[HIGH COURT OF AUSTRALIA.]

THE WATERSIDE WORKERS' FEDERATION OF AUSTRALIA . . . . . } APPLICANT;

AND

GILCHRIST, WATT AND SANDERSON LIMITED . . . . . } RESPONDENT.

THE KING

AGAINST

THE COMMONWEALTH COURT OF CONCILIATION AND ARBITRATION.

EX PARTE GILCHRIST, WATT AND SANDERSON LIMITED.

H. C. OF A. 1924.

SYDNEY, *April* 28-30.

MELBOURNE, *May* 13-15.

SYDNEY, *Aug.* 6.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

High Court—Jurisdiction—Prohibition—Certiorari—Injunction—Award of Commonwealth Court of Conciliation and Arbitration—Prohibition after award—Whether Court functus officio—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 75 (v.)—*Commonwealth Conciliation and Arbitration Act* 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *secs.* 4, 21AA, 31.

Industrial Arbitration—Commonwealth Court of Conciliation and Arbitration—Jurisdiction—Award—Validity—Preference—Preference to some members of organization—Returned soldiers and sailors—Variation between claim and award—Employer—Agent supplying labour—Interpretation of award—Commonwealth Conciliation and Arbitration Act 1904-1920 (*No.* 13 *of* 1904—*No.* 31 *of* 1920), *secs.* 4, 28, 38 (*o*), 38B, 40, 81A—*Registration of Firms Act* 1902 (*N.S.W.*) (*No.* 100), *sec.* 4—*Returned Soldiers and Sailors Employment Act* 1919 (*N.S.W.*) (*No.* 38), *sec.* 3.

Held, by *Knox* C.J., *Gavan Duffy* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting), that the High Court has jurisdiction under sec. 75 (v.) of the Constitution to issue prohibition to the President of the Commonwealth Court of Conciliation and Arbitration where an award has been made by him without jurisdiction.

Per Isaacs and *Rich* JJ.: Even if the prohibition otherwise lay, it should be refused in this case because (1) parties necessarily affected were absent; and (2) the award *de facto* was now operating, not by order of the Court of Conciliation and Arbitration, the term fixed by that tribunal having expired, but by direction of the Commonwealth Parliament.

R. v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co.*, (1909) 8 C.L.R. 419; *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.*, (1910) 11 C.L.R. 1; *Tramways Case* [*No.* 1], (1914) 18 C.L.R. 54; *Builders' Labourers' Case*, (1914) 18 C.L.R. 224; *Holyman's Case*, (1914) 18 C.L.R. 273; *Tramways Case* [*No.* 2], (1914) 19 C.L.R. 43; *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.*, (1918) 25 C.L.R. 434; *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co.* [*No.* 1], (1920) 28 C.L.R. 456; *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co.* [*No.* 2], (1921) 29 C.L.R. 290, followed.

In re Clifford and O'Sullivan, (1921) 2 A.C. 570, distinguished.

Sec. 38 (*o*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 does not confer on the Commonwealth Court of Conciliation and Arbitration authority to give an effective judicial interpretation of its awards.

A dispute was brought before the Commonwealth Court of Conciliation and Arbitration in which an organization of employees claimed against a number of employers that members of the organization should have preference over non-members.

Held, by *Isaacs*, *Rich* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting), that upon that claim an award might properly be made giving preference to returned soldiers and sailors who were members of the organization over all other persons (including other members of the organization), subject to the provision of sec. 81A of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 that nothing in any award should operate to prevent the employment of returned soldiers and sailors, and prohibiting discrimination in favour of any person whatever against returned soldiers and sailors who were members of the organization subject to the same provision of sec. 81A.

An association called the Shipping Labour Bureau was registered under the *Registration of Firms Act* 1902 (N.S.W.) as a firm, its members comprising certain shipowners who were bound by an award of the Commonwealth Court of Conciliation and Arbitration. The Bureau engaged wharf labourers, some called permanent hands, at a weekly wage, and others, called casuals, who were paid at an hourly rate. If a member of the Bureau required wharf labourers to work on his ship, he notified the Bureau, which supplied the number of men

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

required, from the permanent hands first, and, if there were not sufficient of them, then from the casuals. The member did not pay the men so supplied for their services, but paid the Bureau an agreed amount, nor did he exercise the power of dismissing the men for misconduct, &c., but complained in such cases to the Bureau. The control and direction of the men in loading and unloading a member's ship was in the hands of the member, and the men were bound in the course of their work to obey the orders of the member.

Held, by *Isaacs*, *Rich* and *Starke* JJ., that a member of the Bureau was, in relation to the men supplied by the Bureau to work on his ship, their employer for the purposes of the award, which prescribed that when requiring wharf labourers' work to be done the employers bound by the award should give a certain preference of employment.

MOTION for injunction and order nisi for prohibition or certiorari.

On or about 21st December 1922 a demand was made by the Waterside Workers' Federation of Australia on a number of companies and others who ordinarily employed wharf labourers, including Gilchrist, Watt and Sanderson Ltd., that (so far as is material) "members of the Federation shall have preference of employment over non-members." The employers did not accede to the demand. On 12th March 1923 the President of the Commonwealth Court of Conciliation and Arbitration summoned a compulsory conference of the parties, and, no agreement being arrived at, the President referred to the Court the dispute, which he found existed, as to the above-mentioned demand. On 24th December 1923 the President made an award which, so far as is material, was as follows :—

"1. (a) The respondents . . . shall—subject to the provisions of sec. 81A (1) of the *Commonwealth Conciliation and Arbitration Act*, which prevents this Court from making any award or order which shall operate to prevent the employment of returned soldiers or sailors—give preference of employment over all persons but returned soldiers and sailors—other things being equal—to returned soldiers and sailors who are members of the Waterside Workers' Federation of Australia, when requiring wharf labourers' work to be done in Sydney, subject to the following conditions : (b) The preference of employment referred to shall be—Over all other employees except returned soldiers and/or sailors as no order can legally be made by this Court authorizing discrimination by the respondent against any returned soldier or sailor whether a member of the

Waterside Workers' Federation or not. (c) The employment of men at weekly rates of wages, who are not returned soldiers or sailors, shall not be deemed a breach of this award as to preference if the respondents first offer weekly employment to returned soldiers and sailors at the rates they are willing to pay to employees engaged at weekly rates instead of at casual rates."

"2. (a) The respondents . . . shall not, when requiring wharf labourers' work to be done in Sydney, discriminate—other things being equal—against members of the Waterside Workers' Federation—not returned soldiers or sailors—except in favour of returned soldiers and/or sailors. (b) The employment of men at weekly rates of wages, not members of the Waterside Workers' Federation, shall not be deemed discrimination under this award against members of the Waterside Workers' Federation, if they give members of the Federation the same opportunity to accept weekly rates at the same rates they offer to others not members of the Federation."

"'Loyalist' shall mean for the purposes of this award—a person who actually worked on the wharfs in and about Sydney during the wharf labourers' strike period mentioned in the 1918 award of this Court, and who has worked as a wharf labourer in and about Sydney during the last six months preceding 1st December 1923."

"8. This award is made on the assumption that the members of the Waterside Workers' Federation will work for the respondents under conditions of awards made by this Court from time to time, or under agreements for weekly wages, and will not unduly interfere with, or make things unpleasant for, the registered loyalists who may be employed with them from time to time during the term of the award, and will favourably consider applications of competent and eligible loyalists to become members of the Federation. If the union acts contrary to the assumption mentioned, the Court can at any time after 30th June 1924 order that the award shall no longer continue in force."

On 13th February 1924 the Federation applied to the Commonwealth Court of Conciliation and Arbitration for an interpretation of the award, contending that under it (1) returned soldiers and sailors who were members of the Federation were

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

entitled to first preference of all employment over all other persons, other things being equal; (2) non-members of the Federation who were returned soldiers and sailors were entitled to second preference of all employment; and (3) after preference had been given to returned soldiers and sailors who were not members of the Federation, other members of the Federation were entitled to third preference of all employment, other things being equal. On 28th February 1924 the President delivered a judgment in the course of which he said: "The award must be interpreted quite apart from any question whether there have been breaches of it, and in the same way as any other Court would do, namely, not to consider what was intended or what the Court could do, but what the Court did by the award." He interpreted clause 1 of the award to mean "that subject to the provisions of sec. 81A of the *Commonwealth Conciliation and Arbitration Act* 1904-1920, returned soldiers and sailors members of the Waterside Workers' Federation of Australia are entitled to preference of employment—other things being equal—over all persons not returned soldiers or sailors as defined by the award." As to clause 1 he also said: "I interpret the clause to mean that the preference granted was to returned soldiers and sailors generally, so far as the Court could grant it, for all employment as wharf labourers (if the members of the union would accept the terms offered by the respondents)." As to the second claim of the Federation he said:—"The award is interpreted to mean that the members of the Waterside Workers' Federation who are returned soldiers or sailors are not entitled to preference over other returned soldiers or sailors. The Court has no power to give such preference, and the Court said so in the award. All returned soldiers and sailors by law, and as far as the award can affect it, are equally entitled to preference." As to the third claim of the Federation he said: "The award is interpreted to mean that the other members of the Federation not returned soldiers or sailors are not entitled to preference over all other persons except returned soldiers or sailors; for the award only prohibits discrimination against them, other things being equal, except in favour of returned soldiers and sailors."

The Federation now applied, by motion to the High Court, pursuant to sec. 48 of the *Commonwealth Conciliation and Arbitration Act* 1904-1921, for an order in the nature of an injunction to restrain Gilchrist, Watt and Sanderson Ltd. from committing breaches of the award.

Other material facts appear in the judgments hereunder.

S. A. Thompson (with him *Nicholas*), for the applicant. The interpretation given by the President of the award under sec. 38 (o) of the *Commonwealth Conciliation and Arbitration Act* should be taken into consideration as part of the award. Even if the interpretation is left out of consideration, there has been a breach of the award. The respondent is, for the purposes of the award, the employer of the persons supplied by the Shipping Labour Bureau to work on its ships. The Company requires wharf labourers' work to be done and, in obtaining men to do it, is bound by the award. The Bureau is merely an agency for obtaining labourers created by a number of the respondents to the award.

Bavin, A.-G. for N.S.W. (with him *Ferguson*), for the respondent. The remedy of an order in the nature of an injunction given by sec. 48 of the *Commonwealth Conciliation and Arbitration Act* is not intended to be used where another remedy is open (*Whittaker Bros.* v. *Australian Timber Workers' Union* (1)), and there was another remedy open here, namely, a prosecution for a breach of the award. So far as employees who are employed at weekly wages by the Bureau are concerned, they are employees of the Bureau and not of the owner of the ship on which they are employed (*Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (2); *Fitzpatrick* v. *Evans & Co.* (3)). As to those employees the award means that whenever new contracts of employment are made by the Bureau preference must be given to returned soldiers and sailors; it does not mean that those who are permanently employed at weekly wages are to be dismissed. The claim made by the Federation had no reference to permanent employees but only to casual employees, and the

(1) (1922) 31 C.L.R. 564. (2) (1898) 2 Q.B. 588.
(3) (1901) 1 Q.B. 756.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

award could only apply to the latter. There is no evidence that as to casual employees there has been a breach of the award. The interpretation of the award given by the President of the Commonwealth Court of Conciliation and Arbitration is *ultra vires*.

[KNOX C.J. The Court does not think that the interpretation should be looked at.]

An injunction is a matter of discretion, and should not be granted here because the award is invalid. The award, both as to preference and as to discrimination, is *ultra vires*. The claim was merely for preference of members of the Federation over non-members, and does not authorize an award of preference of returned soldiers and sailors over others who are not returned soldiers or sailors or of some members of the Federation over other members. The only power to grant preference is in sec. 40, and that is a power to give preference to a class, namely, members of an organization, over those who are not within that class. The award is invalid also because the only claim was for preference to members of the Federation and there was never any dispute as to preference to returned soldiers and sailors or as to discrimination (see *R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co.* (1); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co.* (2); *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Pty. Co.* (3)). Sec. 31 only applies to valid awards, and sec. 48 empowers this Court to grant an order in the nature of an injunction only to compel compliance with a valid award.

S. A. Thompson, in reply. On an application under sec. 48, the Court should treat the award as valid; and the only questions are whether there has been a breach of it, and whether the breach, if any, should be restrained. Persons in the general employment of the Bureau may, in particular cases, be in the employment of the owner of a ship on which they work (*Jones* v. *Scullard* (4)).

Cur. adv. vult.

(1) (1910) 11 C.L.R. 1, at p. 31.
(2) (1909) 8 C.L.R. 419.
(3) (1913) 7 C.A.R. 132, at p. 147.
(4) (1898) 2 Q.B. 565, at p. 573.

On 2nd May 1924, after the arguments on the injunction motion were concluded, upon motion by Gilchrist, Watt and Sanderson Ltd., an order nisi was granted by *Isaacs* J. calling upon the President of the Commonwealth Court of Conciliation and Arbitration and the Federation to show cause why a writ of prohibition should not issue, prohibiting further proceedings upon the award and the interpretation thereof, or in the alternative why a writ of certiorari should not issue to remove the proceedings into the High Court.

The grounds of the order nisi were substantially as follows :—

(1) That there was not at any material time any industrial dispute between the Federation and the Company extending beyond the limits of any one State with reference to (a) the terms or conditions of employment of permanent wharf labourers by the Company; (b) the preferring of returned soldiers generally or returned soldiers members of the Federation or at all; (c) discrimination as against members of the Federation or as against returned soldiers members of the Federation or at all; (d) the doing of work upon wharves or ships by wharf labourers otherwise than in the legal relation of future employment.

(2) That the President had no power to make an award in respect of preference to returned soldiers and sailors or to returned soldiers and sailors members of the Federation or as to discrimination against members of the Federation.

(3) That at no material time was there a dispute or an inter-State dispute between the Federation and the Company as to the matters dealt with in the award.

(4) That the award was beyond the powers contained in the *Commonwealth Conciliation and Arbitration Act* and/or the *Commonwealth of Australia Constitution Act*, and was a nullity and of no effect and was not binding on the Company.

(5) That the Commonwealth Court of Conciliation and Arbitration and the President had no power under the *Commonwealth of Australia Constitution Act* or otherwise to make the interpretation, and such interpretation was a nullity and of no effect and was not binding on the Company.

The order nisi now came on for argument.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Bavin A.-G. for N.S.W. (with him *Ferguson*), for the prosecutor. There is no evidence of a dispute existing at any time as to any of the matters mentioned in the first ground of the order nisi, and the award is therefore invalid. The only claim being for preference of members of the Federation over non-members, there was no jurisdiction to award preference to returned soldiers and sailors. The claim was in reference only to the relations between employers and employees, and does not warrant an award as to the relation between those who require wharf labourers' work to be done and those who do it. The award should be read as applying only to labourers who were paid an hourly wage, and not to permanent employees; for under the rules of the Federation a member who took permanent employment ceased to be a member (see *Waterside Workers' Federation* v. *Commonwealth Steamship Owners' Association* (1)). There was no dispute as to permanent employment, and the award, so far as it deals with permanent employment, is invalid. The award, so far as it gives preference to returned soldiers and sailors, is invalid as being in conflict with the provisions of the *Returned Soldiers and Sailors Employment Act* 1919 (N.S.W.), which directs preference to all returned soldiers and sailors, while the award purports to limit the preference to returned soldiers and sailors who are members of the Federation (*Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (2); *Tramways Case* [*No.* 2] (3); *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (4)). The interpretation of the award by the President should not be regarded, for it is not a judicial interpretation since the Arbitration Court cannot exercise the judicial power of the Commonwealth (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (5)), and it cannot be regarded as something in the nature of a variation, for it purports to be a judicial interpretation. While the award is still in operation this Court has power to issue prohibition to the Arbitration Court (*R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co.* [*No.* 1] (6)), although it would not

(1) (1914) 8 C.A.R. 53, at pp. 68, 72.
(2) (1910) 10 C.L.R. 266.
(3) (1914) 19 C.L.R. 43, at p. 81.
(4) (1920) 28 C.L.R. 1, at p. 11.
(5) (1918) 25 C.L.R. 434.
(6) (1920) 28 C.L.R. 456.

lie if that Court were *functus officio* (*In re Clifford and O'Sullivan* (1)).

[STARKE J. referred to *R.* v. *Electricity Commissioners* (2).]

Certiorari will lie as an exercise of original jurisdiction. The matter arises under the Constitution, and original jurisdiction is given by sec. 30 of the *Judiciary Act*. Certiorari is not open to the objection that the Arbitration Court is *functus officio* (see *R.* v. *Woodhouse* (3)). The restriction in sec. 31 of the *Commonwealth Conciliation and Arbitration Act* upon the power of the High Court to issue certiorari to the Arbitration Court should be strictly construed (*Jacobs* v. *Brett* (4)), and should not be applied where the statutory jurisdiction has been exceeded (see *Short and Mellor's Crown Practice*, 2nd ed., p. 42; *R.* v. *Bradlaugh* (5); *Clancy* v. *Butchers' Shop Employees' Union* (6); *R.* v. *Arndel* (7)). Although the High Court's power as to certiorari is statutory, the same principles should be applied with regard to restrictions on that power as are applicable to similar restrictions on the powers of superior Courts existing at common law.

Russell Martin, for the Commonwealth Court of Conciliation and Arbitration. The President regards the Arbitration Court as being *functus officio* in regard to the award in question.

Owen Dixon K.C. (with him *Robert Menzies*), for the respondent Federation. The circumstances surrounding the making of the demand show that the dispute was an inter-State one. The award as to preference which was made is authorized by sec. 38B of the *Commonwealth Conciliation and Arbitration Act*, which provides that the Court is not restricted to the particular claim which is made. If the matters included in the award are reasonably incidental to the settlement of the dispute the award is within sec. 38B, and whether what is included is reasonably incidental does not depend on what the claim is. The fact that preference is given to those members of the Federation who are returned soldiers or sailors over members who are not returned soldiers or sailors does not

(1) (1921) 2 A.C. 570.
(2) (1924) 1 K.B. 171, at p. 206.
(3) (1906) 2 K.B. 501.
(4) (1875) L.R. 20 Eq. 1, at p. 6.
(5) (1877) 2 Q.B.D. 569.
(6) (1904) 1 C.L.R. 181.
(7) (1906) 3 C.L.R. 557, at p. 571.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

vitiate the award, such a preference being included in the claim for preference for all members of the Federation. The giving preference of some members of the Federation over others is a matter which affects the Federation alone; it imposes no duty upon employers which they are interested in opposing. Sec. 38B is a valid provision, for what it prescribes is incidental to preventing or settling a dispute. The power given by sec. 40 includes a power to give preference to some members only of an organization. The words " such members " in sub-sec. 1 (*a*) does not necessarily mean all the members of the organization, but may mean a selected class of them, and the words " other persons " may mean all persons not within the selected class. It was intended by sec. 40 (1) to give a power to award something which was outside the limits of the dispute, although incidental to it. Sec. 40 (1) (*b*) supports that view. Sec. 40 is not a limitation on the powers otherwise given, but is an extension of the power given by sec. 24 (2). There is no inconsistency between the award and the provisions of the *Returned Soldiers and Sailors Employment Act* 1919 (N.S.W.): obedience to both is possible. The effect of sec. 31 of the *Commonwealth Conciliation and Arbitration Act* is that awards of the Court, once they are made, cannot be invalidated by reason of non-compliance with the provisions of the Act. The words of the section cover all the grounds upon which an award could be impeached, and negative the limitation of the section to cases where the award is bad but not for want of jurisdiction. If the effect of sec. 31 is that an award is not to be affected by the fact that it does not comply with the Act, full effect is given to sec. 75 (v.) of the Constitution. Certiorari will not lie in this case. That remedy is not given by sec. 75 of the Constitution. The term " matter " in sec. 75 does not include a remedy against a Court which has no jurisdiction. Certiorari is not within sec. 30 or sec. 80 of the *Judiciary Act*, and is negatived by sec. 31 of the *Commonwealth Conciliation and Arbitration Act*. Certiorari does not lie to quash that which is void (*R.* v. *Bristol and Exeter Railway Co.* (1)), and, according to the argument for the prosecutor, the award is void. Certiorari cannot usurp the function of prohibition.

(1) (1838) 11 Ad. & El. 202.

[STARKE J. referred to *Short and Mellor's Crown Practice*, 2nd ed., p. 40; *Re Daws* (1).

[ISAACS J. referred to *R.* v. *Electricity Commissioners* (2).]

Prohibition will not lie, because the Arbitration Court, having made its award, is *functus officio* (*In re Clifford and O'Sullivan* (3); *R.* v. *Maguire* (4); *R.* v. *Call*; *Ex parte Braun* (5)). [Counsel also referred to *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co.* [*No.* 1] (6); *The Vera Cruz* (7)).

[STARKE J. referred to *Tramways Case* [*No.* 2] (8).]

The writ of prohibition referred to in sec. 75 (v.) of the Constitution is for the purpose of protecting the Commonwealth against the usurpation of its judicial power, and is to be used to prevent an invasion, not of any judicial power, but of the judicial power of the High Court. [Counsel referred to *Mayor of London* v. *Cox* (9).]

Bavin A.-G. for N.S.W., in reply.

Cur. adv. vult.

Aug. 6.

The following written judgments were delivered:—

KNOX C.J. AND GAVAN DUFFY J. The Waterside Workers' Federation, an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1921, applied, by motion on notice, for an injunction to restrain Gilchrist, Watt and Sanderson Ltd. from committing breaches of an award (No. 77 of 1923) of the Commonwealth Court of Conciliation and Arbitration. After argument had been heard on that application, Gilchrist, Watt and Sanderson Ltd. obtained an order nisi for a writ of prohibition to restrain further proceedings on the same award, or alternatively for a writ of certiorari to bring up the award to be quashed, and subsequently moved to have the order nisi made absolute.

In the view which we take, the relevant facts were as follows, namely:—On 21st December 1922 the Federation requested certain employers of wharf labourers, including Gilchrist, Watt and

(1) (1838) 8 Ad. & El. 936.
(2) (1924) 1 K.B., at p. 204.
(3) (1921) 2 A.C. 570.
(4) (1923) 2 I.R. 58.
(5) (1884) 10 V.L.R. (L.) 359
(6) (1920) 28 C.L.R. 456.
(7) (1884) 9 P.D. 96, at p. 98.
(8) (1914) 19 C.L.R. 43.
(9) (1867) L.R. 2 H.L. 239, at p. 254.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Knox C.J. Gavan Duffy J.

Sanderson Ltd. (hereinafter referred to as the Company), to agree "that members of the Federation shall have preference of employment over non-members," at Sydney and other places. The employers having refused to agree and a compulsory conference having been held without result, the President referred the dispute into Court under sec. 19 (*d*) of the Act. The dispute referred by the order of the President was—so far as is relevant to this application—whether the members of the Federation should have preference of employment over non-members. The Company was made a respondent to the proceedings in the Arbitration Court and is one of the respondents named in schedule A to the award hereinafter mentioned.

After hearing evidence the President on 24th December 1923 made an award, the material portions of which are as follows, namely:—"I award, order, and prescribe—1. (a) The respondents whose names are set out in schedule A to this award shall—subject to the provisions of sec. 81A (1) of the *Commonwealth Conciliation and Arbitration Act*, which prevents this Court from making any award or order which shall operate to prevent the employment of returned soldiers or sailors—give preference of employment over all persons but returned soldiers and sailors—other things being equal—to returned soldiers and sailors who are members of the Waterside Workers' Federation of Australia, when requiring wharf labourers' work to be done in Sydney, subject to the following conditions: (b) The preference of employment referred to shall be—Over all other employees except returned soldiers and/or sailors as no order can legally be made by this Court authorizing discrimination by the respondent against any returned soldier or sailor whether a member of the Waterside Workers' Federation or not."

The validity of this award was challenged both on the motion for injunction and on the application for prohibition, on a number of grounds. For the reasons which we are about to state in dealing with the application for prohibition, we think the Court of Arbitration had no power to make the award in question, and the award being, in our opinion, invalid, we think it would be improper for this Court to exercise the discretionary power conferred by sec. 48 of the Act in order to enforce obedience to its prescriptions.

Turning to the application for prohibition, the first question to be considered is whether at any material time a dispute existed as to the preferring of returned soldiers generally or of returned soldiers members of the Federation over other members of the Federation or over other persons generally. It is admitted that the only relevant dispute in existence between the parties was that constituted by the demand for preference of employment to members of the Federation over non-members and the refusal of that demand, and it was this dispute which was referred to the Court. It is, we think, obvious that a dispute as to whether returned soldiers should be given preference over persons who were not returned soldiers or whether some members of the Federation should be given preference over other members would not be the same as, or even included in, a dispute whether preference should be given to members of the Federation over non-members. The difference between the preference demanded and that awarded can be demonstrated by an illustration. Assume that A is a member of the Federation who is a returned soldier, B a member of the Federation who is not a returned soldier or sailor and C a returned soldier who is not a member of the Federation. Suppose two vacancies exist for which A, B and C apply. The dispute which existed and was referred was whether both A and B should have preference over C; the award is that A shall have preference over B, the only reference to C being that he is a person who is protected by Act of Parliament from being postponed to either A or B. This is an award, not of the preference sought or a part of it, but of an essentially different preference, which, in our opinion, was not within the ambit of the dispute which existed and was referred to the Court or substantially involved in or connected with it. It is, of course, well settled that the jurisdiction of the Court of Arbitration to make an award can only be exercised in respect of disputes which exist and of which it has cognizance. It follows that clauses 1 (a) and 1 (b) of the award are beyond the jurisdiction of the Court.

But there is another ground on which the award is, in our opinion, invalid, namely, that the Court of Arbitration has no power to award, as it has done in this case, preference of employment among members of an organization; that is, preference of some members

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Knox C.J. Gavan Duffy J.

over other members. The power to award preference is conferred by sec. 40 of the Act and, in our opinion, by that section alone. Even if power to award preference would exist under the general jurisdiction of the Court the power is, we think, limited by the provisions of sec. 40. The section clearly defines the classes between which preference may be awarded. The class that may be given the right to preference consists of "members of organizations," and the class over which preference may be given consists of "other persons . . . offering or desiring service or employment at the same time." The *discrimen* prescribed is membership of the organization; the contrast is between members of the organization and other persons, and in this context "other persons" must, in our opinion, mean persons not members of the organization.

But it was argued that, even if the award were made without jurisdiction or in excess of jurisdiction, prohibition would not issue to restrain proceedings on it. This argument was rested on two grounds, namely: (1) That when an award has been made nothing remained to be done by the Court of Arbitration, and that the decision of the House of Lords in *In re Clifford and O'Sullivan* (1) established that in such a case prohibition would not lie, and (2) that sec. 31 (1) of the Arbitration Act deprived this Court of power to issue prohibition after an award had been made.

1. The right to issue prohibition to the Arbitration Court after award was asserted by this Court in the *Broken Hill Case* (2), the *Builders' Labourers' Case* (3) and the *Tramways Case* [*No.* 1] (4). In *Hibble's Case* [*No.* 1] (5) prohibition was issued to restrain proceedings on an award of a special tribunal constituted under the *Industrial Peace Act*. The position of the special tribunal in that case was not different in substance from that of the Court of Arbitration. It was said that these decisions were in conflict with the decision of the House of Lords in *In re Clifford and O'Sullivan* (1), which was binding on this Court. The argument was founded on the following passage in the speech of Viscount *Cave* (6): "A further difficulty is caused to the appellants by the fact that the officers

(1) (1921) 2 A.C. 570.
(2) (1909) 8 C.L.R. 419.
(3) (1914) 18 C.L.R. 224.
(4) (1914) 18 C.L.R. 54.
(5) (1920) 28 C.L.R. 456.
(6) (1921) 2 A.C., at p. 584.

constituting the so-called military Court have long since completed their investigation and reported to the commanding officer, so that nothing remains to be done by them, and a writ of prohibition directed to them would be of no avail." We think that this statement cannot be regarded as inconsistent with the view which we expressed in *Hibble's Case* [*No.* 1] (1). In the case before the House of Lords the so-called tribunal against which prohibition was sought was not a Court or judicial tribunal and did not claim to have any statutory or common law authority to act. It had no element of permanency, consisting as it did of a number of military officers entrusted by the commanding officer with the duty of inquiring into certain alleged breaches of the commands contained in a proclamation, and of advising him as to the manner in which he should deal with the offences (see per Viscount *Cave* (2)). Having reported to the commanding officer, the officers comprising the "tribunal" were definitely dispersed (per Lord *Sumner* (3)), and the so-called "tribunal," if it ever existed, ceased to exist There is no analogy whatever between such a "tribunal" and a permanent institution such as the Commonwealth Court of Conciliation and Arbitration, or between the advice given by the so-called military Court to the commanding officer and an award of the Court of Arbitration conferring rights and imposing obligations which can be enforced by proceedings in recognized Courts of law. Nor was there, in that case, any power in the "tribunal" to reconsider its decision or its sentence, while the Court of Arbitration is expressly authorized by sec. 38 (*o*) to vary its awards and to reopen any question. Moreover, the real ground of the decision of the House of Lords was that the officers who were said to constitute the tribunal "did not purport to act as a Court in any legal sense" (per Viscount *Cave* (4)). That this was the real ground of the decision, appears clearly from the speech of Lord *Shaw* (5). The only express reference to the objection that the application was too late, except that made by Viscount *Cave*, is contained in the speech of Lord *Sumner*, who apparently attached some weight to the consideration that the

(1) (1920) 28 C.L.R. 456.
(2) (1921) 2 A.C., at p. 581.
(3) (1921) 2 A.C., at p. 591.
(4) (1921) 2 A.C., at p. 584.
(5) (1921) 2 A.C., at p. 585.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Knox C.J. Gavan Duffy J.

"tribunal" had no power to reconsider its decision or alter its sentence (1).

In these circumstances we think we are at liberty, notwithstanding the decision in *In re Clifford and O'Sullivan* (2), to adhere to the view we expressed in *Hibble's Case* [*No.* 1] (3).

2. On the argument based on sec. 31 (1), it is sufficient to say that, inasmuch as the award purports to deal with matters which were not in fact in dispute, the question is, in our opinion, concluded by the decision in the *Builders' Labourers' Case* (4) and the *Tramways Case* [*No.* 1] (5).

In our opinion the order nisi for prohibition against proceeding on the award should be made absolute.

ISAACS AND RICH JJ. *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Gilchrist, Watt and Sanderson Ltd.*—Two orders nisi, one for prohibition and the other for certiorari, in respect of two Federal awards or alleged awards.—Besides the problems presented by the rival arguments, another question arises. It is perhaps novel, but attended with great consequences, not merely to the thousands of individuals immediately concerned in the awards under consideration, but also possibly to hundreds of thousands who base their daily life on the supposed stability of other awards. If the recorded judicial determinations of four of the present members of this Court as hereinafter quoted—that of an absolute majority of the Court—are to govern the decision, then the respondents succeed and the award of preference to returned soldiers and sailors will stand, even if by inadvertence or even by misconstruing some of the difficult statutory provisions, the directions of the Legislature in the *Conciliation and Arbitration Act* have not been strictly followed. We are of opinion that the preference award should stand and the orders nisi should be discharged. Though the grounds upon which both orders nisi are supported are identical, it is desirable in the circumstances of this case to deal with each process separately.

(1) (1921) 2 A.C., at p. 591.
(2) (1921) 2 A.C. 570.
(3) (1920) 28 C.L.R. 456.
(4) (1914) 18 C.L.R. 224.
(5) (1914) 18 C.L.R. 54.

Before doing so, it is necessary to mention certain facts. One is that with one exception all the grounds relied on were raised by way of objection to an injunction motion recently made by the Waterside Workers' Federation against the present prosecutor under sec. 48 of the *Commonwealth Conciliation and Arbitration Act*, and now standing for judgment. During the course of the case one of the grounds now raised was definitely ruled upon. This will be detailed later. The one exception referred to is the contention that the Constitution has been incurably infringed because, so it is said, preference has been given by the President of the Arbitration Court to returned soldiers and sailors who are members of the organization over those members of the organization who are not returned soldiers or sailors, there having been no dispute between those classes of members as to preference really *inter familiam*.

Another circumstance which should be mentioned at once, is that the present applications to annihilate the awards or alleged awards are made on the relation of only *one out of forty employers* parties to them, none of the remaining thirty-nine being party to the present applications, though for all that appears those parties, or some of them at least, may be opposed to what, in the language of the learned President of the Arbitration Court, "would irritate an industrial sore" (1). These proceedings being to destroy the awards *in rem*, we are of opinion that they cannot succeed in the absence of parties directly interested. That is elementary justice, and, in our view, unless the necessary parties are added, the defect should end the matter at the threshold. If it does not, then an utter stranger could proceed in the same way, without notice to any of the parties interested. The Court should, even were this the sole reason, refuse to grant the application.

It is, however, necessary for us to proceed further. That there was a very serious "industrial sore" is beyond question. That it would be irritated anew, thereby imperilling the continuance of necessary services to the community if these applications were acceded to, is, on the very surface, extremely likely. The main award, dated 23rd October 1922, was by the Arbitration Court declared to operate only until 30th September 1923. It is,

(1) (1922) 16 C.A.R., at p. 1011.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

however, still current (*Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1)), not, however, by force of arbitration, but solely *by force of direct legislation.* This is an important circumstance in determining how far the arbitral function is ever of a judicial or a quasi-legislative nature. For it cannot be imagined that the Commonwealth Parliament assumed, or that this Court held that Parliament had assumed, jurisdiction by force of its direct will to extend the force of a " judicial order " beyond the period fixed by the tribunal. Nor can one imagine a Court entertaining an application for prohibition or certiorari directed to the arbitration tribunal in respect of an award which has passed the utmost period fixed by that tribunal and which henceforth *exists and operates,* as the main award does at this moment, *by the mere will and direction of the Commonwealth Parliament.* Such remedies are unheard of to control Parliament.

But, if that be true, it indicates that Parliament regards an award simply as a " *factum* " which, unlike a judicial decree, of itself imposes no obligation and affects no rights. Obligations are imposed and rights are affected by the Act operating on the *factum* of the award. And this is a decisive consideration. It shows that an " industrial award " is, in its essential nature, not a judicial decision, but a step in legislation. Reference will be made to this later. The main award, however, though settling wages, hours and conditions of labour, including the maximum loads to be lifted by wharf labourers, settled those matters as between the organization and the forty respondents and between them only. But by reason of the system adopted by the shipowners it had become, at least to a large extent, a dead letter. This was so because, by means of what was called " Bureau " registration, more particularly dealt with in the injunction application, a system of discrimination was pursued to the disadvantage of members of the Federation. To prevent this, and manifestly to safeguard the very existence of the Federation, the learned President, by award No. 77 of 1923, prescribed : (1) Preference to returned soldiers and sailors members of the union—other things being equal—except as against other returned soldiers and sailors (sec. 81A of the Act), and (2)

(1) (1920) 28 C.L.R. 209.

non-discrimination against members of the union who were not returned soldiers and sailors, except in favour of returned soldiers and sailors.

These facts are referred to for two reasons—the first because we cannot assume that *all* the employers parties to the main award desire to revive the old "industrial sore," and the second because they are material as affecting the discretion of this Court upon the present occasion.

(1) *Prohibition.*—Two facts are incontestable, and are desirably mentioned at once:—(a) The awards or alleged awards now challenged are complete, and nothing is needed or possible to perfect them according to their present directions. They are as formal as they can ever be. Unless and until some substantive application is made to vary or in some way alter them, there is no authority in the Court of Conciliation and Arbitration to do anything with regard to them (sec. 39 of the Act). (b) The learned President, as a formal party to these proceedings, has, in courtesy to this Court, by counsel, informed the Court that there has been no application to vary or interpret either award, and that he is not doing and has no present intention of doing anything in relation to them. Very properly learned counsel for the relators relied upon *Hibble's Case* [*No.* 1] (1). In that case, the Court being equally divided, it was held by force of statutory majority that prohibition lies to a tribunal even though that tribunal is *functus officio*.

Learned counsel for the respondent Federation advanced two reasons, independent of the substantive law of the awards, why prohibition should be refused. They were: (1) the arbitral tribunal is *functus officio*, and (2) the functions of that tribunal are not of a judicial nature having regard to the Australian Constitution.

As to the first reason, having regard to the constitution of the Court that decided *Hibble's Case* [*No.* 1] (1) and of the Court that is called upon to decide this, no reconsideration of that fundamental proposition would be profitable or proper, if it were not for a very material circumstance that has happened since. *Hibble's Case* [*No.* 1] was determined in December 1920. But in the following July four

(1) (1920) 28 C.L.R. 456.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

learned Lords out of five (the fifth expressing no opinion on the particular point) gave, in *In re Clifford and O'Sullivan* (1), a pronouncement upon that identical proposition which appears to us so unmistakably clear and decisive that, but for a suggestion which was made to the contrary, we should have done no more, so far as this point is concerned, than simply refer to the case. That suggestion, however, being made, it is right, where so much is involved, to make very clear why we hold the opinion stated. *In re Clifford and O'Sullivan* was an appeal from the Court of Appeal. There was a preliminary objection that the appeal, being in a criminal cause or matter, was incompetent (2). Viscount *Cave* L.C., at page 579, said : " It is desirable to deal first with the preliminary objection " ; and down to the middle of page 582 his Lordship considered that preliminary objection and ruled against it. Then the Lord Chancellor had to deal with the appeal free from any preliminary objection. " The question arises," he said, " whether, on the assumption that the appellants are right in their view of the facts and of the law applicable to them," that is in assuming the sentence was utterly invalid and even though it concerned life, " a writ of prohibition could have been granted." The learned Lord proceeded at once to state that " the writ should only issue to " (1) " a Court having some jurisdiction," (2) " which it is attempting to exceed." For convenience of consideration we have inserted the figures, because both branches were dealt with separately. In the first place Lord *Cave* dealt with (1) " a Court having some jurisdiction," and held that the broad doctrine of " a pretended Court " was not law. He also referred to the opinion of *Brett* L.J. in *R.* v. *Local Government Board* (3), and assumed it, without accepting it. On this first branch the Lord Chancellor held that prohibition would not lie. But then he went further and deliberately dealt with the second branch, that is, with the very point decided in *Hibble's Case* [*No.* 1] (4). He said (5) :—" A further difficulty is caused to the appellants by the fact that the officers constituting the so-called military Court have long since completed their investigation and

(1) (1921) 2 A.C. 570.
(2) (1921) 2 A.C., at p. 579.
(3) (1882) 10 Q.B.D. 309, at p. 321.
(4) (1920) 28 C.L.R. 456.
(5) (1921) 2 A.C., at p. 584.

reported to the commanding officer, so that *nothing remains to be done by them, and a writ of prohibition directed to them would be of no avail* (see *In re Poe* (1) and *Chabot* v. *Lord Morpeth* (2)). What the appellants really desire is an order restraining " such officers " from confirming and carrying out the sentences ; and it is clear that as against these officers, who are *in no sense the officers or agents of the military Court, prohibition could not be granted.*" Some of the very authorities relied upon in *Hibble's Case* [*No.* 1] (3) in the minority opinion, notably *Short and Mellor's Crown Practice*, 2nd ed., pp. 252-253, *In re Poe* and *Chabot* v. *Lord Morpeth*, were cited by the Lord Chancellor, whose view as to the law coincided on this point precisely with that opinion. The Lord Chancellor's opinion was shared by Lord *Dunedin*, Lord *Atkinson* and Lord *Sumner*. One sentence from the judgment of Lord *Sumner* should be quoted, because it appears to us to be in definite accord with the minority opinion in *Hibble's Case* [*No.* 1]. He said (4): " True, judgment, though given, is not yet executed, but the execution is not in the hands of these officers or of anyone acting under their directions or authority." The contrary suggestion to which we alluded is that Lord *Cave*, and the other learned Lords, intended to limit their observations as to " *functus officio* " to a body having no legal jurisdiction whatever and therefore coming within his observations on the first branch of the definition. The suggestion was founded on some words of *Atkin* L.J. in *R.* v. *Electricity Commissioners* (5). These words are : " I am satisfied that the observations of the Lord Chancellor in that case were directed to the first point." One might *in limine* ask, seeing that Lord *Cave's* words could not possibly have been directed to the preliminary point, what, in Lord Justice *Atkin's* view, is it suggested was Lord *Cave's* first point and what was his second point ? When the judgment of the learned Lord Justice is examined, and his quoted words are read with what precedes and with what follows them, neither from a legal nor from a literary aspect can the suggestion be maintained. His Lordship was dealing with an argument

(1) (1833) 5 B. & Ad. 681.
(2) (1850) 15 Q.B. 446.
(3) (1920) 28 C.L.R. 456.
(4) (1921) 2 A.C., at p. 591.
(5) (1924) 1 K.B., at p. 206.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

which sought to exclude the Electricity Commissioners from liability to prohibition on the ground that they were not a "Court," and on the ground that Lord *Cave's* judgment in *In re Clifford and O'Sullivan* (1) "defines the scope of the writ of prohibition in terms much more restricted than those of *Brett* L.J. in *R.* v. *Local Government Board*" (2). It is obviously to Lord *Cave's* observations on the judgment of *Brett* L.J. in relation to the first branch of the definition that the qucted words of *Atkin* L.J. are directed. The immediately succeeding words on page 206 are inconsistent with any other view. Other passages in the judgment of *Atkin* L.J. are also inconsistent with the suggestion. For instance, at page 204 he says: "Prohibition restrains the tribunal *from proceeding further* in excess of jurisdiction." At page 206 the Lord Justice refers to the dissenting judgment of *Phillimore* L.J. (now Lord *Phillimore*), which deserves separate mention. *Atkin* L.J. says *further,* in accord with that dissenting judgment: "If the proceedings establish that the body complained of *is exceeding* its jurisdiction by entertaining matters" &c. On the same page he says, with reference to *In re Clifford and O'Sullivan*, that the House of Lords held prohibition would not lie (1) "because the so-called Courts were not claiming any legal authority other than the right to put down force by force, and" (2) "because the so-called Courts were *functæ officio.*" It may not be out of place to note that the very foundation of prohibition is that it prevents judicial power being usurped by force. *Willes* J., in *Cox's Case* (3), says: "Any exercise, however fitting it may appear, of jurisdiction not so authorized, is an usurpation of the prerogative, and a *resort to force* unwarranted by law." That remedy, however, by prohibition for such force is only where its jurisdiction is exceeded by some tribunal being a "Court," not necessarily in the strict sense but yet armed with some royal curial authority. We cannot do the learned Lord Justice the wrong of supposing he thought that for the first reason the so-called Courts were free from prohibition whether they were *functæ officio* or not, and for the second reason, but *peculiar to themselves*, were free provided they were *functæ officio*. Clearly "*functus officio*" applies

(1) (1921) 2 A.C. 570.
(2) (1882) 10 Q.B.D. 309; see (1924) 1 K.B., foot of p. 185 and top of p. 186.
(3) (1867) L.R. 2 H.L., at p. 254.

only where the tribunal has, or for the sake of argument is supposed to have, an "*officium*" but has discharged it. The second reason is independent of the first. We have yet to quote Lord *Phillimore's* opinion in the Court of Appeal in *R.* v. *Board of Trade* (1). There he said, in words which have an important bearing on two parts of this judgment: "But I should express my doubt whether, supposing the Light Railway Commissioners to be a tribunal to which a writ of prohibition could appropriately issue, they were shown to be *at the time when the rules were applied for doing or about to do anything* in excess of their so-called jurisdiction."

These new events, particularly the judgment of the House of Lords, added to, if that be legally possible, by the opinion of *Phillimore* L.J. and *Atkin* L.J., do not merely, in our opinion, leave us free to act upon the view we expressed in *Hibble's Case* [*No.* 1] (2) on the subject of prohibition in relation to a tribunal *functus officio* as to the particular decision complained of. They really, though not technically, control us. The law declared in *In re Clifford and O'Sullivan* (3) has in Great Britain the effect of a statute. The same learned Lords sitting as the Judicial Committee would, of course, enunciate the same law as they did sitting in the House of Lords. We, therefore, feel bound to adhere to our former judgment on this point.

It was also suggested, though not vigorously, that the learned President was not *functus officio quâ* the awards or alleged awards in question because the Act enables the tribunal in certain cases to vary or reopen or interrupt an award. But the law is clear that he must first be set in motion as "the Court" by some method indicated in the Act, and even then it may be for the purpose of doing something entirely within his admitted jurisdiction, or possibly for the purpose of striking out an objectionable term. This is very plainly indicated in the judgment of *Powers* J. in *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (4), where the learned Justice points out that "the old dispute is settled by the award," but that a variation may be made within the ambit of the old dispute provided "a new dispute" arises. Obviously and

(1) (1915) 3 K.B. 536, at p. 548.
(2) (1920) 28 C.L.R. 456.
(3) (1921) 2 A.C. 570.
(4) (1919) 27 C.L.R. 72, at p. 97.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

necessarily that judgment connotes that until "a new dispute" arises, within the ambit of the old dispute—in effect a recrudescence of some part of the old dispute—the tribunal is *functus officio*. In any event the undeniable fact is that, employing the words of Lord *Phillimore*, he is not "shown to be at the time when the rules were applied for doing or about to do anything" in relation to those awards. By his counsel, as already stated, he expressly informed the Court to the contrary. The law, sec. 39, says he is incapable of taking any further step in relation to them except in circumstances that have not arisen. For reasons which have been expressed at length in *Hibble's Case* [*No.* 1] (1), we have stated, and our brother *Higgins* has stated, why the Arbitration Court in such a case is *functus officio*. Without repeating them, we adhere to those reasons.

We must, however, direct special attention to one circumstance which is too often overlooked. Observations of Justices of this Court, culled from former judgments, are sometimes quoted without reference to the changes which statutes or later decisions have brought about. For instance, before *Alexander's Case* (2) it was frequently said that prohibition to the Court of Conciliation and Arbitration was appropriate even after an award where the Court was involved. But that was because the Court was supposed to be in the position of any other tribunal having the power and duty to see its orders enforced. For instance, in the *Tramways Case* [*No.* 1] (3) it was clearly stated by *Isaacs* J. that, though the Arbitration Court was not a "Court" within the meaning of the judicature provisions of the Constitution, it was (as was then thought) a Court well constituted for the enforcement of the award. At page 72 it is said: "*The tribunal which in this case is sought to be prohibited is therefore a Court in the strict sense; and the question is, does prohibition ever lie to it, even when it is proceeding to exceed its jurisdiction.*" That is the kernel of the position at the time, and the statement rested on the assumption that the one tribunal was both arbitral and judicial in the strict sense. But *Alexander's Case* dissipated that view. That was in September 1918. In December

(1) (1920) 28 C.L.R. 456. (2) (1918) 25 C.L.R. 434.
(3) (1914) 18 C.L.R., at pp. 71-72.

of that year (Act No. 39) Parliament, in consonance with that decision, eliminated all attempts at judicial power whatever from the structure of the arbitral tribunal, and placed it in the hands of Courts strictly so called. Consequently, judicial observations prior to that date on the subject of prohibition respecting awards have to be read by the light of that fact. As to the second reason advanced for refusing prohibition, judicial dicta to the effect that the nature of the functions of the arbitration tribunal are judicial or quasi-judicial, in the sense of constitutional judicial power or of attracting prohibition, are similarly to be regarded with reference to *Alexander's Case* (1). It there became necessary, not merely to separate the judicial from the arbitral functions, but also to definitely ascertain the nature of the latter. In *Hibble's Case* [*No.* 1] (2) we summarized the position in the following passage :—" 6. The ' award ' is not an exercise of the judicial power of the Commonwealth : *it is not like an order of a Court, as to which, as the House of Lords has said, the Court is not functus officio until the order is fully obeyed. It is a part, and a necessary part, of the method of legislation* by sec. 51 (xxxv.), and when the arbitrator's opinion (for that is all the award amounts to) as to the dispute is announced, *the statute takes it up* (*sec.* 17) *and stamps it with legislative force as a legal obligation, the duty of enforcement being in the hands not of the Coke Tribunal but of the ordinary Courts.* We have fully expounded our views as to this in *Alexander's Case* (3) ; and our brother *Powers's* view (4) is, as we read it, in accordance with our own. It is also held by our brother *Higgins* in *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (5), basing it, as we have based it in *Alexander's Case*, on the principle laid down by the Privy Council in *Powell* v. *Apollo Candle Co.* (6). *It stands, therefore, on the authority of four, that is, an absolute majority, of the present members of this Court, that an award is of a ' legislative ' nature because it is a ' factum ' on which the law operates.*"

Since *Alexander's Case* (1), but a few months before *Hibble's Case* [*No.* 1] (7), a further step was taken. In *Waterside Workers' Federation*

(1) (1918) 25 C.L.R. 434.
(2) (1920) 28 C.L.R., at pp. 475-476.
(3) (1918) 25 C.L.R., at pp. 462-464.
(4) (1918) 25 C.L.R., at p. 485.
(5) (1910) 10 C.L.R., at p. 332.
(6) (1885) 10 App. Cas. 282, at p. 291.
(7) (1920) 28 C.L.R. 456.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

of Australia v. *Commonwealth Steamship Owners' Association* (1), a decision was given that *Parliament can validly enact that awards shall continue as long as it thinks fit.* The necessary effect of that decision is that the conditions of employment approved by the arbitration tribunal constitute a *factum* as to which Parliament may say it shall be the law between the parties for whatever period it chooses irrespective of any limit of time chosen by the arbitrator. This goes even further than the view taken by our brother *Powers* and ourselves, and even further than as stated in the *Boot Trade Case* (2). But the decision in the *Waterside Workers' Case* introduces a new element, namely, that admitted by *Bankes* L.J. in *R.* v. *Electricity Commissioners* (3), with reference to the Irish case of *In re Local Government Board*; *Ex parte Commissioners of Kingstown* (4), there mentioned. The learned Lord Justice says that if the function were "quasi-legislative—that is, a proceeding towards legislation"—the decision goes far to support the argument of the Attorney-General, that is, that prohibition would not lie. This view is again made plain by *Dodd* J. in the Irish Free State case of *R.* v. *Maguire* (5). It becomes of extreme importance from the decision of the House of Lords in *In re Clifford and O'Sullivan* (6). The House repelled the old idea that even "a pretended Court" was amenable to prohibition, and adhered in prohibition to the central idea in the words quoted with approval from *Short and Mellor*, 2nd ed., p. 252, "*to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction*," without limiting the word "Courts" to the old strict form of Courts. The tribunal there under consideration, without any pretence of royal authority to dispense justice, illegally assumed judicial functions. It was not and did not claim to be a Court or judicial tribunal in any legal sense (7). In that it differed from the true Court Martial in *In re Poe* (8). Prohibition was, therefore, inappropriate. But it seems to us to follow necessarily that, if the definition adopted by the House was decisive as to the word "Courts," it must be equally

(1) (1920) 28 C.L.R. 209.
(2) (1910) 10 C.L.R. 266.
(3) (1924) 1 K.B., at p. 197.
(4) (1885) 16 L.R. Ir. 150; (1885) 18 L.R. Ir. 509.
(5) (1923) 2 I.R., at p. 64.
(6) (1921) 2 A.C. 570.
(7) (1921) 2 A.C., at p. 581.
(8) (1833) 5 B. & Ad. 681.

decisive as to the nature of the jurisdiction to be superintended by "prohibition." That jurisdiction must, *ex vi termini*, be "judicial" in the true sense, namely, dispensing royal justice in relation to existing rights and liabilities. Whatever the nature of the tribunal may be that is selected by law (or possibly by what is by some misapprehension on the part of the Executive assumed to be law, so that it has some prima facie royal authority), the *function* prohibited must be "judicial" in the true and legal sense, and adhering to the central idea of curial functions—though not restricting that term to the old strict form of Courts, to which ordinarily the idea of "judicial acts" attaches—the House of Lords has, we think, laid down the law of the ancient remedy in a way that compels every other Court to reconsider the position. It is true, as *Atkin* L.J. says—and as, indeed, all the Lords Justices thought in the *Electricity Commissioners' Case* (1) — that there was no overruling of all the cases which had been considered "judicial" for the purpose of prohibition or certiorari. But the Lord Chancellor threw no doubt on the necessary nature of the appropriate function; and that has to be ascertained in every case from the source of the tribunal's authority. Having examined carefully most of the cases referred to (we think we may say all the important ones within reach), it appears to us that no general principle can be extracted from them, except that they purport to follow, by reason of the legal function of the organ concerned, the central definition mentioned in the House of Lords case. For instance, if we look at page 193, *R.* v. *Glamorganshire Inhabitants* (2) is mentioned. That case had reference to an order by justices to levy money under the authority of an Act of Elizabeth, the statute itself placing definite proportionate liabilities on the County of Glamorgan and the Town of Cardiff for repairing a bridge. The objection was that the jurisdiction was new, being newly created by Act of Parliament. The Court held that was no objection, and said: "For this Court will examine the proceedings of all *jurisdictions* erected by Act of Parliament." Then, as to *Re Ystradgunlais Commutation* (3) and *Re Appledore Commutation* (4), they were

(1) (1924) 1 K.B. 171.
(2) (1700) 1 Ld. Raym. 580.
(3) (1844) 8 Q.B. 32.
(4) (1845) 8 Q.B. 139.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

decided under Acts which variously described the decision of the Commissioners as an "order or adjudication," and to be made "if any suit shall be pending" &c., and as a "judgment or determination," as a "decision," and declared it "final and conclusive." In *Chabot* v. *Lord Morpeth* (1) the subject of consideration was a trial before a jury, with a verdict, and an order thereupon. In *R.* v. *Clerkenwell Commissioners of Taxes* (2) the application had reference to an appeal to the respondents under the Act of 1880. Secs. 57 to 59 inclusive leave no doubt of the truly judicial nature of their functions. In *Caledonian Railway Co.* v. *Banks* (3) Lord *Gifford* spoke of "the determination—that is, the decision in law—which the Commissioners have pronounced upon the facts proved or admitted before them." In *In re Hall* (4) there was made what *A. L. Smith* J. called (5) "one of the most novel applications" he had ever heard. Prohibition was refused on a ground rendering it unnecessary to decide the present point, and counsel for respondent were not called upon to argue. In *R.* v. *Board of Trade*; *R.* v. *Light Railway Commissioners* (6) the Act was of a different character, and the question turns upon its true construction. If we may, we respectfully share the evident doubt entertained by Lord (then Lord Justice) *Phillimore* (7) as to the Commissioners being a tribunal to which a writ of prohibition could appropriately issue. In *Board of Education* v. *Rice* (8) Lord *Loreburn* L.C., when saying "in such cases the Board of Education will have to ascertain the law and also to ascertain the facts," was obviously, when the rest of that page is read in collocation, indicating that Parliament, in accordance with modern practice, had entrusted to a special and administrative tribunal some functions exactly similar to those of a Court of Justice, though the decision was to be in the form of an award, and that these functions were from their nature subject to certiorari. In *R.* v. *London County Council* (9) considerable doubts were expressed by all three members of the Appeal Court as to whether prohibition lay at all, even supposing invalidity in the

(1) (1850) 15 Q.B. 446.
(2) (1901) 2 K.B. 879.
(3) (1880) 1 Tax Cas. 487, at p. 498.
(4) (1888) 21 Q.B.D. 137.
(5) (1888) 21 Q.B.D., at p. 142.
(6) (1915) 3 K.B. 536.
(7) (1915) 3 K.B., at p. 548.
(8) (1911) A.C. 179, at p. 182.
(9) (1893) 2 Q.B. 454.

order. The question comes down to the true connotation of "judicial" functions within the meaning of the definition of prohibition and certiorari. In *R.* v. *Woodhouse* (1) *Moulton* L.J. said "judicial" in that sense meant as distinguished from "purely ministerial." But in 1914 Lord *Moulton*, in *Local Government Board* v. *Arlidge* (2), had to deal with a case where the Local Government Board, after considering evidence taken on a public inquiry before an inspector designated for the purpose and also his report, confirmed an order of a borough council closing a dwelling-house. In one sense it was certainly a judicial function, as opposed to purely ministerial duty. But Lord *Moulton* was fully conscious that statutory acts of legislatively created bodies were not exhaustively to be described as either "judicial" or "ministerial." He said (3): "I do not wish by this judgment to give any countenance to the view that certiorari is a proceeding applicable to administrative orders made by such a department of State as the Local Government Board under statutory powers such as we have here to deal with, but the point was not argued, and I therefore assume in favour of the respondent that the procedure he adopted was correct." See also, per Lord *Haldane* L.C. at page 132, where "judicial" functions are contrasted with "executive" functions; and per Lord *Parmoor* at page 140, where judicial functions are stated to extend to powers "to impose a liability or to give a decision which determines the rights or property of the affected parties." It is well worth while, when considering the true import of the observations of *Brett* L.J. in the *Local Government Case* (4), to read what Lord *Sumner* (when *Hamilton* L.J.) said in *R.* v. *Local Government Board*; *Ex parte Arlidge* (5), namely:—"The Local Government Board here is a statutory tribunal, anomalous as compared with common law Courts, created by the Legislature for a special class of appeals and endowed by it with the power of formulating its own procedure. We must assume that a department which the Legislature has trusted will be worthy of the trust. The judgment of such a tribunal, regular on its face, is surely entitled to as much credit as that of a foreign Court." The words of Lord

(1) (1906) 2 K.B., at p. 535.
(2) (1915) A.C. 120.
(3) (1915) A.C., at p. 149.
(4) (1882) 10 Q.B.D., at p. 321.
(5) (1914) 1 K.B. 160, at pp. 201-202.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

Haldane, Lord *Parmoor* and Lord *Sumner* look to powers creating *instant liability in specified persons or instantly determining their rights, duties or property on the basis of some previously existing legal standard.* But their words seem very far from a regulation as to industrial conditions, which create no enforceable instant obligations or rights whatever between specific persons, which may never eventuate in any obligations or rights, for the employers may never employ any member of the organization, but which merely lay down *a rule or standard of conduct* for the future which will, if certain contractual relations be created between persons of designated classes, eventuate by force of law in the prescribed rights and obligations, some mutual and some not. To put the matter concretely :—Suppose an award between an organization of employers and an organization of employees in a given industry. How could it be predicated that the award itself imposed liabilities or duties upon individuals? The first organization does not employ the second. Not all the members of the first employ all the members of the second. The individuals who are members of the first may cease the next day to employ any of the members of the second; or, if so employing them, they may cease to be members of the first. The members of the first organization may even employ the same individual employees, who, however, cease to be members of the second organization. Indeed, members of the first organization may cease to be such members. In none of these cases does the award apply. The award becomes a mere code, framed by an "arbitrator," and when framed is brought into legal force by the Act (*Powell* v. *Apollo Candle Co.* (1)). It needs for its application, and it is generally a very varied application, the ascertainment of new circumstances, and this ascertainment and the enforcement of the provisions of the new industrial code is itself properly the subject of subsequent judicial procedure. Though "arbitration," it is not of the same species as ordinary arbitration as to existing rights. It is more of the nature of wages board determinations, the distinction between the two being that one is arrived at without an actual dispute, the other after actual dispute has arisen. But the essential feature of each is a legislative (though indirect) regulation of industrial

(1) (1885) 10 App. Cas., at p. 291.

conditions. Whether, therefore, the actual decision in the *Electricity Commissioners' Case* (1) conforms or not to the line of thought indicated by previous governing authorities is dependent entirely upon the construction of the relevant statute. The principle of the case is that no new doctrine is suggested, and the former cases are recognized as binding. A very late case in the House of Lords, decided shortly before *In re Clifford and O'Sullivan* (2), confirms this view. *Everett* v. *Griffiths* (3) was a case where a justice of the peace made an order for the reception of the appellant as a lunatic into an asylum, under the *Lunacy Act* 1890, sec. 16. The question of the effect of entrusting some "quasi-judicial" powers to bodies other than Courts and Judges is one that is still in process of development (see per Viscount *Haldane* (4)). It has, for many purposes, to be solved by reference to the terms of the Act which creates the powers and confers them. The applicability of prohibition was not within the sphere of consideration in *Everett* v. *Griffiths* (3), but some very valuable opinions were expressed extremely pertinent to this case. For instance, Lord *Atkinson* says (5) that a proceeding may be a "judicial proceeding" although the person conducting the proceeding is not a superior Court Judge nor an inferior Court Judge nor a justice of the peace, and although the ordinary formalities of a Court are wanting. His Lordship adds: "Whether a proceeding is a judicial proceeding or merely an administrative proceeding depends much more on what is authorized to be done by the named authority: *what is done, and the effect of the act upon the rights and interests of others.*" He approves of the definition of judicial act by *May* C.J. in *R.* v. *Dublin Corporation* (6), of which the potent words are "*imposing liability or affecting the rights of others.*" As to the proper interpretation of those words, something will be said presently. But, to complete the reference to Lord *Atkinson's* judgment, the cases he quotes are, when examined, each and all of the class described in the analysis of the cases cited in the *Electricity Commissioners' Case*, and they respond to the formula stated above.

(1) (1924) 1 K.B. 171.
(2) (1921) 2 A.C. 570.
(3) (1921) 1 A.C. 631.
(4) (1921) 1 A.C., at p. 659.
(5) (1921) 1 A.C., at p. 682.
(6) (1878) 2 L.R. Ir. 371, at p. 377.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

The definition of *May* C.J. was approved and explained in *R.* v. *Local Government Board* (1). *Palles* C.B. (2) emphasizes the words "imposing" and "affecting." He says further (3): "I mean that the liability is imposed, or the right affected by the determination only, and not by the fact determined." *FitzGibbon* L.J. (4) seems to state properly and accurately the position when he says: "I can find no one word that will adequately describe all the acts which are not judicial, in the sense required, except the contradictory 'non-judicial.'" He adds usefully: "Of other words, 'ministerial' is as good as any, its use is sanctioned, and its meaning has been elucidated by authority. *As so elucidated*, 'judicial' and 'ministerial' conveniently describe the acts which are, and the acts which are not, subject to control by certiorari." The foregoing conclusions are further supported by the following recent cases: *Keller* v. *Potomac Electric Power Co.* (5) and *R.* (*O'Connell*) v. *Military Governor of Hare Park Camp* (6).

With reference to the second *Hibble's Case* (7), it is true prohibition was granted to restrain a special tribunal under the *Industrial Peace Act* 1920. But the following considerations should be mentioned: (1) Neither in the argument nor in the judgments is the point as to the *non-judicial* character of the tribunal discussed or mentioned; (2) if it had been, the House of Lords had not then decided *In re Clifford and O'Sullivan* (8), limiting with supreme authority (9), the office of prohibition in accordance with the well-known definition to "*Courts entrusted with judicial duties*" to keep within the limits of their jurisdiction. It is also worthy of observation that that decision excised the long practice of Courts, both in England and in Australia, to be guided by *Chambers* v. *Jennings* (10) based on "pretended Court," a practice which was of long duration, and is probably the root of some of the doctrine prevailing before *In re Clifford and O'Sullivan*. It had influence, for instance, in *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (11).

(1) (1902) 2 I.R. 349.
(2) (1902) 2 I.R., at p. 373.
(3) (1902) 2 I.R., at pp. 373-374.
(4) (1902) 2 I.R., at p. 384.
(5) (1923) 261 U.S. 428.
(6) (1924) 2 I.R. 104, at p. 109.
(7) (1921) 29 C.L.R. 290.
(8) (1921) 2 A.C. 570.
(9) (1921) 2 A.C., at p. 582.
(10) (1703) 2 Salk. 553.
(11) (1910) 11 C.L.R., at p. 22.

We therefore think the House of Lords case cited is of commanding force, and should guide our decision whatever the previous practice of this Court has been.

We may summarize the position as to prohibition thus :—(a) The function of a tribunal amenable to prohibition or certiorari must be judicial in the same sense that the function of a strict Court is judicial, whatever the constitution or the appropriate procedure of the tribunal may be (*In re Clifford and O'Sullivan* (1); *Board of Education* v. *Rice* (2); *Arlidge's Case* (3), and *Everett* v. *Griffiths* (4)). (b) That sense is that the determination of the tribunal must itself, and of its own direct force, instantly impose an obligation or affect the rights of the parties concerned (ibid.). (c) A function that is substantially executive or legislative in its nature is not judicial in the necessary sense (*Rice's Case*; *Arlidge's Case*; *Woodhouse's Case* (5); *In re Local Government Board*; *Ex parte Commissioners of Kingstown* (6)). (d) Federal arbitration is, in its nature, legislative and not judicial in the necessary sense. (*So held by four of the present Justices of this Court, and in necessary effect by the decision in the Waterside Workers' Case* (7); see also *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (8)). (e) A plenary legislature may, as in England in the cases cited, entrust "judicial" functions in the requisite sense to any person or department, executive or otherwise. But the Commonwealth Constitution requires such functions to be vested in *Courts* strictly so called (sec. 71 and *Alexander's Case* (9)). (f) It follows that it is legally impossible that the arbitral functions of the so-called Court of Conciliation and Arbitration are of a character amenable to either prohibition or certiorari. (g) But whether that so-called Court is ever amenable to prohibition or not, that remedy is inappropriate once an award is made, for then the tribunal is *functus officio*. (This, as well as proposition (d), is held by four of the Justices at present constituting the Court—*Higgins* J. in

(1) (1921) 2 A.C. 570.
(2) (1911) A.C. 179.
(3) (1915) A.C. 120.
(4) (1921) 1 A.C. 631.
(5) (1906) 2 K.B. 501.
(6) (1885) 16 L.R. Ir. 150; (1885) 18 L.R. Ir. 509.
(7) (1920) 28 C.L.R. 209.
(8) (1910) 10 C.L.R., at pp. 313-332.
(9) (1918) 25 C.L.R. 434.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

Hibble's Case [*No.* 1] (1), *Powers* J. in the *Metropolitan Gas Co.'s Case* (2), and ourselves).

We would suggest that the chance circumstance of the absence of one of those four Justices from Australia, and the unwritten practice (not prescribed by any law) whereby the Justice who happens to be the President of the Arbitration Court, whether he has or has not had anything to do with the award challenged, refrains from sitting to determine constitutional and other legal questions, ought not to detract from the force of their opinions already judicially expressed. It may be worth the consideration of the Legislature to say definitely whether—on questions of law that, as President, the head of the arbitration tribunal has no jurisdiction to determine and does not determine in any binding sense, but merely construes, as he is bound to do, for the purpose of his arbitral duty—the Commonwealth and the States are to be deprived of his opinion as a Justice of the High Court when it becomes necessary to consider such questions judicially. The Constitution may be interpreted quite differently, and legislation may be construed quite differently, according to the presence or absence of a Judge, not merely by his own ultimate judgment but also by the aid he affords towards the general opinion of the Court. Before passing from prohibition it should be observed that sec. 31 of the Act was greatly discussed but principally in connection with non-constitutional excess of jurisdiction. This section, which is of very special importance, is more appropriately considered later.

(2) *Certiorari.*—The mere circumstance that a Court is *functus officio* is no bar to certiorari where all other conditions for its applicability exist. What we have already said is, however, if correct, decisive of the inappropriateness of the remedy here. But, assuming that to be incorrect, should the order be made absolute? As to one of the instruments attacked—the "interpretation" award—the order should not, in our opinion, be made absolute for the following reason: Before the order nisi was applied for, the Full Court had already upon the injunction motion definitely ruled its invalidity. Reasons remained to be given, but for all legal purposes in Australia the so-called interpretation award was null

(1) (1920) 28 C.L.R. 456. (2) (1919) 27 C.L.R., at p. 97.

and void. As to the preference and discrimination award, we assume, contrary to our actual views expressed in the injunction motion, that the award offends against sec. 40 of the Act. We will also, for the moment, assume that it offends against the Constitution by awarding a preference *inter familiam*, when there was no dispute *inter familiam*. What then? Must the Court award certiorari to quash the award *in toto*? Or is it a matter within the sound discretion of the Court? In the case of *R.* v. *Glamorganshire Inhabitants* (1) the Court, as early as the year 1700, was careful to see that no avoidable public damage was done by certiorari. It said:—"As to the cases of orders made by the Commissioners of Sewers, and of the Fens, the Court is cautious in granting certiorari; and first they make inquiry into the nature of the fact, and what will be the consequence of granting the writ; because the country may be drowned in the meantime, while the Commissioners are suspended by the certiorari. But that is only a discretionary execution of the power of the Court." Lord *Sumner* (when *Hamilton* L.J.) said in *R.* v. *Local Government Board; Ex parte Arlidge* (2): "The grant or refusal of a rule absolute for a certiorari is always a matter of judicial discretion." This is in accord with *Bramwell* L.J. in *R.* v. *Sheward* (3). This is certainly so where the prosecutor is not a "party grieved," that is, who "substantially brings error to redress his private wrong" (*R.* v. *Surrey Justices* (4)). The case last mentioned, *R.* v. *Surrey Justices*, was decided in 1870; and the line of demarcation there drawn between "a party grieved" and other persons was somewhat new. No doubt the fact that the applicant in a given case is "grieved" is a material element in determining the mind of the Court, but that it is anything more than an element of degree, and not of kind, is quite another question. There is also no doubt that in several cases since 1870, and quite recently also in 1914, 1919, 1920 and 1921, the Court of King's Bench Division has more or less acted on the rule of *R.* v. *Surrey Justices*. Still, even there it has been recognized (see *R.* v. *Richmond* (5)) that the

(1) (1700) 1 Ld. Raym. 580.
(2) (1914) 1 K.B. 160, at p. 204.
(3) (1880) 9 Q.B.D. 741.
(4) (1870) L.R. 5 Q.B. 466, at p. 473.
(5) (1921) 1 K.B. 248, at p. 256.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

interest may be so slight as not to be acted on. That is not very far, if at all, removed from discretion; and it may be, after all, that the decision referred to establishes merely the practice of the Court. For a man's absolute right, however small, is a matter that a Court of law must give effect to if regularly approached. On the other hand, the judgment of Lord *Sumner* (then *Hamilton* L.J.) in *R.* v. *Local Government Board* (1) was given in a case brought by a party aggrieved, and expressly the learned Lord Justice acted upon "judicial discretion."

But there is really a very strong body of authority in support of the opinion of Lord *Sumner* and *Bramwell* L.J., which was, indeed, concurred in by both *Baggallay* L.J. and *Brett* L.J., though other reasons were added. In the Court below (2) *Manisty* J. (for *Lush* J., *Bowen* J. and himself) made it very clear that it was discretionary in the Court, notwithstanding the applicant was a party aggrieved, to grant or refuse a certiorari, and the case of *R.* v. *South Holland Drainage Committee* (3) was approved. Lord *Denman's* judgment in the latter case was unmistakably clear that the Court had a discretion even where a defect appeared on the face of the proceedings. Earlier authorities (as *Hawkins P.C.*, vol. II., c. 27, sec. 27; *R.* v. *Lewis* (4), and *R.* v. *Bass* (5)) support that position. Indeed, in 1869, the year before *R.* v. *Surrey Justices* (6), it was held by *Lush* and *Hayes* JJ. in *R.* v. *Newborough* (7), a case of a party "aggrieved," that "it is in the discretion of the Court to grant or to refuse a certiorari, and it is not a matter of right." The discretion was exercised, by refusing certiorari though the order impeached was invalid. (See also *R.* v. *Leicester Justices* (8) and *R.* v. *Londonderry Justices* (9).) But lastly, and decisively for us, the Privy Council has so held. In *Colonial Bank of Australasia* v. *Willan* (10), a case of certiorari for want of jurisdiction and fraud, it is said: "The Court of Queen's Bench, whose exercise of this jurisdiction is discretionary," &c. At the foot of that page, it will be observed that their Lordships

(1) (1914) 1 K.B. 160.
(2) (1880) 5 Q.B.D. 179, at p. 182.
(3) (1838) 8 A. & E. 429.
(4) (1769) 4 Burr. 2456.
(5) (1793) 5 T.R. 251.
(6) (1870) L.R. 5 Q.B. 466.
(7) (1869) L.R. 4 Q.B. 585, at p. 589.
(8) (1860) 29 L.J. M.C. 203.
(9) (1905) 2 I.R. 318.
(10) (1874) L.R. 5 P.C. 417, at p. 450.

not only recognized but also described the applicants as "the parties aggrieved." That case was decided four years after *R.* v. *Surrey Justices* (1). We therefore think the jurisdiction in certiorari is in all cases, discretionary. Judicial discretion, however, is not capricious, but must be exercised in a reasonable manner according to the circumstances.

As to other grounds of complaint the present applicant may or may not be right in asserting that it is a party aggrieved, but in respect of this particular ground of complaint the applicant is really no more concerned, upon the facts before us, than any stranger to the award.

Let us see how it would stand if this were the only ground. The objection is that returned soldiers and sailors within the union are to be preferred when seeking employment, and all things being equal, to other union members. It is purely an internal preference. *Well, unless the applicant desires to discriminate against returned soldiers and sailors in the union* in favour of members who are not returned soldiers or sailors, there is no individual grievance. The applicant has not, in so many words, said it does desire so to discriminate. Unless, therefore, notwithstanding the declared and recognized policy of this country, it is to be held rigidly that the individual arbitrary power to discriminate against returned soldiers and sailors is a right that an applicant can demand to be conserved by a Court, even at the cost of destroying the whole provision for preference, and against discrimination, and irritating anew an industrial sore, or is a right that *ought* to be protected even to the public detriment, we do not see why that extreme course should be followed in this case. The Court is not obliged to take that course, and, in our opinion, sound discretion points to refusal, so far as this ground is concerned.

As to the other grounds, they are not based on any alleged infringement of the Constitution, but on failure to follow the provisions of the Act, that is, of the Legislature. For reasons given on the injunction motion and for the reasons we shall now give in connection with sec. 31 of the Act, a complete answer exists as to those other grounds, even assuming there was the alleged failure,

(1) (1870) L.R. 5 Q.B. 466.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

and even assuming further that, apart from that section, there was no discretion to refuse the remedy.

(3) *Sec.* 31 *of the Act.*—It must be conceded that the will of the Legislature in sec. 31 is as potent as its will in any other part of the Act. If it says—as in effect it does say, by sec. 31—"Though until an award or order is actually made, parties may insist on compliance with our directions, and advantage may be taken of the means provided by the Act to prevent departure from these directions, yet, once the award or order is made and the Commonwealth's decision terminating the dispute is formally published, it shall for the sake of industrial peace within the Commonwealth be as though all our directions had been followed," why is the Court to interpose and deny that result, to the obvious disturbance of the public peace? Where a legislature prescribes various safeguards for the formation of statutory companies, safeguards which as enacted are essential to the very existence of a company, and yet makes a registrar's certificate conclusive evidence of regularity, no one questions its efficacy. The House of Lords itself, in a well-known decision, admits coercion by the legislative will in such a case. But, where the services of a whole continent internally and externally in relation to its multiple industries is concerned, it is gravely argued that even so emphatic a declaration as sec. 31 is to be disregarded. We are unable to approve the argument. Indeed, except so far as it rests on the contention of utter invalidity, we have to confess our inability even to understand it. We shall state why we do not accept the argument.

As to its general nature and effect, we have, in conjunction with our brother *Powers*, stated our opinion in the contemporaneous case of *Ince Bros. and Cambridge Manufacturing Co. Pty. Ltd.* v. *Federated Clothing and Allied Trades Union* (1). We incorporate that opinion, and add the following, solely appropriate to the present case:—The problem as to sec. 31 relates both to its interpretation and its legal effect so interpreted. It was sought first to interpret the section as an attempt to exclude judicial interference with awards, even if they openly violate the Constitution, with the legal effect of the complete nullity of the section. The interpretation of any legislative

(1) *Ante*, 457.

enactment consists simply of declaring the intention of the legislator ascertained from the words used. The prima facie meaning of words is their primary or natural sense. But a secondary or more limited sense may be required by the subject or the context (*Attorney-General of Ontario* v. *Mercer* (1)). Sub-sec. 1 of sec. 31 says : " No award or order of the Court shall be challenged, appealed against, reviewed, quashed, or called in question, or be subject to prohibition mandamus or injunction, in any other Court on any account whatever." The words used are certainly, in their literal signification, as sweeping as any that could be used. Literally, therefore, they confer on every " award or order " of the Arbitration Court complete immunity from curial review and supervision of every kind. They unmistakably cover in their literal signification even departures from all jurisdictional limits which have been prescribed. In the case of a plenary legislature no one would, we think, venture to dispute that such is the literal and primary ambit of the words used. But before we so determine in the present case, we must have regard to the nature of the legislator and to the subject of the legislation. For it is always material in construing a document to inquire whose instrument it is and what are the surrounding circumstances. The legislator is the Commonwealth Parliament, a legislature of enumerated powers, and, in this case, of a power limited in more than one way. It is a well established principle of construction of even English statutes to limit general words by considerations which, in *Stradling* v. *Morgan* (2), are called " foreign circumstances." The latest case of supreme authority is that of *In re Viscountess Rhondda's Claim* (3). In that case Viscount *Birkenhead* L.C. (with whom concurred Lord *Atkinson*, Lord *Buckmaster*, Lord *Sumner* and Lord *Carson*) said (4) : " The words of the statute are to be construed so as to ascertain the mind of the Legislature from the natural and grammatical meaning of the words which it has used, and in so construing them *the existing state of the law, the mischiefs to be remedied, and the defects to be amended, may legitimately be looked at together with the general scheme of the Act.*" The learned Lord Chancellor referred, among other things, to " a

(1) (1883) 8 App. Cas. 767, at p. 778.
(2) (1559) 1 Plowd. 199, at p. 205.
(3) (1922) 2 A.C. 339.
(4) (1922) 2 A.C., at p. 365.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

constitutional question of the utmost gravity." See also per Lord *Dunedin* (1) and by Lord *Wrenbury* (2), the latter approving *Stradling* v. *Morgan* (3). Numerous prior examples are found, of "foreign circumstances," that is, circumstances extraneous to the enactment interpreted, limiting the generality of its terms. Among them are *Jefferys* v. *Boosey* (4), *Ex parte Blain* (5) and *Cooke* v. *Vogeler* (6). These authoritative decisions indicate that, even where Parliament confessedly possesses plenary power within its own territory, the full literal intention will not ordinarily be ascribed to general words where that would conflict with recognized principles that Parliament would be prima facie expected to respect. Something unequivocal must be found, either in the context or the circumstances, to overcome the presumption. But, if that is the case where Parliament has the power to go as far as the words themselves would literally extend, how much greater is the obligation of reducing the generality of words, if that be reasonably possible, where the parliamentary power is restrained by a written Constitution and where the full imputed intention would entirely nullify the enactment. The maxim *ut res magis valeat quam pereat*, as applied to *Macleod* v. *Attorney-General* (7), is applicable to sec. 31 (1) (see *Jumbunna Coal Mine* v. *Victorian Coal Miners' Association* (8), *Irving* v. *Nishimura* (9) and *W. & A. McArthur Ltd.* v. *Queensland* (10)). This is, indeed, a rule of very general application (see cases cited in *Broom's Maxims*, 7th ed., at p. 399). There is no reason for imputing to Parliament a wilful transgression of the Constitution, nor anything but a strong determination to prevent, after the completion of an award, any of its own provisions from being fatal to the establishment of the industrial peace, *which is the sole raison d'être of the statute*. The words "on any account whatever" are properly construed as referring to the effect of Commonwealth legislation. They go to the very limit of the Parliament's power; but no further. The sub-section, which was penned originally when the "Court of Arbitration," so-called, was

(1) (1922) 2 A.C., at p. 390.
(2) (1922) 2 A.C., at p. 397.
(3) (1559) 1 Plowd. 199.
(4) (1854) 4 H.L.C. 815.
(5) (1879) 12 Ch. D. 522.
(6) (1901) A.C. 102.
(7) (1891) A.C. 455.
(8) (1907-08) 6 C.L.R. 309, at pp. 363-364.
(9) (1907) 5 C.L.R. 233, at p. 238.
(10) (1920) 28 C.L.R. 530, at p. 550.

thought to be both arbitral and judicial, covers every conceivable mode of attack, and for every conceivable reason jurisdictional or otherwise. But that is always clear of conflict with the Constitution. The first interpretation suggested is, therefore, in our opinion, inadmissible.

Then, failing that, it was argued that defects of jurisdiction, even if the creation of Parliament, were not within the protective scope of the sub-section. For this, *Clancy's Case* (1) was cited. That was a case under a New South Wales statute. This Court held a section which enacted (*inter alia*) that "no award . . . of the Court shall . . . be liable to be challenged, appealed against, reviewed, quashed, or called in question by any Court of Judicature on any account whatsoever" was similar to sections taking away the right to certiorari and other remedies, which had "always been construed as not extending to cases in which a Court with limited jurisdiction has exceeded its jurisdiction." That passage (2) was relied on in this case. That case overruled the judgment of the Supreme Court of New South Wales. There were other reasons given for arriving at the conclusion besides what was held to be the similarity of the well-known form of certiorari sections. But later cases have to be taken into account when dealing with the present section 31 (1).

Two cases in this Court, namely, *Baxter* v. *New South Wales Clickers' Association* (3) and *Minister for Labour and Industry (N.S.W.)* v. *Mutual Life and Citizens' Assurance Co.* (4), are important. *Baxter's Case* was a case arising on the New South Wales statute amended to meet *Clancy's Case* (1) by adding "prohibition." Diversity of opinion appears in the judgments, and the judgments of *O'Connor* J. and *Isaacs* J. would, in the present case, make in favour of refusing prohibition and certiorari. The case of *Minister for Labour and Industry (N.S.W.)* v. *Mutual Life and Citizens' Assurance Co.* was decided on the New South Wales *Industrial Arbitration Act* of 1912. No doubt the observation applies that the construction of that Act does not govern the construction of sec. 31 of the Commonwealth Act. But it must be noted that in sec. 55 the words "no other proceedings . . . by prohibition shall be

(1) (1904) 1 C.L.R. 181.
(2) (1904) 1 C.L.R., at pp. 196-197.
(3) (1909) 10 C.L.R. 114.
(4) (1922) 30 C.L.R. 488.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

allowed" were not thought to be governed by *Clancy's Case* (1).

Another case to be taken into account is *R.* v. *Nat Bell Liquors Ltd.* (2). That case is important for several reasons. It does not, of course, control the present case, because the construction of one Act cannot control the construction of another in different language. But it enforces with supreme authority what has not always been recognized, namely, that the language of the ordinary privative section in English legislation is always in a form which is very limited. The words ordinarily used are such as "final" and "without appeal," and so, says Lord *Sumner* for the Judicial Committee (3), "again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by certiorari. There is no need to regard this as a conflict between the Court and Parliament; on the contrary, the latter, by continuing to use the same language in subsequent enactments, accepted this interpretation." We may add some other words which had the same effect, namely, "remove" and "removable," which frequently went with the words "final and without appeal." (See, for instance, 13 Geo. III. c. 78, sec. 80; 7 & 8 Geo. IV. c. 53; 24 & 25 Vict. c. 96, sec. 111; 24 & 25 Vict. c. 97, sec. 69, and 24 & 25 Vict. c. 100, sec. 72.)

It is with respect to cases decided on provisions of that nature that the Privy Council in *Willan's Case* said (4): "There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari," that is, for manifest want of jurisdiction or for manifest fraud. That observation was apparently extended to *Clancy's Case* (1), and, as we suggest, in misapprehension. No case was cited to us or is known to us which affords a precedent for such extension. Lord *Sumner* in *R.* v. *Nat Bell Liquors Ltd.* (2) proceeds to show how the common law jurisdiction of the Court of Queen's Bench was limited in its exercise by a mere change in procedure. By a statutory provision as to the contents of a record what was "manifest" before ceased to be manifest afterwards, and so the jurisdiction for

(1) (1904) 1 C.L.R. 181.
(2) (1922) 2 A.C. 128.
(3) (1922) 2 A.C., at p. 160.
(4) (1874) L.R. 5 P.C., at p. 442.

that reason only was incapable of exercise in future. The case of *R.* v. *Nat Bell Liquors Ltd.* (1) does not directly assist us further. But it very materially assists indirectly, and for this reason :—The learned Lord, speaking of the new statutory provision's effect on the common law jurisdiction of the Queen's Bench, and after observing that it did not stint the jurisdiction of that Court, says (2) :—" What it did was *to disarm its exercise.* The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record 'spoke' no longer, it was the inscrutable face of a sphinx." He says (3) : " The Legislatures of Canada have not failed to profit by the experience of England in framing new or amending statutes directed to the removal of difficulties in the administration of the law, which arose out of common law rules and forms no longer adapted to the purposes of the day." And finally the learned Lord, with manifest appositeness to the present case, after alluding to the established position created by English legislation and the presumption in Canada from similar legislation observes (4) :—" Of course, it is competent for the Legislature to go further than this, and, where the language used shows such an intention, the presumption above stated is negatived. This may be done notably in two ways. The one *is to take away certiorari explicitly and unmistakably, or to limit it in a manner not within the older decisions upon such words as 'final' or 'without appeal'* ; the other is, on the other hand, to restore it to its pristine rigour by restoring to the record a full statement of the evidence." The second course is certainly not taken ; the first incontestably is taken.

The Commonwealth Parliament, it is patently plain, has endeavoured, like the State legislatures, to escape from the judicially restricted forms of expression referred to in *Willan's Case* (5), and, when dealing with the new industrial legislation, by words intended " to disarm the exercise " of prohibition and certiorari for departure from its own directions, and to displace certiorari entirely by words not within the older decisions upon such words as " final " and " without appeal," and thereby to make its " awards "—that is,

(1) (1922) 2 A.C. 128.
(2) (1922) 2 A.C., at p. 159.
(3) (1922) 2 A.C., at p. 161.
(4) (1922) 2 A.C., at p. 162.
(5) (1874) L.R. 5 C.P. 417.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs, J. Rich J.

its legislative codes—as stable and as free from judicial supervision as possible, except by the tribunal expressly constituted for the purpose and specially conversant with the subject in hand.

Unless the doctrine that even the express words of Parliament are not sufficient for the purpose is to be the rule of this Court, we can see no loophole in sec. 31 (1) whereby prohibition or certiorari can creep in for any statutory defect once an award is duly made and perfected. The mere use of the word "prohibition" seems decisive—for there is no room for its exercise except for lack of jurisdiction. Again, the words "on any account whatever" challenge the ingenuity of a draftsman to find any expression more complete. Nor does the fact that sec. 75 (v.) of the Constitution confers inalienable jurisdiction by way of "prohibition" on this Court—not certiorari be it observed—carry the matter any further. That jurisdiction exists, but it needs a proper case for its exercise. Such a case exists wherever Parliament evinces its intention that curial action shall bind only when certain conditions are satisfied. But if Parliament in one section says that certain conditions shall be observed, and in a later section enacts that, notwithstanding they are not observed, the arbitral action is not to be challenged, there arises what *Griffith* C.J. in *Baxter's Case* (1) describes as "a contradiction in terms." As he says "effect must be given to the whole statute." But how is the apparent contradiction to be reconciled, and what is the effect of the statute in this case? The effect is that, *before* an award is made, ample opportunity is given to ascertain by legal process of various kinds whether the new industrial code in question shall be promulgated for the co-operators in the industry. *But, once the code is promulgated formally, that shall be the law of the Commonwealth and industry may safely proceed on that basis*, peace shall be preserved, and the community need not fear an interruption in the satisfaction of its needs. That is the broad intention written in bold terms on the face of the Act, and that is the dominant feature of the legislation. To read sec. 31 otherwise is to create what Lord *Sumner* calls "a conflict between the Court and Parliament," and, we add, a disastrous conflict in a domain fully within the legislative competence of Parliament.

(1) (1909) 10 C.L.R., at p. 131.

For the reasons which we have felt constrained to state with elaboration to meet the complex and, in some respects, meticulous objections that were gathered together in argument to destroy the awards in question, we are of opinion that the application should be refused.

Waterside Workers' Federation of Australia v. *Gilchrist, Watt and Sanderson Ltd.*—This is an application under sec. 48 of the *Commonwealth Conciliation and Arbitration Act* made by the Waterside Workers' Federation to obtain an order in the nature of an injunction restraining Gilchrist, Watt and Sanderson Ltd., a party to a Federal award, from committing breaches of the award. The particular award the immediate subject of the application was made on 24th December last by *Powers* J., and is No. 77 of 1923. The breaches, actual or threatened, which are relied on by the applicants, are: (1) Preference to returned soldiers and sailors not observed in employing wharf labourers; (2) discrimination against returned soldiers and sailors members of the organization, (3) discrimination against other members of the organization. The respondent contends that (a) the respondent has not employed any wharf labourers; (b) the award does not prescribe preference to returned soldiers and sailors over any of the men actually employed; (c) the award does not prescribe anything against the employment of such returned soldiers and sailors as register at the Shipping Bureau in preference to those who do not; (d) the award does not prescribe anything against the employment of wharf labourers who at its date were "permanently" engaged by the "Shipping Bureau" in preference to Federation members, including returned soldiers and sailors, who were not so "permanently" engaged; (e) if the award does on construction permit preference as in (c) and (d), it is *ultra vires* and invalid.

A preliminary point, however, presents itself as to what is to be considered as the "award." Is it that document as actually framed; or is it that document *plus* the interpretation that has been put upon it by the learned President on 28th February 1924? It is evident that some highly important issues are involved, and these will be considered in order.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

1. *The Interpretation Order.*—Ought this Court to take into consideration the "interpretation" declared by *Powers* J. as President of the Arbitration Court on 28th February 1924? During the argument the Court unanimously ruled in the negative, leaving reasons to be stated later. Our reasons are as follows:—The declaration as to "interpretation" was made upon a substantive application made under sub-sec. (*o*) of sec. 38 of the *Commonwealth Conciliation and Arbitration Act.* By that sub-section, with the governing words of the section, it is enacted: "The Court shall, as regards every industrial dispute of which it has cognizance, have power—(*o*) to vary its orders and awards, and to reopen any question and to give an interpretation of any term of an existing award." The words "and to give an interpretation of any term of an existing award" were added by the amending Act of 1920, No. 31, sec. 16. That is to say, the addition was made long after it was established by this Court that the Court of Arbitration was an arbitral tribunal only and not a branch of the Federal Judicature. The Parliament consequently knew when those words were added to the Act they were not added as a function of one of the Courts of the Commonwealth in the strictly judicial sense. Moreover, they were added to a paragraph which, as it stood, referred to a new arbitral determination. And now the question raises very directly the point as to the function of the tribunal as a Federal arbiter or as a branch of the Federal Judicature. If the latter, the "interpretation" of 28th February 1924 must stand, and, unless reversed or varied on appeal if there be an appeal, would govern the matter. If the former, then the true import of the added words has to be sought outside the ordinary judicial meaning of the word "interpretation." An award, as has been more than once expounded, and as held by four of the present Justices of the Court (whose opinions are referred to in the judgment on the prohibition motion), is in the nature of a *legislative act.* It is something which, authorized to be made by a statute, is, when made, covered by and made of binding force by the statute, just as is a Governor's regulation or a rule of Court, or a municipal by-law. It does not create instant rights or obligations of individuals. The moment after it is promulgated no one could assert any right under it. Its operation

is ordinarily prospective, like any other ordinance, governing future relations and giving rise in appropriate circumstances to new possible rights and obligations.

Looking at par. (*o*), that paragraph as it now stands contemplates (1) variation, (2) reopening a question, and (3) interpretation of a "term" of an existing award. "Term" is a comprehensive expression, and includes any provision in the award. See, for instance, pars. (*d*), (*da*) and (*f*) of sec. 38. But unquestionably (1) and (2) contemplate a new direction as part of the award, unless the award stands exactly as before. In the collocation, and having regard to the nature of the tribunal and its functions, the third, namely, "interpretation of any term," means also a new direction as henceforth part of the award. It is something which by way of a clause of interpretation is inserted in, and becomes an integral part of, the award, that is, after examining the matter as arbitrator and not as a Court of Judicature. Reading the judgment of the learned President on the application in question, it is clear that that judgment proceeded on the judicial and not on the arbitral basis. That seems to be conclusively shown by the following extract:—"The award must be interpreted quite apart from any question whether there have been breaches of it and in the same way as any other Court would do—namely, not to consider what was intended or *what the Court could do*—but what the Court *did* by the award. That can only be ascertained from *the words used*." Clearly, that is the "interpretation" as a Court of Judicature, and in the exercise of a function which cannot, in face of sec. 71 of the Constitution, be invested in any but a Court of Judicature as exercising the judicial power of the Commonwealth. What the Court of Arbitration "could do" and "intended" to do, or thinks ought to be done, on the application for "interpretation," is what is intended, by the words used, to be included in the statutory power. As the award stands, therefore, we have to construe it, according to its own words and our own understanding of its meaning, unaffected by the declaration of 28th February 1924.

2. *Who is the Employer?*—The respondent says the men who perform the work of loading vessels are not in its employ at all, but are in the employ of an independent contractor called "The

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

Shipping Bureau." "The Shipping Bureau," it is said, is a separate registered firm, who engage men, some permanently and some casually, as their servants. The terms of permanent men are that they register in the books of the Bureau, upon application in writing, and then *wait* until some shipowner wants that class of work done. Until that happens, the Bureau guarantees a weekly wage, and, when, it happens, the men are told off to work at A's ship or B's ship or C's ship, as the case may be. A, B or C does not pay them *wages* at all, at any time, under any circumstances. True, he may, as a convenience and as agent for the Bureau, pay such wages as the Bureau owes them. But that is not as the men's employer. A's only obligation is to pay to the Bureau *a sum agreed upon* between the Bureau and A. The amount is arrived at by taking casual rates as a basis, but A does not pay it as "wages" to the man but as an assessment to the Bureau. All that is the view presented by the respondent.

As the Bureau is not a party to the award, and never could be, since it was not a party to the dispute, it is plain the Bureau stands clear outside the award, and is not bound by any of its terms, wages, hours, preference or anything else. It might take any rate as the basis and be free from the award and impose any conditions of weight-carrying, &c., also free from the award. Moreover, it does not profess to do any business except that of "Shipping Labour Bureau," which appears to be to provide labour for shipowners and, having provided that labour, that is, by sending men like any ordinary labour agency, its duties and responsibilities end. It does not, as a principal, enter into any contract to do the work itself, as in *Cameron* v. *Nystrom* (1). There is not the least evidence that it enters into any contract to do anything. Not even to supply labour. It merely, when requested, sends such number of men on its register as a shipowner asks for. It would be difficult to imagine that it incurred any duties or responsibilities under any law, State or Federal. The Bureau, then, is not, in the proper sense or any relevant sense, a "contractor" for the work of loading ships, any more than was the Government of Queensland a contractor to pilot ships in *Fowles* v. *Eastern and Australian Steamship Co.* (2). Further,

(1) (1893) A.C. 308.

(2) (1916) 2 A.C. 556.

is it an " independent " body ? It is registered as a " firm " under the *Registration of Firms Act* 1902 of New South Wales. Registration, of course, cannot add to its character ; it is a new statutory condition attached to every partnership that carries on business. The nature and character of the " firm " so registered and its relation to the respondent depend on other considerations. It is simply a voluntary association of some fourteen shipowners and one stevedoring firm, who have agreed to call themselves " The Shipping Bureau." For the common purpose of selecting such labour as they or some of them may in future require, they appoint a gentleman, Mr. McKell, as manager, furnish him with suitable housing accommodation, and twenty-eight assistant clerks, call themselves " The Shipping Bureau," and register as such, stating their business to be " Shipping Labour Bureau." That does not make the firm a separate entity ; there is no new *persona* (per *Farwell* L.J. in *Sadler* v. *Whiteman* (1), and other cases). Its members (apart from the solitary stevedore) are simply the same shipowners they were before.

The arrangement may be a convenient method of obtaining labour. It may be so conducted as to be beneficial to all concerned. It may have rendered very meritorious service in the past in circumstances of an abnormal character and which have now ceased to exist. But it may also be made—or attempted to be made —the means of frustrating the will of the national Parliament of Australia in the settlement of industrial disputes that affect the welfare of the whole community. And that, whatever the motive of its supporters may be, appears to be the inevitable result, if " The Shipping Bureau " can be successfully maintained as a screen between the shipowners, parties to the award, and the Waterside Workers' Federation. It is perfectly evident that, if such a device as here exists is successful for the purpose now sought, it is sufficient to break down any system of arbitration, Federal or State. If a firm can be formed of fifteen, it can be formed of (say) two or three or six respondents who may take any collective fancy name and register as a firm, their joint " business," or rather function, being to engage and supply labour to each separately. Then, the " firm " being outside the award, they need not obey a single word

(1) (1910) 1 K.B. 868, at p. 889.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

of it, whatever else they may have to obey. And, as individual parties to the award, none of the persons composing the firm need obey the award, because, by the hypothesis, not one of them is the "employer" of the men. As a consequence the award would stand as an official but wholly inert declaration of imaginary rights, and, as a means of correcting abuses or maintaining industrial peace, it would be worse than if merely non-existent. The evidence leads, quite apart from any affirmative evidence, to the conclusion that "The Shipping Bureau" was no independent *persona* and was never intended to be more than an instrument operated by and at the will of the various real persons who had combined for the purpose. It is a mere labour concentration camp from which supplies can be drawn by the parties interested as and when they need them. All the complications of registry, and guarantee, and payment, and dockets, &c., are machinery and part of the method for doing indirectly and in association what each could do directly and singly.

But there is affirmative evidence of a conclusive character furnished by Mr. McKell himself in par. 26 of his affidavit. Speaking of a conference of 4th January 1924 between the Federation and the employers' representatives, he says he was present at the conference, and that "the representatives of the Overseas Shipping Representatives' Association and the New South Wales Coastal Steamship Owners' Association clearly intimated that the *employers they represented* had complied with the award of the 24th day of December last by depriving casual loyalists of the privileges of the Bureau, and that they intended to *continue* to carry out the award and give preference to *approved* returned soldiers and sailors which would include returned soldier and sailor members of the said Federation." It may be mentioned that in par. 7 he states that the present respondent is included in the Overseas Shipping Companies. The word "approved" means, according to the only possible inference, such as were previously registered at the Bureau. Then the affidavit continues:—"Mr. Morris" (that is, the Federation's secretary) "was handed the said *employers'* interpretation of the award, which was as follows:—'(1) That in the engagement of casual wharf labour the *employers* will continue to give preference of *employment* to *approved* returned soldiers and sailors *through* the

Shipping Labour Bureau. (2) When further labour is required and all *approved* returned soldiers and sailors are employed, members of the Federation who are not returned soldiers and sailors will be given equal opportunity of engagement with other labour.' " It ought to be at once observed that, if that written statement, clearly prepared with great care and deliberately, were honestly made by the representatives—not of the Shipping Labour Bureau—but of the Overseas Shipping Representatives' Association and the New South Wales Coastal Steamship Owners' Association, as Mr. McKell says it was, and as it no doubt was, then it is the shipowners, who are the employers of the men, and the Shipping Bureau is only their mechanical intermediary and agent, and is under their control, and to a much greater extent than as supplying labour to eight firms. Not only so, but, had the position been then thought to be that which is now taken up since the legal proceedings have been begun, namely, that the Bureau (and not the shipowners) was the true and real employer of the men, would not the employers' representatives, aided by the presence of Mr. McKell, have said so directly ? Their case would have been then, and, indeed, it would have been before *Powers* J. when preference was sought: " We do not employ these men at all; they are not employed by any respondent to the award; they are not employed under the award; they are employed by a totally distinct independent contractor, unaffected by the award, as to hours, rates, preference or anything else, and you must look to the Bureau." But as business men they knew that to be untrue and absurd as a fact, and they abstained from suggesting it to the Arbitration Court and afterwards made their view permanent on paper. They were obviously right then, and their legal representatives' view is obviously wrong. The Bureau was then regarded as, and is in fact, their " instrument " and nothing more. That being their attitude on 4th January, they proceeded to utilize the Bureau. There were what the Bureau calls its " permanent " men, and of these it kept a list, which will be referred to later. But it is perfectly plain that the first objection fails, and that the shipowners are the employers of the wharf labourers who load their ships.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

3. *Preference in the Award.*—The true meaning of the provision made by the award itself with respect to preference is somewhat difficult to collect. The difficulty is not wholly attributable to the language. It is due largely to the double and disconnected provisions of the Act as to (1) preference (sec. 40) and (2) returned soldiers and sailors (sec. 81A). The combined intention of the Legislature is to be sought from a consideration of the Act as a whole. Sec. 40 enables the Court to direct (*inter alia*) that as between members of organizations of employees and other persons (not sons or daughters of employers) offering service, preference may be given to such members. That is unlimited as to "other persons" except the limitation of sons and daughters of employers. Standing alone, for instance, it would enable returned soldiers and sailors who are members of an organization to be preferred to returned soldiers and sailors outside the organization. But it does not stand alone, and is not now intended to operate alone. Sec. 81A says: "Nothing in any award or order made under this Act, or in any agreement relating to industrial matters, shall *operate* to prevent the employment of returned soldiers or sailors." It matters not what provision for preference is made in an award—there may be some such provision in unqualified form in an existing award—sec. 81A has the effect of preventing any *preference against* returned soldiers and sailors outside the organization. There is then, by force of the operation of the award clause of preference under sec. 40, in view of the direct statutory provision of sec. 81A, this result: *the union returned men stand in the front rank, and so do the non-union returned men —neither having any preference over the other.* It would be against the law as represented by sec. 81A to put the non-union returned men *behind* the union returned men, and it is equally against the law as represented by the award to put the union returned *men behind* the non-union returned men. When clause 1 (a) of the award is read, it is seen that the learned President has expressly referred to sec. 81A (1) as "preventing the Court from making any award which shall operate to prevent the employment of returned soldiers or sailors"; and, therefore, it must be a wrong intention imputed to the clause itself, if it is read as *permitting the union returned men to be postponed to the* non-union returned men. What we have said,

when the Act and the award are read together and as a whole, is the true intention of Parliament and Arbitration Court. This is greatly strengthened by reference to clause 2 (a), which assumes that the whole of the returned soldiers and sailors both in and out of the organization are on the same level, and in the front rank as against all others, and fully guarded against discrimination in favour of men outside the Federation. Further, that the intention is to be gathered from the broad meaning of the award, and not from some cramped technical reading of its words, is shown by the general tenor of the enactment, and perhaps in this connection more particularly by sec. 28 (1) prescribing that "the award shall be framed in such a manner as to best express the decision of the Court and to avoid unnecessary technicality." Looking, therefore, at the award, in the light of the Act as a whole and of its own terms as a whole unaffected by the interpretation of 28th February 1924, the conclusion is that it provides: (*a*) *Preference for returned soldiers and sailors members of the organization against all persons whatsoever subject only to this, that, other things being equal, they are not to be preferred to returned soldiers and sailors outside the organization.* This is, of course, subject as to operation to sec. 81A of the Act. It was contended, and not strongly denied, that the words "all persons" in the preference clause included fellow members of the organization. Whether denied or not, the construction of the award depends on its own language as framed by the learned President, and not on the view taken by either or both of the parties.

We are of opinion that its true construction does no violence either to the Act or the Constitution. The dispute was in these terms: "The members of the Federation shall have preference of employment over non-members." Other words were added modifying the claim, but, reading it as a whole, it is clear that the preference claimed was not *inter familiam* of the union, but was as between union members on one side and "other persons," that is, non-members of the union on the other. It is obvious that where "preference" is asked for between two classes it means going the whole distance of placing class A before class B. Like every other demand it may be granted in full or in part. If granted in full, there is no necessity to talk of "non-discrimination," because the

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

greater includes the less. But if granted, not in full but partially, non-discrimination may be a necessary incident. Thus, as in the present case, the learned President went the whole way on the road to preference as to returned soldiers and sailors, but only half the way asked as to other members. He said " preference " as to the former, and non-discrimination as to the latter—always reserving the rights of returned soldiers and sailors outside as well as inside the union, and always (expressly in one case and tacitly in the other) subject to " other things being equal." .

The words " all persons " in the preference clause 1 (a) must be construed on the principle that words in a contract or other instrument should be interpreted with reference to the proved subject matter under discussion. If necessary, the principle *ut magis valeat quam pereat* would also apply. But, on full consideration of the Constitution and the Act, the latter maxim is not necessary. It is true that constitutionally a dispute is an essential condition of arbitral action and of the necessary legislative authority to arbitrate. Both constitutional power to legislate and the requisite legislative exercise of the power are necessary to sustain any award. There is no doubt that " preferential employment " is an industrial matter as to which an industrial dispute may be dealt with by arbitration (secs. 4 and 19 of the Act). But, once conceding a dispute, the Legislature is free to legislate at discretion in applying arbitration to settle it. Sec. 40 is a section for this purpose, and, if read as broadly as its language reasonably permits and the subject matter requires, is wide enough to sustain the award under consideration without contravening the Constitution. It provides that " The Court, by its award, . . . may (*a*) direct that as between members of organizations of . . . employees and other persons (not being sons or daughters of employers) . . . desiring service or employment at the same time, preference shall, in such manner as is specified in the award, . . . be given to such members, other things being equal." It is observable that in the opening words of sub-clause (*a*) we find " members " not " the members." This points to indefiniteness, which, when the phrase " such members " is read in conjunction, indicates that the Court may select among the members of the organization " such members " as are to have

preference over " other persons "—that is, " other " than those to whom preference is given, whether those " other persons " are within or without the organization. The section so construed is within the constitutional power of legislation providing remedies for an existing industrial dispute, and so construed the award is in terms supported by the section.

4. *Discrimination in the Award.*—Preference to A over B necessarily connotes discrimination against B in favour of A. The latter concept is the obverse side of the same medal. The preference given in fact to those returned soldiers and sailors who, whether unionists or non-unionists, obtain " Bureau Registry " over those who have only the " organization membership " is, of course, an open discrimination against the latter class of returned soldiers and sailors. But it is said, and perhaps truly, that the award does not specifically forbid this, but leaves it to the operation of the affirmative preference above explained. The only express provision against discrimination relevant to this case is found in clause 2 (a) of the award. That runs as follows: " The respondents whose names are set out in schedule A shall not, when requiring wharf labourers' work to be done in Sydney, discriminate—other things being equal—against members of the Waterside Workers' Federation—not returned soldiers or sailors—except in favour of *returned soldiers and/or sailors.*" This negative provision against discrimination is irrespective of the affirmative provision *for* preference. The care to mention " returned soldiers and sailors " again, shows that the learned President was zealous to protect *all* returned soldiers and sailors, and to keep them, as among themselves, on an even footing. Clearly, he thought that between the two provisions and the Act all returned soldiers and sailors would stand on a common platform of equality among themselves and preference as regards others, outside the union, including the " loyalists."

5. *Loyalists.*—The learned President dealt expressly and specifically with the position of the loyalists in clause 8. Reading that clause with clause 2 (a), it is certain he gave them no preference. Accepting the award as he framed it, loyalists who are members of the Federation have the same rights as and no greater rights than the general members of the Federation. Of course loyalists outside the union

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

can have no greater rights. All returned soldiers and sailors who are members of the Federation have by the award preference over "loyalists" as such outside the union, if such loyalists are not themselves returned soldiers or sailors. The award is certainly specific as to this. But a mode of escape is suggested. It is said first that both "preference" and "discrimination" are referable only to men newly engaged after the date of the award. Next it is said that the loyalists—some 189—who are preferred to the members of the union, though they are not returned soldiers or sailors, are "permanent" employees, and consequently outside the preference and discrimination clauses. They are said to be "permanent" employees of the Bureau and, failing that, of each constituent member of the Bureau. As to the Bureau, that has been shown not to be the real employer for loading up ships. A labour agency giving a thousand men a sort of retaining fee to work for any designated employer when called on, could not be said to convert the men into permanent employees of the employers bound by an award. Then it is said that the men registered at the Bureau are the permanent employees of each and every member of the Bureau. That will not bear the strain of investigation. If A, B and C are a firm owning a steamer called the *Cæsar*, and if A, X and Y are a firm owning a sailing vessel called the *Pompey*, and A alone owns a collier called the *Grace*, could it be reasonably said that the men constantly employed on the *Cæsar* were the permanent employees of A in relation to the *Pompey* and the *Grace*. If that is followed as to his other partners in relation to the *Pompey*, it becomes still more patently wrong. The word "permanent" does not occur. It is first imagined, and then stretched. Any document could be annihilated by such a process. At the root of the argument, however, there is something more reasonable. It is this: that a preference clause and a non-discrimination clause each contemplates—unless the contrary is stated—that existing contracts are not to be broken so as to create a cause of action if the award were not made. But —assuming, without by any means deciding, that to be correct—it does not include a case of a daily engagement which is tacitly renewed each day by conduct, or a weekly hiring which is renewed tacitly by a weekly continuance, notice, if necessary, being within the

voluntary power of either party. In that case there is, by the mere continuance and abstention from exercising the unilateral power of refraining from renewing the employment, a disregard of the clause of preference to or of non-discrimination against others who are waiting to be employed and in whose favour the award is made. We therefore hold that the 189 loyalists now preferred and in favour of whom a discrimination is made are not exempt from the clauses referred to.

6. *Breaches.*—The breaches are so obvious that it seems tedious to state why. But contrary arguments elaborately endeavoured to show the contrary, and out of respect to them the matter may be briefly stated. There are 3,500 men in the organization entitled to the benefits of the awards. There are 321 so-called " permanent " men on the Bureau registry of whom 113 are returned soldiers and sailors, 189 are loyalists and 19 are neither returned soldiers or sailors or loyalists. The registry is forbidden to any others as " permanent " men. Then there are men, not necessarily unionists, but all of them returned soldiers and sailors, registered as " casuals." When the respondent requires wharf labourers' work to be done, the labourers are supplied exclusively from the registry of the Bureau—taking that registry in order of " permanent " and then " casual." But the " Bureau " will not permit the organization members to register as they wish—and 500 of them were actually refused registration. That is, it is said, because no more men are yet needed. But that is fatal to the argument, because it is a confession that the " possibility " or " opportunity " of obtaining employment is denied to the members of the organization *as such*, however skilful and able and willing they may be. Employment is confined to those whom the Bureau *chooses to register*—even though they may be less able or less skilful than members of the organization. As to the returned soldiers and sailors on the Bureau registry, they have a perfect right to preference over others who are not returned soldiers and sailors, but they have no right whatever to preference over their comrades who are returned soldiers and sailors and are not upon the Bureau registry. Even the Bureau admittedly discriminates against returned soldiers and sailors who register with the Bureau.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Isaacs J. Rich J.

A so-called "permanent" loyalist is placed ahead of a returned soldier or sailor on the casual list.

The whole operation of the Bureau then is: (1) Non-recognition of the organization membership as such; (2) non-recognition of preference to returned soldiers and sailors by reason of the award; (3) creation of an indispensable condition of employment by any individual shipowner in the position of the respondent, namely, admission to registration at the Bureau, which may be and has been refused; (4) general attempt to be free from the operation of the award, since the individual employer claims not to be liable to pay any "wages" to the wharf labourers employed. These considerations establish, not merely a breach, but a wholesale *abandonment of the provisions of the award.* That is only material now in relation to the specific breaches complained of, and these are manifest.

7. *Ultra Vires.*—The last suggested avenue of escape from the consequences of the system is the contention that the award is *ultra vires* of the Arbitration Court. This is asserted on several grounds, namely: (a) sec. 40 does not permit preference to returned soldiers and sailors only, but either preference must be given equally to them and other members of the organization or no preference at all must be given; (b) non-discrimination is outside the power of the Arbitration Court; (c) the dispute on which the award was made claimed "preference" generally and that alone could be granted—if not granted *in toto*, preference must be refused; (d) there was no dispute in fact about returned soldiers and sailors.

As to (a), the words are elastic enough to give full play to the wide discretion which an arbitrator, having to survey the kaleidoscopic circumstances of industry, must necessarily have. So far from limiting his discretion, there is even an obligation cast upon him by sub-sec. 2 of sec. 40, which indicates the precise contrary of what is contended. As to (b), the matter is plainly within the definition of industrial matters in sec. 4. As to (c), the words are wide enough to include complete preference, and therefore the limited preference granted was within the ambit of the dispute. The point is really not arguable. As to (d), so far as that is rested on the wording of the documents referring to the dispute, it becomes a matter of construction. So far as it is rested on the absence in fact of any dispute, it is of a

graver nature and touches the Constitution. But to all of these objections there is also one common answer. In this proceeding *this Court is exercising a jurisdiction conferred upon it, not by the Constitution, but by Parliament* using its discretion under the authority of the Constitution (sec. 76). The jurisdiction is contained in the Arbitration Act (sec. 48), and *must be exercised on the terms and subject to the limitations Parliament has thought fit to declare. One of those terms and limitations is contained in sec.* 31, which forbids an award once made to be challenged by any means whatsoever in any Court of law. Without exceeding our jurisdiction we cannot consider on this proceeding the objections of *ultra vires*. Sec. 31 is a legislative command for the purposes of the Act—and sec. 48 is a part of the Act—that every Court shall refrain from entertaining an objection to the validity of an award once it is made. Whether the Court would have any or what restriction in a proceeding under sec. 75 (v.) of the Constitution is quite another matter, as to which nothing is said.

In our opinion the respondent Company should be enjoined against breaking the award by (1) preferring any person whatsoever to returned soldiers and sailors who are members of the Waterside Workers' Federation; (2) discriminating in favour of any person whatsoever against returned soldiers and sailors who are members of the Federation; (3) preferring to or discriminating against members of the said Federation in favour of any person whatsoever by reason of such person being registered by or at or affiliated to "The Shipping Bureau."

STARKE J. The Waterside Workers' Federation applied to this Court, pursuant to the *Commonwealth Conciliation and Arbitration Act* 1904-1920, sec. 48, for an injunction restraining Gilchrist, Watt and Sanderson Ltd. (which I shall call the Company) from contravening certain provisions of an award of the Arbitration Court; and the Company obtained an order nisi from this Court calling upon the President of the Arbitration Court and the Federation to show cause why further proceedings upon the award should not be prohibited, or, in the alternative, why a writ of certiorari should not issue, directed to the Arbitration Court and the President

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Starke J.

thereof, to remove the proceeding before that Court, and the award, into this Court. In 1922 the Federation requested certain shipowners, including the Company, to adopt the following condition of employment of members of the Federation, namely, "that members of the Federation should have preference of employment over non-members. If at any time the Federation fails to supply a sufficient number of competent men approved of by the employer for his requirements, such employer may engage non-union labour to make up the deficiency at the rates and conditions set out in the last award of the Court. A failure to supply a sufficient number of competent men approved of by the employer shall mean a failure to do so within one hour, meal hours excluded, after a request in writing (by any employer directed to the secretary of the local branch) shall have been lodged at the registered office of the local branch marked 'Labour' with the secretary, clerk or caretaker thereof during business hours. The said condition is to apply to Sydney, Melbourne, Tasmania, and the coal work at Port Pirie, South Australia, also Albany, West Australia." The request was not acceded to, and a compulsory conference was summoned pursuant to sec. 16A of the Arbitration Act, and, no agreement being reached, the dispute —as the request is now called—was thereupon referred to the Arbitration Court pursuant to sec. 19 (*d*) of the Act. Subsequently an award was made which is the subject of these proceedings.

The document is curiously phrased and its meaning by no means clear; but it provides in substance—so far as its provisions are material to these cases: (1) that the respondents in the proceedings requiring wharf labourers' work to be done in Sydney give preference of employment over all persons—other things being equal—to returned soldiers and sailors members of the Federation, subject, however, to the express provisions of sec. 81A of the Arbitration Act, that nothing in any award shall operate to prevent the employment of returned soldiers or sailors; (2) that the employment of men at the weekly rate of wages, who are not returned soldiers or sailors, shall not be a breach of the award as to preference if the respondents first offer weekly employment to returned soldiers and sailors at the rates they are willing to pay to employees engaged at weekly rates; (3) that the respondents to the proceedings requiring wharf labourers'

work to be done in Sydney shall not discriminate—other things being equal—against *members of the Federation* other than returned soldiers and sailors.

In February 1924 an application was made to the Arbitration Court, pursuant to sec. 38 (*o*) of the Arbitration Act, to give an interpretation of this award. That Court, however, quite misunderstood its powers, and proceeded to determine the true meaning of the award in point of law, and therefore attempted to exert the judicial power of the Commonwealth. Thus the Court asserts that "the award must be interpreted quite apart from any question whether there have been breaches of it, and in the same way as any other Court would do, namely, not to consider what was intended or what the Court did by the award—that can only be ascertained from the words used." No part of the judicial power of the Commonwealth is or can be vested in the Arbitration Court as at present constituted (*Alexander's Case* (1)), and, therefore, sec. 38 (*o*) cannot confer that power. The "interpretation" given by the Arbitration Court to its award of December 1923 is a nullity, and cannot, therefore, be relied upon in these cases. I do not stay, in this view, to consider the validity or effect of sec. 38 (*o*) as to interpretation, but, as at present advised, this provision does not appear to me to add anything to the power to vary awards and orders and to reopen questions, contained in the preceding words of the sub-section.

We are consequently thrown back upon the award itself; and the Federation contends that the Company has contravened its terms, because it refuses preference to returned soldiers and sailors and discriminates against members of the union in the employment of labour. A firm called the Shipping Labour Bureau is registered under the *Registration of Firms Act* in New South Wales. The members of this firm comprise shipowners, shipping representatives, including the Company, and stevedores. It engages, apparently, two classes of wharf labourers, one which it calls "permanent hands," paid upon a weekly basis, and another which it calls "casuals," paid at an hourly rate. These permanent hands and casuals must be registered at the Bureau, and unless so registered

(1) (1918) 25 C.L.R. 434.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Starke J.

cannot obtain work through the Bureau. The permanent hands consisted of returned soldiers or sailors within the meaning of the *Returned Soldiers and Sailors Employment Act* 1919 of New South Wales, "loyalists," that is, persons in whose favour certain shipowners or shipping representatives, including the Company, might discriminate under an award of the Arbitration Court dated June 1918 (see *Waterside Workers' Federation* v. *Commonwealth Steamship Owners' Association* (1)) and a few other persons who were neither returned soldiers or sailors nor "loyalists." The casual hands, prior to the award of December 1923, consisted of returned soldiers and sailors, some of whom, I understand, were members of the Federation, and "loyalists"; but since the award the "casuals" have consisted of returned soldiers or sailors only. Admittedly, since the award, "permanent hands," that is to say, returned soldiers and sailors, "loyalists," and possibly some of the few men neither returned soldiers or sailors nor "loyalists," have been doing wharf labourers' work in and about ships controlled by the Company. Moreover, the Company insists that this employment is lawful and in no wise a contravention of the award. But the fact remains, as to the permanent hands, that the Company did not give preference, in connection with wharf labourers' work which it required to be done, to returned soldiers and sailors members of the Federation over the "loyalists" and the few other men already referred to, as prescribed by the award. It follows, I think, that discrimination is exercised in favour of these "loyalists" and "other men" against members of the Federation. So far as the "casuals" are concerned, no contravention whatever of the award has been proved. They are all returned soldiers and sailors, and the award does not prohibit employers from selecting for work those whom they please, within the preferred class. And by the terms of the award itself, discrimination is allowed in favour of returned soldiers or sailors against members of the Federation. The Bureau, in order to comply with the award, notified some 200 "loyalist" wharf labourers who were "casuals" not to use the Bureau again. Those who are acquainted with the history of the "loyalists," which is set out by my brother *Higgins*, when President of the Arbitration Court,

(1) (1918) 12 C.A.R. 277, at p. 293.

in *Waterside Workers' Federation* v. *Commonwealth Steamship Owners' Association* (1), may feel that the December award did not, through some lack of appreciation of the facts, sufficiently provide for the protection of these unfortunate men, but that is in truth a matter wholly for the consideration of the Arbitration Court.

The practical object of the injunction proceedings now before us is to oust the permanent-hand "loyalists" and "other men" from the wharf labourers' work required by the Bureau or its members to be done in Sydney. Preference to soldiers and sailors members of the Federation will exclude the "loyalists," because the former class will absorb most, if not all, of the wharf labourers' work required by the Company and other members of the Bureau. Again, the clause in the award providing that the Company and other members of the Bureau shall not discriminate against members of the Federation also seriously affects the position of the "loyalists" and their chance of employment. A pious declaration is set forth in clause 8 of the award that the members of the Federation will not unduly interfere with or make things unpleasant for the "loyalists" who may be employed from time to time during the award and will favourably consider applications of competent and eligible "loyalists" to become members of the Federation. It does not surprise me that the Company makes a last stand for these "loyalists" and others, numbering some 200 men. They have never been heard by any Court, but are described as "highly efficient, obedient, speedy, dependable and honest workmen, and willing to undertake the handling of any class of cargo." According to the Federation, the Arbitration Court requires, in the interests of industrial peace, that these men should be sacrificed, in the manner already indicated, and their skill lost, I fear, to the waterfront of Sydney.

The Company seeks to avoid this result and to justify or excuse its action in allowing these men to do wharf labourers' work in and about ships controlled by it, on several grounds :—(1) That the men are not employed by the Company, and the duty prescribed by the award is to give preference of employment, when requiring wharf labourers' work to be done. The Bureau, so it was argued, and not

(1) (1918) 12 C.A.R., at pp. 279 *et seqq.*

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v GILCHRIST, WATT & SANDERSON LTD.

Starke J.

the Company, employed the men. I pass by the fact that the Company was one of the members of the Bureau, and, therefore, a member of the firm which employed the men, because it is simpler to treat the Bureau, for the purposes of the present case, as a separate and independent entity. The Bureau, in my opinion, acted simply as a supplier of labour to its members: it hired the services of wharf labourers to such members at an agreed amount; it engaged the "permanent hands," and, if a member required wharf labour, then he notified the Bureau, which supplied the number of men required—from the "permanent hands" in the first place, and, in the event of a shortage, from the "casual hands." The members did not pay the men for their services, but paid the Bureau; and they did not exercise the power of dismissing the men for misconduct, unskilfulness or any other reason, but made complaint, in such cases, to the Bureau, and the Bureau then dealt with the matter. The control and direction of the men, however, in loading and unloading the Company's ships, was, I am satisfied, in the hands of the member using their services, namely, the Company, and the men were bound, in the course of their work to conform to the orders of that member. In such cases the law is clear enough: when an employee is sent by his employer to do work for another, it is a question of fact whether he becomes *quoad hoc* the employee of the person for whom he is, for the time being, working, or whether he remains in all respects the employee of his ordinary employer (see *Salmond on Torts*, 5th ed., p. 99; *Donovan* v. *Laing &c. Syndicate* (1); *Jones* v. *Scullard* (2); *Hall* v. *Lees* (3)). The facts of the present case make it abundantly clear, to my mind, that *quoad* the loading and discharging of the Company's ships the wharf labourers were in its employ and under its directions. (2) That the Court had no jurisdiction to prescribe that the Company should not discriminate against members of the Federation. The opinion of my brother *Higgins* in the *Engine-Drivers' Case* (4), when sitting as President of the Arbitration Court, was strongly relied upon in support of this proposition. Preference was claimed; but the Court is not restricted to the relief claimed, and may give such relief, within the ambit of

(1) (1893) 1 Q.B. 629.
(2) (1898) 2 Q.B. 565.
(3) (1904) 2 K.B. 602.
(4) (1913) 7 C.A.R., at p. 147.

the claim, as seems to it expedient (*Commonwealth Conciliation and Arbitration Act*, sec. 38B). Now, the Court refused the full claim to preference, but granted it in part and also a lesser remedy, namely, that the employers should not discriminate against members of the union. Such a provision as this is, in my opinion, clearly within the ambit of the claim, and is an industrial matter which the Arbitration Court is competent to award (*Commonwealth Conciliation and Arbitration Act*, sec. 4). (3) That the award prescribing preference relates to men paid on the hourly basis ("casuals"), and not to men paid on the weekly basis ("permanent hands"). The argument was based on the fact that the main award of the Arbitration Court in relation to waterside workers only prescribed an hourly rate of wage. Therefore, it is said, the award cannot apply to men who are not engaged on an hourly basis. A minimum wage at an hourly rate is prescribed by the award, however, for waterside workers members of the Federation, if employed by the Company and others; and apart from some special provision in the award, employment on a weekly basis and payment at a weekly rate would not enable the employer to escape payment of the minimum wage fixed at the hourly rate, if the weekly sum fell below that amount. The argument is as faulty in logic as it is bad in law. But then it was claimed that the men employed at weekly rates were exempted from the preference clause by reason of the express provision of the December award: "the employment of men at weekly rates of wages who are not returned soldiers or sailors shall not be deemed a breach of this award as to preference if the respondents (who include the Company) first offer weekly employment to returned soldiers and sailors at the rates they are willing to pay to employees engaged at weekly rates instead of at casual rates." This argument fails for two reasons: one that the Company did not employ men at weekly rates—it hired them on terms from the Bureau, and paid the Bureau for their services at a rate based on the number of hours worked; the other that it did not offer weekly employment to all the preference men at weekly rates or at all. (4) That preference to returned soldiers and sailors members of the Federation was contrary to the provisions of the law of the State of New South Wales (*Returned Soldiers and Sailors Employment Act* 1919 (No. 38), sec. 3) and, therefore, beyond

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Starke J.

the constitutional power of the Commonwealth. The argument is based upon *Federated Saw Mill, Timber Yard and General Woodworkers' Employees' Association* v. *James Moore & Son Pty. Ltd.* (1) and *Whybrow's Case* (2); and, if those cases be still law, I should be prepared to assent to the argument. The State Act provides that every employer "shall give preference in employment in any . . . industry to a returned soldier or sailor who . . . is registered for employment in that . . . industry under section ten of this Act, or applies in writing, for such employment, and is not excluded from the benefits of this Act, as against any other person offering his service at the same time." But by force of the definition in sec. 2, the returned soldier must be resident in New South Wales, and his enlistment must have terminated. Now, the Federal award is less extensive in some respects than this provision, and more extensive in other respects. Thus the preference under the award is limited to soldiers and sailors members of the Federation, but is not conditioned upon residence in New South Wales or upon registration under the State Act. There may be some returned soldiers and sailors who fall within the terms of both the State Law and the Federal award, and who can claim preference under each provision (cf. *Engine-Drivers' Case* (3)). But, in the main, the State Act and the award must conflict in operation, and both cannot be obeyed. The award is, therefore, in my opinion, inconsistent with the State law. It is impossible, however, to my mind, to reconcile the principles underlying the decisions in the *Woodworkers' Case* (1) and *Whybrow's Case* (2) with the decision of this Court in the *Engineers' Case* (4), where the Court said: "However valid and binding on the people of the State where no relevant Commonwealth legislation exists, the moment it" (that is, the State legislation) "encounters repugnant Commonwealth legislation operating on the same field the State legislation must give way." An award made under the authority of the Commonwealth legislation takes its sanction and its force from that legislation, and has, therefore, supremacy over the State law. Consequently this argument also fails. (5) That the award of preference to returned soldiers and

(1) (1909) 8 C.L.R. 465.
(2) (1910) 10 C.L.R. 266.
(3) (1920) 28 C.L.R., at p. 12.
(4) (1920) 28 C.L.R. 129.

sailors members of the Federation over all persons subject to the provisions of sec. 81A transcends the constitutional power of the Commonwealth, and exceeds the authority of the Arbitration Court. The preference prescribed is " over all persons," but, subject to the provisions of sec. 81A of the Act, and that, no doubt, gives the selected class, subject as aforesaid, preference over other members of the Federation as well as over persons who do not belong to it—non-unionists, as they are called. The Federation did not claim preference for some of its members over other members, but over non-members. But there can be no doubt that the Arbitration Court might obtain cognizance of an industrial dispute involving a claim for preference of a selected class of unionists over " all other persons," and make an award with respect thereto. An industrial dispute includes a dispute as to industrial matters, and industrial matters include the employment, preferential employment, dismissal, or non-employment of any particular persons (see Arbitration Act, secs. 4, 19, 24). The question is whether the Arbitration Court can make such an award if no dispute or claim was raised as to the particular matter awarded and now in controversy. Two sections were relied upon for this purpose, namely, secs. 38B and 40. I pass by sec. 38B, because the provisions of sec. 40 warrant, in my opinion, the award made by the Court. That section is not a limitation but an expansion of the authority of the Arbitration Court: it is a substantive grant of authority to the Court in connection with industrial disputes of which it has cognizance, whether preference has or has not been put in dispute by the parties, or claimed in the proceedings before it. It may be exerted even after an award has been made, on the application of any organization or person bound by the award, and whenever, in the opinion of the Court, it is necessary for the prevention or settlement of an industrial dispute or for the maintenance of industrial peace or for the welfare of society. As a matter of construction the section enables the Court, in my opinion, to select the members of organizations who shall have preference, and that selection may be for or against all the members of an organization or for or against a limited class among them. But the selection being made, then other things being equal, preference " shall . . . be given to such members," that is, to the members

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Starke J.

selected, over "other persons"—which phrase must, to my mind, denote all persons but the selected class. There is no reason that I can understand for limiting the words "other persons" to persons who are not members of the organization. It has been suggested that this construction of sec. 40 exceeds the constitutional power of the Commonwealth. But the Parliament has "power to make laws for the peace, order, and good government of the Commonwealth, with respect to . . . conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State," and, while the power of the Parliament is limited and cannot be transcended, yet within the ambit thereof the Parliament is supreme and may "use any means which are in fact conducive to the exercise of a power granted by the Constitution" (*Stemp* v. *Australian Glass Manufacturers Co.* (1)); "you may complement, but you may not supplement, a granted power" (*Whybrow's Case* (2)). Now, implicit in sec. 40 is the necessity of some industrial dispute before the powers conferred by that section can be exercised. The constitutional power is not limited to a determination by means of arbitration of the matters or items in dispute, but is a power to make laws with respect to arbitration for the prevention and settlement of industrial disputes. Given a dispute, actual or threatened, it is within the competence of Parliament to say what means, what powers and authorities, the arbitrator may use for the purpose of settling or preventing that dispute. If industrial peace be the object of the Constitution and the Arbitration Act, and the Legislature attempts to attain that end by means of a power conferred upon the arbitrator to grant preference, then Courts of law cannot deny that the end justifies the means, however severely some individuals may suffer (see *Adkins* v. *Children's Hospital* (3)—*Holmes* J.). In my opinion, the provisions of sec. 40 complement, and do not supplement, the constitutional power of the Commonwealth, and are competent and valid provisions (cf. *Waterside Workers' Case* (4)).

Consequently, it appears to me that an injunction must issue against the Company restraining further contravention of the

(1) (1917) 23 C.L.R. 226, at pp. 232, 234.
(2) (1910) 11 C.L.R 311, at p. 338.
(3) (1923) 261 U.S. 525, at p. 571.
(4) (1920) 28 C.L.R. 209.

award of the Arbitration Court. It follows, of course, that the order nisi for prohibition and certiorari must be discharged.

I should have been glad to leave the matter here, but the opinions prepared by my brother *Isaacs*, in these cases and in *Ince Bros.' Case* (1), make desirable some reference to sec. 31 of the *Commonwealth Conciliation and Arbitration Act* and to the power to issue prohibition to the Arbitration Court. So far as sec. 31 is concerned, no one can deny that the Parliament cannot transcend the Constitution by any form of words or by any device. "From the authority to ascertain and determine the law in a given case there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect, and binding on no one. This is not the exercise of a substantive power to review and nullify Acts" of the Parliament, "for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the Court, to the determination of which must be brought the test and measure of the law" (*Adkins* v. *Children's Hospital* (2)). Thus sec. 31 cannot affect the grant of jurisdiction to this Court contained in sec. 75 (v.) of the Constitution. Nor can it give to an award which transcends the constitutional power of the Commonwealth any validity or force. Some remedies, such as prohibition, mandamus or injunction, so far as they be within the power of Parliament, may be withdrawn from the Courts, but still that does not make such an award efficacious: it is still beyond the power of the Commonwealth, and binding upon no one. So that if Parliament, as in sec. 31, enacts that the award shall not be challenged in any Court, still, if that award transcends the Constitution, it is of no effect. The supreme law must prevail and the provisions of sec. 31 must be rejected. Consequently I should have felt no difficulty in refusing an injunction in this case if I were of opinion that the provisions of sec. 40 exceeded the constitutional power of the Commonwealth. But I will not further pursue the consideration of sec. 31, for I realize that the views I have expressed are mere dicta and quite unnecessary for the determination of these cases.

(1) *Ante*, 457.

(2) (1923) 261 U.S., at p. 544.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Starke J.

The power of the High Court to issue prohibition to the Arbitration Court has been affirmed on many occasions. Every member of this Court, both past and present, has affirmed and acted upon the power and no question has been more hotly contested or more thoroughly explored before it. The long history of the controversy may be found in the following cases: *Broken Hill Case* [*No.* 1] (1); *Whybrow's Case* (2); *Tramways Case* [*No.* 1] (3); *Builders' Labourers' Case* (4); *Holyman's Case* (5); *Tramways Case* [*No.* 2] (6); *Alexander's Case* (7); *Hibble's Case* [*No.* 1] (8); *Hibble's Case* [*No.* 2] (9). To which may be added two cases relating to proceedings for prohibition to State industrial tribunals, namely, *Clancy's Case* (10); *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Pty. Ltd.* (11). It is now suggested that the power does not exist; firstly, because the award of the Arbitration Court is legislative and not judicial in character and, secondly, because prohibition cannot in any case be granted after an award has been made, for the arbitrator is then *functus officio*. Neither argument has escaped the attention of the Court. In *Whybrow's Case* (12) *Griffith* C.J. said:—"A prohibition is a writ directed to the Judge and parties in an inferior Court, and does not lie except to persons or bodies exercising judicial or quasi-judicial functions. It lies to a pretended Court as well as to a real one (*Chambers* v. *Jennings* (13)). When, therefore, the Constitution speaks of a prohibition against an officer of the Commonwealth it means an officer whose functions are judicial or quasi-judicial. It cannot be denied that the Judge of the Arbitration Court is an officer of the Commonwealth, or that his functions are judicial." And in the *Tramways Case* [*No.* 1] (14) my brother *Isaacs* was even more explicit:—"It is necessary to define the exact point arising for our decision. The application is to prohibit the Arbitration Court, as I term it for brevity, from enforcing an award already made and completed; that is to say, it is not an application to prevent the

(1) (1909) 8 C.L.R. 419.
(2) (1910) 11 C.L.R. 1.
(3) (1914) 18 C.L.R. 54.
(4) (1914) 18 C.L.R. 225.
(5) (1914) 18 C.L.R. 273.
(6) (1914) 19 C.L.R. 43.
(7) (1918) 25 C.L.R. 434.
(8) (1920) 28 C.L.R. 456.
(9) (1921) 29 C.L.R. 290.
(10) (1904) 1 C.L.R. 181.
(11) (1907) 5 C.L.R. 33.
(12) (1910) 11 C.L.R., at p. 22.
(13) (1703) 2 Salk. 553.
(14) (1914) 18 C.L.R., at pp. 70-77.

President from proceeding to make an award. The difference is precisely as if in ordinary State jurisdiction a private arbitrator made an award between the parties, and it were then filed as a rule of Court, or an action were brought upon it in the Supreme Court. The fact that the arbitrator happens to be personally identical with an individual who presides in the Court is irrelevant. The tribunals are distinct; and the question is whether 'a Court' can be prohibited under sec. 75 (v.) of the Constitution. The well-known rule that a judgment given without jurisdiction can be prohibited so long as anything remains to be done under it, does not touch this point. The Legislature has assumed to create a Court of Record for all purposes, preliminary and consequent, as well as for the actual settlement of the dispute. And no doubt the nature of the function of the arbitrator in actually determining the dispute is quasi-judicial, in the sense indicated by Lord *Selborne* in *Spackman* v. *Plumstead Board of Works* (1). That would be sufficient according to the established authorities to attract prohibition in a proper case. See, for instance, *Church* v. *Inclosure Commissioners* (2); *R.* v. *Local Government Board* (3); *Great Western Railway Co.* v. *Waterford and Limerick Railway Co.* (4); *In re Local Government Board*; *Ex parte Kingstown Commissioners* (5); *Partridge* v. *General Council of Medical Education* (6); *R.* v. *Clerkenwell General Commissioners of Taxes* (7)." (To these I would add the late case of *R.* v. *Electricity Commissioners* (8).) "But in the sense that constitutes a judicial tribunal a Court of justice, one of the kind of Courts in which the Constitution vests the judicial power, the arbitrator is not a 'Court,' and in my view—reasons for which appear in the *Sawmillers' Case* (9) and in the *Boot Employees' Case* (10)—the Legislature cannot convert him into a 'Court' within the meaning of the Judicature provisions of the Constitution. So much of the Arbitration Act as assumes to do so may, in my opinion, be simply disregarded. The President has all necessary powers, and the mere fact that he is called a Court does not affect his powers.

(1) (1885) 10 App. Cas. 229, at p. 240.
(2) (1862) 11 C.B. (N.S.) 664.
(3) (1882) 10 Q.B.D., at p. 321.
(4) (1881) 17 Ch. D. 493.
(5) (1885) 18 L.R. Ir., at p. 514.
(6) (1890) 25 Q.B.D. 90, at p. 96.
(7) (1901) 2 K.B. 879.
(8) (1924) 1 K.B. 171.
(9) (1909) 8 C.L.R. 465.
(10) (1910) 10 C.L.R., at pp. 316 *et seqq.*

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Starke J.

But in respect of the enforcement of an award, the position is entirely different. The award, when made, creates and settles rights, and those rights may be judicially enforced in the manner prescribed by the Legislature, by any recognized Court, and, in my opinion, by no other, because such enforcement, including interpretation, is properly within the judicial power. In this domain the Court is well constituted, and none the less by reason of the wide provisions of sec. 25 of the Act. That section should be read as a procedure section, and it does not except 'rules of law,' as was the case in *Moses* v. *Parker* (1), a circumstance that seems to me to have been the real point of the judgment of the Privy Council. And see *Canadian Pacific Railway Co.* v. *Toronto Corporation* (2). The Legislature, so far from contemplating the Court being free from any rules of law, clearly intends that the rights of the parties shall be fixed by the award, and that those rights are to be enforced by the methods prescribed: see, for instance, secs. 32 and 48. The tribunal which in this case is sought to be prohibited is therefore a Court in the strict sense; and the question is, does prohibition ever lie to it, even when it is proceeding to exceed its jurisdiction. I would here introduce a word of caution to avoid future misapprehension. This is not a question whether, whatever be the law as to the nature of an industrial dispute, or the validity of the enactment of preference, that Court has or has not jurisdiction to entertain an application to enforce an award *de facto* made by the arbitrator, or to decide the validity of any award in whole or in part. That may yet have to be determined. It is simply a question whether, assuming the Court itself to be proceeding without or in excess of jurisdiction, it may be prohibited. . . . On the whole, therefore, I am of opinion that, notwithstanding sec. 31 of the *Commonwealth Conciliation and Arbitration Act*, it is within the competence of this Court under sec. 75 (v.) to grant prohibition to the Arbitration Court in a case where that Court is proceeding to act without jurisdiction" (3). *Alexander's Case* (4) established as a decision the opinion given by my brother *Isaacs* in the *Tramways Case* [*No.* 1] (5) that "in the sense that constitutes a judicial

(1) (1896) A.C. 245.
(2) (1911) A.C. 461.
(3) (1914) 18 C.L.R. at p. 81.
(4) (1918) 25 C.L.R. 434.
(5) (1914) 18 C.L.R. 54.

tribunal a Court of justice, one of the kind . . . in which the Constitution vests the judicial power," the Arbitration Court is not a Court, and that so much of the Arbitration Act as assumes to so treat it might be disregarded. But in none of the judgments is any doubt thrown upon the other proposition so explicitly stated in the opinion of my learned brother. In *Hibble's Case* [*No.* 2] (1) the whole Court, excepting my brother *Isaacs*, who took no part in the case, concurred in granting prohibition to a special tribunal under the Arbitration Act, and it is inconceivable that *Alexander's Case* (2) was overlooked or forgotten by any member of the Court.

Thus the settled law of the Court is that prohibition may issue to the Arbitration Court. *In re Clifford and O'Sullivan* (3) is said to conflict with these decisions. But the body there sought to be prohibited, though called a military Court, " was not a Court in any legal sense." " It was not a Court Martial, that is to say, a tribunal regularly constituted under military law, but a body of military officers entrusted by the commanding officer with the duty of inquiring into certain alleged breaches of his commands . . . and its 'sentences,' if confirmed, derived their force not from the decision of the military Court, but from the authority of the officer commanding His Majesty's forces in the field" (4). Prohibition, it was held, did not lie in such a case, because the officers constituting the military Court did not claim to act as a judicial tribunal in any legal sense. But Viscount *Cave*, with whom Lords *Atkinson* and *Shaw* concurred, said (5) :—" It is true also that in *R.* v. *Local Government Board* (6) *Brett* L.J. expressed the opinion that the Court should not be chary of granting prohibition, and that wherever the Legislature entrusts to any body of persons, other than the superior Courts, the power of imposing an obligation upon individuals, the Court ought to control those persons if they attempt to go beyond the powers given to them by Act of Parliament; but even if this view be accepted, it cannot cover the case of a body of persons to whom no such powers have been entrusted either by Parliament or by the common law. It is unnecessary to decide

(1) (1921) 29 C.L.R., 290.
(2) (1918) 25 C.L.R. 434.
(3) (1921) 2 A.C. 570.
(4) (1921) 2 A.C., at p. 581.
(5) (1921) 2 A.C., at p. 583.
(6) (1882) 10 Q.B.D., at p. 321.

H. C. OF A. 1924.

WATERSIDE WORKERS' FEDERATION OF AUSTRALIA v. GILCHRIST, WATT & SANDERSON LTD.

Starke J.

whether prohibition could in any case be granted against a body improperly setting itself up as a Court with legal authority to try cases and pass judgments; but, however that may be, there is no precedent for the issue of" a "writ against a body which has no statutory or common law authority to do either, and which claims no such authority." A reversal of the whole of the decisions and practice of this Court cannot be justified on the strength of anything decided in *Clifford's Case* (1).

Again, this Court has determined that prohibition can issue to the Arbitration Court after an award has been made—that the Arbitration Court is not then *functus officio* (*Tramways Case* [*No.* 1] (2); *Tramways Case* [*No.* 2] (3); *Builders' Labourers' Case* (4)). In *Clifford's Case* Viscount *Cave* said (5): "A further difficulty is caused to the appellants by the fact that the officers constituting the so-called military Court have long since completed their investigation and reported to the commanding officer, so that nothing remains to be done by them, and a writ of prohibition directed to them would be of no avail (see *In re Poe* (6) and *Chabot* v. *Lord Morpeth* (7))." But, in the case of the Arbitration Court, established under the Federal law, its award is subsisting and operative, and the proceeding in which it issues remains pending in the Court. Any question can be reopened, and any award or order can be varied (sec. 38 (*o*) and sec. 39). Nothing in *Clifford's Case*, however, throws any light upon the proper application of the well-known and long established legal principle mentioned therein to tribunals lawfully established as Courts with arbitral functions and statutory authority. It seems to me that the members of this Court should stand upon its decisions, and upon the law so declared, and that they ought not individually to depart from them. "It is," of course, "impossible," as *Griffith* C.J. said in the *Tramways Case* [*No.* 1] (8), "to maintain as an abstract proposition that the Court is either legally or technically bound by previous decisions. Indeed, it may in a proper case be its duty to disregard them.

(1) (1921) 2 A.C. 570.
(2) (1914) 18 C.L.R. 54.
(3) (1914) 19 C.L.R. 43.
(4) (1914) 18 C.L.R. 224.
(5) (1921) 2 A.C., at p. 584.
(6) (1833) 5 B. & Ad. 681.
(7) (1850) 15 Q.B. 446.
(8) (1914) 18 C.L.R., at p. 58.

But the rule should be applied with great caution, and only when the previous decision is manifestly wrong, as, for instance, if it . . . is contrary to a decision of another Court which this Court is bound to follow; not, I think, upon a mere suggestion that some or all of the members of the later Court might arrive at a different conclusion if the matter were *res integra*. Otherwise there would be grave danger of a want of continuity in the interpretation of the law." And, in any case, we did not, in the cases now before us, assume the responsibility of reopening the former decisions and reconsidering the reasons upon which they were rested.

ISAACS J. As the opinions of those who are in favour of granting an injunction differ as to its extent, the order must be limited to the extent to which those opinions agree.

Order that, other things being equal, the Company be enjoined from (1) *preferring any person whatsoever to returned soldiers and sailors who are members of the Waterside Workers' Federation, subject, however, to the provisions of sec.* 81A *of the Commonwealth Conciliation and Arbitration Act* 1904-1920; (2) *discriminating in favour of any person whatsoever against returned soldiers and sailors who are members of the said Federation, subject, however, to the provisions of the said section. Respondent to pay costs of injunction motion. Order nisi discharged with costs.*

Solicitors for the Waterside Workers' Federation of Australia, *J. B. Moffatt*; *Farlow & Barker.*

Solicitors for Gilchrist, Watt and Sanderson, *H. de Y. Scroggie*; *E. S. Dunhill*; *Blake & Riggall.*

B. L.