex parte Victorian Stevedoring &c. Co.* (1). In that case the men refused to " sling " flour for export to Java until the price of bread should be reduced from 8d. to 6d. per loaf. This reduction, of course, was out of the power of the employers; but the men were induced at the conference to leave the subject of the price of bread to the Government and Parliament. If the definition do not fit such a case, so much the worse for the definition; it would be extraordinary if the Court of Conciliation and the President were to be treated as helpless in such a case. Yet the definition would fit well enough if we bear in mind that the employed classes can grant or refuse as well as employers—they can grant or refuse their work. I do not see why an award cannot be made forbidding a union and its members to refuse work on specified grounds—even in the case of a sympathetic strike. In a converse case (the case of the *Amalgamated Society of Engineers and The Commonwealth* (2)) I decided that the Commonwealth Government should not refuse to give employment on the ground that the Society and its members would not sign an agreement binding them to accept piece-work rates. I cannot think that these disputes were not both " industrial disputes " within the Constitution. Both were between actual or possible employers and employees, as to the taking or giving of employment, or as to the conditions of employment; and both stood in the way of the supply of the commodities or services which the country needed.

(1) 10 C.A.R., 2. (2) 12 C.A.R., 386.

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Higgins J.

So far as the Constitution is concerned, therefore, I am of opinion that all the matters, the subject of debate in this case are "industrial disputes." I do not think that there is anything in the actual decision of *Clancy's Case* (1) which conflicts with this view. That was a decision under the New South Wales Act, and as to the definition of "industrial matters" therein contained; and it turned on the fact that the industrial agreement purported to regulate the hours of a butcher's shop even after all the employees had left. What the shopkeeper or his wife or daughter might do after the employees had left was not a matter affecting the employment.

But it may be that our Act covers a more limited area than the Constitution. Under sec. 4, an industrial dispute *includes* "any dispute as to industrial matters"; but it also "*means* an industrial dispute extending beyond the limits of any one State"; and as the phraseology of the Constitution is used here without qualification, I am inclined to think that the Act was intended to cover as wide a ground as the Constitution under which it became law. But, if this view be not accepted, what is the meaning of "any dispute as to industrial matters"? "Industrial matters" are defined, and very comprehensively. Claim 71 asks that the officer of the union shall have power to inspect the workroom on due notice, with right of access to the wages-book or time-sheet; that the employer shall keep a time-book showing the hours worked and the wages paid; and that the union be permitted to post notices on a board—as I understand, union notices of meetings, &c. In effect, the claim is that if the employer use the services of any member he shall not only observe certain conditions of labour, but that he shall enable the union to which the employee belongs to see that any agreement or award is being obeyed; and that the union, being an organization of employees devised for their mutual protection under the encouragement of the Act (sec. 2 (VI.)) shall be enabled to carry out its functions effectively. To me, these claims seem to be claims as to matters "relating to the rights or duties of employers or employees," and to "the terms and conditions of employment"; as well as to "matters pertaining to the relations

(1) 1 C.L.R., 181.

of employers and employees," and "questions of what is fair and right in relation to any industrial matter."

As for the third matter—a claim for an order forbidding work outside the shop or factory, or else for high rates on a piece-work basis, the work to be confined to members of the union—this seems to me, whether the claim is just or unjust either in whole or in part, to come easily within the definition. Even on the narrowest view of "industrial matters" it is of vital importance to the members of the union that an employer shall not have facilities for evading the award rates and conditions, or for resorting to the individual bargaining which homework often involves, or for getting women and girls who have other aids to support to accept work at low prices. The claim comes also under the words "all matters pertaining to the employment, preferential employment, . . . or non-employment of any particular persons."

The matter as to which I have felt some doubt is claim 67. We have to consider first the meaning of the claim, and then its purpose. Reading the claim, as my brother *Isaacs* suggests, with the general words of the plaint as they appear before the specific claims, I take it to mean that every respondent shall cause to be affixed to every garment which he purports to have made, to order or otherwise, the name of the actual manufacturer. But what is the purpose? How does it affect employment? A manufacturer bound by an award gets an order which he gives out to a sub-contractor not bound by the award, and thus evades the obligations of the award as to wages, &c.; but not necessarily any obligations to members of this union. A country tailor sends a chart order to a city tailor, and pretends to the customer that he himself has made the garment. But in each case the label would ordinarily be seen by the customer only—if he see it at all; and he might give the matter no more thought. To some extent, however, the provision for a label would tend to deter respondents from pretending to manufacture garments which they have not manufactured; and would thereby tend to prevent the substitution of underpaid workers for workers protected by the award. In this aspect, the claim is on the same lines as a claim for preference, which is clearly an industrial matter. But

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Higgins J.

on broad grounds also, it seems to me an industrial matter, a matter relating to conditions of employment, when the members of the union say "we shall not work for you unless your name appears on the garments which you make and the name of the sub-contractor on the garments which he makes." On the whole, I concur in the view that claim 67 also involves an industrial matter.

In my opinion, the dispute as to all the matters in par. 4 is a dispute as to industrial matters; and it is an industrial dispute within the Constitution and within the Act.

GAVAN DUFFY J. In the *Municipalities' Case* (1) I came to the conclusion that an "industrial dispute" within the meaning of sec. 51 (xxxv.) of the Constitution must have reference to matters directly affecting employees in the performance of their duties. Applying this test in the present case, I answer:— (1) The dispute as to the first matter set forth in par. 6 of the case stated is not a dispute within the meaning of the Constitution. (2) The dispute as to the second matter set forth in par. 6 of the case stated is not a dispute within the meaning of the Constitution except as to item 71 (*c*). As to that item, it is such a dispute so far as it applies to parties to the dispute but not otherwise. (3) The dispute as to the third matter set forth in par. 6 of the case stated is not such a dispute as to items 74 and 74 (*b*), but is such a dispute as to item 74 (*a*) so far as it applies to parties to the dispute and not otherwise. Those items which are within the Constitution are also, in my opinion, within the *Commonwealth Conciliation and Arbitration Act* 1904-1915.

POWERS J. For the reasons given by me in the *Badge Case* (2), I hold that all the matters referred to in the case submitted, so far as they are matters which are in the control of, and can be enforced by, the respondents in connection with their industry, are matters about which an industrial dispute within the meaning of the Constitution and the Act can arise. Whether an award should or should not be made in respect of them, and the conditions upon which they should be granted, if granted, are matters for the Arbitration

(1) 26 C.L.R., 508. (2) 17 C.L.R., 680.

Court to decide. The answers to the questions should be: Question 1, Yes; Question 2 (*a*), Yes; Question 2 (*b*), Yes.

Questions answered in the affirmative.

Solicitors for the claimant, *Brennan & Rundle.*

Solicitors for the respondents, *Derham, Robertson & Derham.*

B. L.

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FEDERATED CLOTHING TRADES OF THE COMMONWEALTH OF AUSTRALIA *v.* ARCHER.

[HIGH COURT OF AUSTRALIA.]

THOMAS ALFRED POWELL . . . . APPELLANT;
DEFENDANT,

AND

THE FARLEIGH ESTATE SUGAR COMPANY LIMITED . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Sugar-Cane—Awards—Central Sugar Cane Prices Board—Jurisdiction—Effect of making of new award upon prior award—Subsequent application to alter prior award—Statute—Construction—Regulation of Sugar Cane Prices Act 1915 (*Qd.*) (6 *Geo. V. No.* 5), *secs.* 3, 6, 7, 8, 12, 14.

By secs. 3, 6 and 7 of the *Regulation of Sugar Cane Prices Act of* 1915 (Qd.), Local Boards, and, on their default, a Central Board, are empowered to make awards determining the price of sugar to be paid and accepted by mill-owners and cane-growers respectively, and incidental matters, which, when made, shall have the force of law. Sec. 8 provides that an award made under that Act is to take effect from a fixed date and remains in force for such period not exceeding twelve months as is specified, and after "the expiration of that period shall continue in force, unless the Central Board otherwise order, until

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BRISBANE, *July* 21, 22, 25.

Isaacs, Gavan Duffy and Rich JJ.