[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN COMMONWEALTH SHIPPING BOARD AND ANOTHER } APPLICANTS;

AND

THE FEDERATED SEAMEN'S UNION OF AUSTRALASIA . . . . } RESPONDENT.

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MELBOURNE, *May* 27-29.

SYDNEY, *Aug.* 13.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Industrial Arbitration—Commonwealth Court of Conciliation and Arbitration—Jurisdiction—Deregistration of organization—Powers of Parliament—Ultra vires—Award—Variation—Determination of award—Altering period of award—Case stated—Hypothetical questions—Commonwealth Conciliation and Arbitration Act 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *secs.* 25, 28, 31, 38 (*o*), 60—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.).

Sec. 60 of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 does not purport to confer part of the judicial power of the Commonwealth upon the Commonwealth Court of Conciliation and Arbitration, and is a valid exercise of the legislative power of the Commonwealth, and therefore that Court may order the registration of an organization to be cancelled.

That Court as constituted by the Deputy-President has power to ascertain facts for the purpose of forming its opinion under sec. 60 of the Act as to matters mentioned in that section, but an unreversed decision of a Court exercising judicial power is, as between the parties to that decision, final and binding.

Held, by *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that the period for which the award is to remain in force, as specified in the award under sec. 28 (1) of the Act, forms part of the award for the purposes of variation under sec. 38 (*o*); that the Commonwealth Court of Conciliation and Arbitration has jurisdiction under sec. 28 (3) to entertain an application to alter the period for which it is to remain in force; and that sec. 28 (3) gives power to determine an award wholly.

An application having been made to the Commonwealth Court of Conciliation and Arbitration for the cancellation of the registration of an organization of

employees, the Deputy-President of that Court, before dealing with the application, stated a case for the opinion of the High Court under sec. 31 of the Act asking whether, in the event of the cancellation of the registration of the organization, the present or future members of the union whose registration is cancelled would be or continue to be entitled to the benefit of an award made by that Court to which the union as registered was a party.

Held, by *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that the question was hypothetical, and did not "arise in the proceedings" within the meaning of sec. 31 (2) of the Act, and therefore should not be answered.

CASE STATED.

Application having been made to the Commonwealth Court of Conciliation and Arbitration by the Australian Commonwealth Shipping Board and the Commonwealth Steamship Owners' Association for the cancellation of the registration of the Federated Seamen's Union of Australasia, an organization of employees registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1921, Mr. Deputy-President *Webb* stated, for the opinion of the High Court, a case under sec. 31 (2) of that Act which, as amended, was substantially as follows:—

1. On 1st May 1925 upon the application of the Australian Commonwealth Shipping Board, a respondent to an award of the Commonwealth Court of Conciliation and Arbitration made on 10th March 1924, a rule nisi was granted by Sir *John Quick*, a Deputy-President of the said Court, directed to the Federated Seamen's Union of Australasia calling upon the said Union to show cause why its registration as an organization under the above Act ought not to be cancelled. Such rule nisi was made returnable upon 21st May 1925.

2. Upon the same date a rule nisi in similar terms—directed to the said Union and returnable on the said date—was granted by the said Deputy-President upon the application of the Commonwealth Steamship Owners' Association, a respondent to the said award.

3. Pursuant to a direction from the said Deputy-President each of the said applicants compiled and served upon the said Union a statement setting out in summary form the grounds upon which such applicant intended to ask the said Court to cancel the registration of the said Union.

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4. On 1st May 1925 the applicant the Australian Commonwealth Shipping Board duly took out and served a summons (subsequently amended by my leave), directed to the said Union and returnable on 21st May 1925, for a variation of the said award by curtailing the term thereof, or alternatively for a cancellation of the said award so far as it related to the said applicant.

5. On 5th May 1925 the applicant the Commonwealth Steamship Owners' Association duly took out and thereafter served a summons, directed to the said Union and returnable on 21st May 1925, for a variation of the said award by curtailing the term thereof and for an order that such award should not after the date specified in such summons be binding upon such applicant and its members.

6. On 21st May 1925 the said Union appeared to such rules nisi and summonses, and was represented by its General President, Mr. Walsh, and by consent the hearing of the whole of the said matters was adjourned until 22nd May 1925.

7. On 22nd May 1925 the said matters and each of them came on for hearing before me as a Deputy-President of the above Court in the presence of counsel for each of the said applicants and of the Union's representative, the aforesaid General President.

8. Counsel for the said applicants pressed me to make the said rules nisi absolute and to make the variations asked by the aforesaid summonses, but I announced that, having regard to the nature of the proceedings and of the grounds therefor and to the provisions of sec. 60 of the above Act, I was of opinion that the powers which I was invited to exercise were judicial powers. I further indicated that, particularly in view of the decisions in *Waterside Workers' Federation* v. *J. W. Alexander Ltd.* (1) and *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (2), I was of opinion that neither the Court nor I as Deputy-President thereof was invested with any such judicial power or with any power to grant the orders sought or any of them. I also stated that, in view of the decision in *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (3), I was of opinion that neither the Court nor I as such Deputy-President had any power to vary the period for which the said award is to remain in force as specified in the said award. I also

(1) (1918) 25 C.L.R. 434. (2) (1925) 35 C.L.R. 422.
(3) (1919) 27 C.L.R. 72.

stated that I was of opinion that I had no power to determine such award during such period on the grounds on which such determination was asked or at all. I therefore declined to proceed further with the said matters without securing the opinion of the High Court.

9. I further announced, as the fact is, that, in the event of it being held by the High Court that there was power in the above Court and in me as Deputy-President thereof to cancel the registration of the said Union, the question as to whether such cancellation has or has not the effect of disentitling members of the Union to the benefits of the award would, in my mind, be a material fact to be considered in deciding the manner in which the discretion to grant or refuse such cancellation should be exercised, and that, in view of the dicta in *Waterside Workers' Federation*; *Ex parte Attorney-General of the Commonwealth* (1), the question should be authoritatively decided before I proceeded with the case.

10. I further stated, as the fact is, that doubts have arisen as to whether it is proper for the Court to take into consideration the effect of its decision on industrial peace, and I desired to be directed as to whether it was proper for the Court to take such matters into consideration.

11. Counsel for the applicants thereupon argued (*inter alia*) that if my views were correct the whole of Part V. of the said Act must be invalid, but stated that, in view of my opinions expressed as aforesaid, they desired that a case should be stated for the opinion of the High Court, and the Union representative agreed to such course being taken.

12. Unless I have no power to grant such applications and do not proceed therewith, questions arise as to the power of the Court and of me as Deputy-President thereof to compel the attendance of witnesses, to cause the same to be sworn and to control their conduct while in the witness-box.

14. The following questions which arise in the above proceedings are, in my opinion, questions of law; and I state the same for the opinion of the High Court:—

(1) Has the Commonwealth Court of Conciliation and Arbitration and have I as Deputy-President thereof

(1) (1917) 11 C.A.R. 600, 821.

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power to cancel the registration of the above Union in the proceedings mentioned in pars. 1 and 2 of this case or on any other proper application made on similar grounds?

(2) Is sec. 60 of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 within the legislative power of the Parliament of the Commonwealth?

(3) Is Part V. of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 within the legislative power of the Parliament of the Commonwealth?

(4) Has the said Court and have I as Deputy-President thereof power to ascertain whether the above-mentioned grounds or any of them exist in fact?

(5) Do such grounds or any of them (if found to exist in fact) constitute a valid reason for cancelling the registration of the above Union?

(6) Has the said Court and have I as Deputy-President thereof power for the purpose of ascertaining facts as aforesaid to (i.) compel the attendance of witnesses; (ii.) cause a witness to be sworn; (iii.) compel a witness to answer questions properly put to him?

(7) Does the clause of the above award which prescribes the period for which it is to remain in force form part of the award for purposes of variation within the meaning of sec. 38 (*o*) of the above Act?

(8) Has the said Court and have I as Deputy-President thereof power to (i.) determine the above award as asked; (ii.) alter the period for which the said award is to remain in force?

(9) (a) Am I entitled to take into consideration in deciding the application for cancellation the effect of cancellation upon the operation of the award? (b) In the event of the cancellation of the registration of the above Union and without further order would (i.) present members, (ii.) future members, of the said Union be or continue to be entitled to the benefit of the said award?

(10) When granting or refusing cancellation under sec. 60 of the above Act is it proper for me to take into consideration

the effect on industrial peace of granting or refusing cancellation ?

Latham K.C. (with him *Owen Dixon* K.C. and *Robert Menzies*), for the Commonwealth Steamship Owners' Association.

Owen Dixon K.C. (with him *Robert Menzies*), for the Australian Commonwealth Shipping Board.

Sir Edward Mitchell K.C. (with him *J. H. Moore*), for the Commonwealth intervening.

Foster, for the respondent.

Cur. adv. vult.

May 29.

THE COURT answered the questions submitted as stated in the judgment of *Knox* C.J. hereunder.

Aug. 13.

The following written judgments were delivered :—

KNOX C.J. This was a case stated by a Deputy-President of the Commonwealth Court of Conciliation and Arbitration for the opinion of the High Court on the following questions :—[The questions were set out as above.]

The matter being urgent, the Court on 29th May ordered that the questions be answered as follows :—(1) The Court of Conciliation and Arbitration constituted by the Deputy-President has jurisdiction to hear and determine the application to cancel the registration of the above Union. (2) Yes. (4) The said Court constituted by the Deputy-President has power to ascertain facts for the purpose of forming its opinion under sec. 60 of the Act as to matters mentioned in that section, but any unreversed decision of a Court exercising judicial power is, as between the parties to it, final and binding. (7) Yes. (8) (i.) and (8) (ii.) The Court, constituted by the Deputy-President, has jurisdiction to entertain an application to determine the award or to alter the period for which it is to remain in force. The Court is of opinion that the other questions should not be

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answered. No order was made as to costs. The Court announced that reasons would be given at a later date. I now state my reasons for concurring in the order of the Court.

(1) and (2) I gather from clause 8 of the case stated that these questions are based on the suggestion that sec. 60 of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 purports to confer part of the judicial power of the Commonwealth on the Commonwealth Court of Conciliation and Arbitration, a Court so called, which according to the decision in *Waterside Workers' Federation* v. *J. W. Alexander Ltd.* (1) cannot, consistently with the Constitution, be invested with any part of such judicial power. In my opinion, there is no foundation for the argument that the power to deregister given by sec. 60 of the Act is judicial power. In *Jumbunna Coal Mine, No Liability*, v. *Victorian Coal Miners' Association* (2) it was decided that the grant of power to register organizations was incidental to the exercise of the power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes conferred by sec. 51 (xxxv.) of the Constitution, and it appears to me that the power to deregister stands in no different position. I think, therefore, that sec. 60 of the Act is clearly within the powers of Parliament.

(3) Presumably this question was framed on the assumption that sec. 60 of the Act was invalid. That assumption being unfounded, no answer is necessary.

(4) The Court being required before making an order under sec. 60 of the Act to form an opinion as to the matters mentioned in that section, it follows that it has power to ascertain the facts necessary to enable it to form that opinion. But, if a Court of competent jurisdiction has determined any relevant fact, its decision must be regarded as final and binding as between the parties to the litigation in which that fact was determined.

(5) and (6) There is nothing in the case stated to show that either of these questions has arisen in the proceeding before the Deputy-President. Both questions are, in substance, hypothetical; and neither should, in my opinion, be answered.

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

(2) (1908) 6 C.L.R. 309.

(7) In my opinion, it is clear that the period prescribed in the award during which it is to remain in force is part of the award for purposes of variation within the meaning of sec. 38 of the Act. See sec. 28 (1) of the Act.

(8) (i.) and (8) (ii.) The power to set aside or vary any terms of the award is expressly given by sec. 28 (3) of the Act. It follows that the Court has jurisdiction to entertain an application to determine the award or to alter the period for which it is to remain in force.

(9) (a), (9) (b) and (10) These questions are not shown to have arisen, and in my opinion should not be answered.

ISAACS J. Judgment has already been delivered in this case, but it is, in the circumstances, desirable to state my reasons for the answers to which I subscribe.

A case for the opinion of this Court was stated by Deputy-President *Webb* under sec. 31 of the *Commonwealth Conciliation and Arbitration Act* 1904-1921. That section has so often been the subject of consideration by this Court that it is quite unnecessary to do more than refer to the precise portion of it that directly bears upon this case. It is very necessary to keep in mind, and to act upon, what no doubt would at once be conceded as an abstract proposition, namely, that every Court must take care not to act beyond its jurisdiction. I cannot more forcibly express my reasons or the authorities for this than I did in *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co.* [*No.* 1] (1). Lord *Hewart* C.J. has recently emphasized the same point (*Tindall* v. *Wright* (2)). There is considerable danger of overlooking this elementary principle from a desire to expound the law. But unless the occasion places on the Court the legal duty to do so, any attempt at the requested exposition is an intrusion. On some occasions the unofficial intrusion may be harmless or may be even benevolent. But there are others —and this is one—when expressions of legal opinion, before the person entrusted with confidence and responsibility has made up his mind as to the facts, may not merely help in his final determination, but may influence the evidence submitted and may even unconsciously influence the arbitrator's conclusions of fact. There

(1) (1913) 16 C.L.R. 591, at p. 619. (2) (1922) 127 L.T. 149, at p. 152.

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is every reason, in my view, why in a case of this nature the Court should adopt the attitude (1) of rigidly confining itself to its strict duty and jurisdiction, and (2) within the range of that jurisdiction and not beyond it, of assisting the arbitrator to the utmost of its power in discharging his very difficult and responsible functions. The first thing, therefore, is to inquire as to our jurisdiction in this case.

There are three expressions in sec. 31 which are material for this purpose, namely, (1) "state a case," (2) "upon any question arising" and (3) "a question of law."

It is absolutely settled law both in England and in Australia that the expression "state a case" involves stating facts, that is, the ultimate facts, requiring only the certainty of some point of law applied to those facts to determine either the whole case or some particular stage of it—the stage at which the case is stated (*Merchant Service Guild Case* (1); *Boese* v. *Farleigh Estate Sugar Co.* (2)). The opinion of the Court is then a conclusive judgment binding on the arbitration tribunal (*Federated Engine-Drivers' &c. Association* v. *Broken Hill Pty. Co.* (3) and *Merchant Service Guild Case*). It may be that no remedy exists if the tribunal disregards it, but the legal duty to follow it exists all the same.

The second phrase, "upon any question arising," is of central importance. It is manifestly impossible for this Court or any other Court to "hear and determine" a question so as to give it the character of a conclusive judgment, unless that question "arises" so as necessarily to enter into the legal determination of the matter upon the facts stated. Remote or merely possible relation of the question of law to the facts is not enough to make the question "arise" in a legal sense. To say that it *may* arise is not the same as saying it *does* arise, which is the meaning of "arising." We have only to remember the use of the word "arising" in sec. 75 of the Constitution to see the vital importance of this. If it applied to every matter which *may* arise under the Constitution or under a Commonwealth law, though in fact the Constitution or the statute is irrelevant, the judicial power of this

(1) (1913) 16 C.L.R. 591. (2) (1919) 26 C.L.R. 477.
(3) (1912) 16 C.L.R. 245.

Court would be almost illimitably enlarged and would extend into matters that proved to be purely State jurisdiction. Further, by reflex action the operation of sec. 77 (II.) could be made almost to strip State Courts of all jurisdiction. So with sec. 40A of the *Judiciary Act*. If a question "arises" merely because a possible state of facts may eventually be accepted as the true state of facts, then sec. 40A would, on that mere possibility, denude the Supreme Court of a State of jurisdiction to proceed even to a judgment determining the facts actually to be otherwise. Both those intolerable positions are, however, contrary to express decisions of this Court (*Miller* v. *Haweis* (1); *Troy* v. *Wrigglesworth* (2); *R.* v. *Maryborough Licensing Court* (3); *George Hudson Ltd.* v. *Australian Timber Workers' Union* (4)). Those decisions then establish that "arising" means necessary for the decision on the ascertained or asserted facts of the case. They are in line with English cases laying down the "non-hypothetical rule." It is abundantly established by cases of the highest authority that a Court does not give judgments on hypothetical facts. That is fundamentally not the function of any ordinary Court. Of this Court, resting on a statutory basis (the Constitution), that is so in a special degree, as is seen by the decision in *In re Judiciary and Navigation Acts* (5). But quite apart from that special position, the ordinary jurisdiction of a Court does not extend to answering questions as problems of law dependent on facts yet unascertained. The latest case in this Court so holding is *Luna Park Ltd.* v. *Commonwealth* (6).

For English decisions it is not necessary to do more than refer to three—one in the House of Lords, one in the Privy Council, and one for its very recent and instructive application of the principle in the Court of Appeal. *Glasgow Navigation Co.* v. *Iron Ore Co.* (7) was in the House of Lords. The only material circumstance in the case is that the facts were hypothetical. Lord *Loreburn* L.C. stated the principle in these words (8): "It was not the function of a

(1) (1907) 5 C.L.R. 89.
(2) (1919) 26 C.L.R. 305.
(3) (1919) 27 C.L.R. 249.
(4) (1923) 32 C.L.R. 413.
(5) (1921) 29 C.L.R. 257, particularly at foot of p. 265.
(6) (1923) 32 C.L.R. 596.
(7) (1910) A.C. 293.
(8) (1910) A.C., at p. 294.

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Court of law to advise parties as to what *would be* their rights under a hypothetical state of facts." I italicize the words "would be." In the same volume, in *Williams* v. *O'Keefe* (1), the Judicial Committee (Lord *Loreburn* L.C., Lord *Macnaghten*, Lord *Collins* and Sir *Arthur Wilson*) acted on the same principle in a different state of facts. At the foot of p. 190 it is said: "It is undesirable for this Board to express any opinion upon *an abstract point of law* without any knowledge of the actual facts or any jurisdiction to determine." (The italics are mine.) And lastly I refer to *Stephenson, Blake & Co.* v. *Grant, Legros & Co.*, reported in the *Law Journal* (2) and more fully in the *Reports of Patent Cases* (3). It was an action for infringement of a registered design. The material facts were in dispute. For the purpose of a preliminary decision of points of law, and for that purpose only, admissions of fact were made but the facts in dispute were reserved for the trial. *Eve* J. heard the preliminary argument and gave a decision. The points of law were as to the construction of statutes. On appeal, however, the Court of Appeal were distinctly of opinion that this course was wrong. They simply discharged the order and sent the case for trial in the ordinary way. Lord *Cozens-Hardy* M.R. said:— "We have been considering this case and we all think that this is an appeal which we ought not to entertain. It is not part of the duty of the Court to answer abstract questions of law of the kind raised in the present case." *Warrington* L.J. said, with what seems to me great appositeness to the present case: "The function of the Court is not to decide abstract questions of law, but to *decide questions of law when arising between the parties as the result of a certain state of facts.*"

The third relevant *phrase* is "question of law." That excludes all that is not law. The discretion of the arbitral tribunal under the Act we are considering is entrusted to it alone. The very principle of the constitutional power is that even Parliament shall not itself decide the terms upon which an industrial dispute is to be settled. But Parliament may select its arbitrator, and clothe his opinion with statutory force. The Act is an instance of the

(1) (1910) A.C. 186, at p. 190.
(2) (1917) 86 L.J. Ch. 439.
(3) (1917) 34 R.P.C. 192.

well established parliamentary practice—voluntary in other cases, but compulsory on the Commonwealth Parliament in this—to legislate conditionally on the exercise of discretion by a person in whom the Legislature places confidence. Lord *Selborne* expounded this principle in *R.* v. *Burah* (1). But the discretion is always that of the person entrusted with it by the Legislature (see per Lord *Tenterden* in *R.* v. *Mayor of London* (2) and other cases). Assuming jurisdiction, the authority to form an opinion upon facts is left to the sense of justice of the arbitrator. The question as to whether there is jurisdiction to take a given course or step, or to finally decide, depends on the facts as ascertained up to that point. But short of such ascertainment the matter is within the exclusive authority of the arbitrator or at least is not within the jurisdiction of this Court.

I am now in a position to state categorically my reasons to each question propounded in the case stated.

Question 1.—On the facts so far as they are ascertained, there arises the question of law whether the Arbitration Court has power to enter upon and entertain the application to cancel the registration. But there are no ascertained facts going further. Reading the question, not strictly but liberally and distributively, so as to afford all assistance consistent with jurisdiction, I answer it up to the point of entertaining the application affirmatively.

Question 2.—This clearly arises and is answered in the affirmative. It was argued for the organization that sec. 60 of the Arbitration Act purported to confer strictly judicial power. But that cannot be sustained. The creation and equipment of representative organizations both of employers and employees is an incident to the power in sec. 51 (xxxv.) of the Constitution. They are instruments for the more effective exercise of the power (*Jumbunna Case* (3)). Parliament may adopt them as part of its mechanism. That mechanism can be made and unmade at the will of Parliament. It may be moulded, refashioned, or abolished in any manner indicated. The step of establishing an organization may be retraced at any point and, for any reason

(1) (1878) 3 App. Cas. 889, at p. 906. (2) (1832) 3 B. & Ad. 255, at p. 271.
(3) (1908) 6 C.L.R. 309.

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declared by the Act, by any officer in whom Parliament places confidence for the purpose and to whom it gives the necessary discretion. The function created by sec. 60 is not judicial in the constitutional sense.

Question 3.—Except as to sec. 60 on the ascertained facts on the case, the validity of no other section of Part V. comes into consideration.

Question 4.—The reasons already given as to question 2 apply, and I accordingly join in answering it as the Court has directed.

Question 5.—This question, as indeed appears on the face of it from the words in parentheses, namely, "if found to exist in fact," is purely hypothetical. Properly construed, it asks not what *does* constitute but what *would* constitute a valid reason *if* facts alleged were proved. Obviously the question, even if it be one of law (as to which it is unnecessary to decide), is wholly premature.

Question 6.—This also is premature. No facts exist to raise the question of law in any of its branches.

Question 7.—This distinctly arises, as it touches the jurisdiction to entertain the application of the Shipping Board. In *Waterside Workers' Federation* v. *Commonwealth Steamship Owners' Association* (1) my brother *Rich* and I said: "The settlement, the complete settlement" (by Parliament), "of industrial disputes is limited to 'arbitration,' which consists in judicial examination into the circumstances of each particular case as to *how, and for how long*, ordinary rights should be varied in the interests of industrial peace." I am still of that opinion. Judicial opinions were quoted at pp. 231 and 232, and of these I repeat one for its terseness and the authority in industrial matters of the learned Judge. *Heydon* J. in *Re Saddlers' Award* (2) said: "Part of the award is the time for which it shall endure." Since the *Gas Case* (3) and the *Waterside Workers' Case* (4) Parliament has legislated on the subject, and, as it appears to me, the legislation is on the same basic assumption as to terms as the passage above quoted. By Act No. 31 of 1920 it added to sec. 28 of the Act we are considering what is now sub-sec. 3, and stands as follows: "Notwithstanding

(1) (1920) 28 C.L.R. 209, at p. 229.
(2) (1905) N.S.W.A.R. 329, at p. 330.
(3) (1919) 27 C.L.R. 72.
(4) (1920) 28 C.L.R. 209.

anything contained in this Act, if the Court is satisfied that circumstances have arisen which affect the justice of any terms of an award, the Court may, in the same or another proceeding, set aside or vary any terms so affected." The Court's power is given "notwithstanding *anything* contained in the Act." It is, therefore, not permissible to regard any part of the Act as forbidding the full exercise of the power conferred by the words which follow. The Court must first be "satisfied" that circumstances have arisen which "affect the justice of any terms" of an award. The fact of which the Court is to be satisfied is one which is of the largest import. The injustice of a term may rest in its actual provisions or in its very existence. The term may be one of many, or it may be the sole term of the award. What is true of a term may be true of every term. To set aside every term necessarily means ending the award. If all the terms are no longer consonant with justice, and should individually be set aside, it would be repugnant to the enactment to leave one of them standing. Which one would be selected? To allow that one to operate alone, might cause even greater injustice. The words "any terms" include, therefore, the term of duration as well as the terms of what is to happen during the period specified.

Question 8.—I join in the curial answer to this question for the reasons already stated as to questions 2 and 4.

Question 9.—This to me is clearly hypothetical. I have already shown that questions as to the "power to cancel" are premature, except as to the separate power to *entertain* the application. Question 5 was, therefore, so limited. But question 9 is a stage further on upon the road of conjecture. Even if there be power to cancel (a stage not yet reached for this purpose), the facts justifying it might not be found and, if found, the discretion, apart altogether from the matters mentioned in question 9, might be exercised to refuse the application. So those matters might prove entirely immaterial. The position assumed by the question then is: Supposing the evidence should satisfy the Court that the facts alleged existed or exist; and supposing the Court should think them *sufficient* to warrant the granting of the application; and supposing further the Court in its discretion *would grant* the application unless the circumstances mentioned can be taken into

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account: then, in that case, can the Court consider them? It is a very pronounced instance of hypothesis, and the case of *Stephenson, Blake & Co.* v. *Grant, Legros & Co.* (1) is very closely in point. I therefore join in the majority answer.

Question 10.—This is precisely in the same position as the immediately preceding question.

Higgins J. The learned Deputy-President of the Commonwealth Court of Conciliation has stated a case, as in pursuance of a power conferred on him by sec. 31 of the Act, for our opinion upon ten questions. He states that these questions arise in proceedings before him, and that they are, in his opinion, questions of law. One of the proceedings is an application by the Commonwealth Shipping Board, an employer respondent to an award, for an order that the registration of the Union as an organization be cancelled, under sec. 60, on certain grounds, which are stated. In par. 9, the Deputy-President says: "The question whether such cancellation has or has not the effect of disentitling members of the Union to the benefits of the award would in my mind be a material fact to be considered in deciding the manner in which the discretion to grant or refuse such cancellation should be exercised."

The question 9 (b) is as follows: "In the event of the cancellation of the registration of the above Union and without further order would (i.) present members, (ii.) future members, of the said Union be or continue to be entitled to the benefit of the said award?"

It will be noticed that the Deputy-President does not, according to this par. 9, seek to evade any of the responsibility which is imposed upon him by the Act. Under sec. 60, it is left absolutely to his discretion to order or not to order cancellation; and, under sec. 25, it is his duty to act according to equity, good conscience and the substantial merits of the case. But, with the view of exercising his discretion, the Deputy-President wants to know what the consequences of the order asked would be: the effect of the order, as he says, is material to be considered in exercising his discretion. This Court, by a majority, has refused to answer the question, on the ground that it is "hypothetical." I think that

(1) (1917) 86 L.J. Ch. 439; 34 R.P.C. 192.

this refusal is unwarranted; and that the refusal operates to defeat the intention of Parliament that this High Court shall give to the Court of Conciliation any necessary guidance on matters of law that arise in the proceeding.

Sec. 31 of the Act provides:—"(2) The President may, if he thinks fit, in any proceeding before the Court, *at any stage* and upon such terms as he thinks fit, state a case in writing for the opinion of the High Court upon any question *arising in the proceeding* which in his opinion is a question of law. (3) The High Court *shall hear* and determine the question." Now, sec. 31 does not use the word "hypothetical" at all; and this question is not "hypothetical" in the only relevant sense—that it does not "arise in the proceeding." A question need not be answered, even a question of law, if it does not "arise in the proceeding." If it does not actually arise in the proceeding, but *may* arise; or if it arises only in another proceeding, or may arise: it is to be rejected. But the mere fact that the question begins with the formula "In the event of" or "If" does not show that the question does not arise in the proceeding; the substance of the question has to be considered. To say that this Court will not answer questions because they begin with an "if" or any other word of contingency is to put an unwarranted gloss on this section. In substance the Deputy-President says: "I am asked to cancel the registration of a union; and before taking evidence or applying my mind to the facts I want to know whether cancellation destroys the award or not." The meaning, the effect, of the Act is, of course, a question of law; and the Deputy-President is empowered by sec. 31 to ask the question "at any stage." In ordinary litigation, a point of law is often set down for hearing and disposed of before the trial of the facts. My view is that this High Court has not been given any discretion as to answering or not answering; and that whenever the case stated comes within the terms of sec. 31, it is our duty to give an answer—not necessarily in the words of the question asked, not necessarily without qualifications or limitations, but in such form as will best show the true state of the law and meet the needs expressed by the Deputy-President. Question 9 (b) should, in my opinion, be answered; but, as the majority of my learned colleagues think not, I shall not presume to give an answer.

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I concur with the other members of the Court that questions 5 and 10 should not be answered; for they are not questions of law, but of discretion. It is true that sec. 31 directs an answer to questions which, *in the opinion of the President* (or Deputy-President), are questions of law—and he has stated his opinion; but I obey a ruling of this Court that the questions must be actually, in our opinion, questions of law.

Question 7 asks: "Does the clause of the above award which prescribes the period for which it is to remain in force form part of the award for purposes of variation within the meaning of sec. 38 (*o*)?" As this question is confined to the meaning of sec. 38 (*o*), I should have no hesitation in answering No. But the question of power under sec. 28 is much more difficult, and will be dealt with under question 8.

Question 8 asks (i.): Has the Court power to determine the award as asked? "As asked" refers to the only request to determine the award. This is contained in the summons of the Shipping Board calling on the Union to show cause why the awards should not be varied by substituting in clause 42 for the "first day of March 1926" (the period specified in the award) the words "30th May 1925 or such other date as the Court may think fit, or be set aside and *determined*." The grounds for the application are certain alleged strikes, &c., of the Union. Now, there is not, from first to last in the Act, any express provision whatever for determining an award or setting it aside. The absence of such a provision is very significant in face of the numerous amendments made from time to time by Parliament, and the stormy history of the Act. It may be that Parliament thought the remedies it provided for misconduct, &c., were sufficient. Under sec. 44 there are provisions for penalties; the penalties can be enforced against the Union's property, and, if the property be insufficient, against the members (sec. 47). In sec. 48 there are provisions for mandamus or injunction, fine or imprisonment; and in sec. 50 there is provision for forfeiture of all rights in respect of the funds of the Union. But there was a section inserted in an amending Act passed in 1920, after the decisions in the case of the Gasworkers (1) and in the case of the Waterside

(1) (1919) 27 C.L.R. 72.

Workers (1)—a section evidently directed to relieve the practical difficulties arising from those decisions—the *impasse* created; and it appears now as sec. 28 (3). This, I understand, is regarded as conferring a power to "determine" an award: "Notwithstanding anything contained in this Act, if the Court is satisfied that circumstances have arisen which affect the justice of any terms of an award, the Court may, in the same or another proceeding, set aside or vary *any terms so affected.*" The object of this provision is clear. It had recently been decided—in 1919 and 1920—that the Court of Conciliation had no power, during the period specified in an award, to entertain an application, in the same proceedings or in a new dispute, for an increased minimum wage, even if the cost of living should have increased by 100 per cent. This Court, by a majority, held that this was the result of sec. 28 (1); and hence the expressions "notwithstanding anything contained in this Act," and "in the same or another proceeding." Sec. 28 (3) was a qualification of sec. 28 (1), taking away an obstruction to the powers of the Court of Conciliation, and in no way diminishing the powers conferred by sec. 38 (*o*).

There is nothing about determining or setting aside an award in the sub-section. It is a power, when circumstances arise that affect the justice of any specific terms (e.g., a great rise in the cost of living), to set aside or *vary* those particular terms. It is not a power to set aside the award as a whole; and, *a fortiori*, not a power to set it aside on the ground that the Court thinks it an injustice to the employers, or to some of them, to be under any award. The only answer that I have grasped as to this reasoning is that there may be only one term in an award; or that each and every term of a long award may be treated as unjust. But, under the sub-section, the test of justice would have to be applied to each term separately on its own merits, regard being had to alteration of circumstances as affecting each term. After all, a power to pull down any house in a town as being unfit for human habitation is not the same as a power to pull down the whole town; nor is a power to set aside or vary any term that has ceased to be just the same thing as a power to set aside a whole award on the ground that the Union is

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

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not worthy of any award. A power to vary an award as to any term or terms that have become unjust assumes, from the nature of the case, that the award as to other terms still exists. If, as alleged here, the Union has treated the Shipping Board badly by strikes, &c., in Sydney, how would that justify the Court in determining the whole award as to employers and members of the Union who are peaceably doing their business round Broome or Cairns or Launceston or Eden? In an analogous case in 1908 the Full Court of the time went even further as to this principle than I was prepared to go (*Eastern Extension &c. Co.* v. *Commonwealth* (1)).

I am of opinion that the answer to (8) (i.) is No.

The next question, (8) (ii.), is: Has the Court power to alter the period for which the award is to remain in force? The Court certainly can alter any term of the award for any reason that it thinks proper in pursuance of sec. 38 (*o*); and, if the power to vary applies to the period specified in the award, I am inclined to think that the power could be exercised even by shortening the period so as to make the period end immediately, as is sought here. But does the power to vary apply to varying the period?

Sec. 28 provides:—(1) The award shall be framed in such a manner as to best express the *decision* of the Court . . . and shall subject to any variation ordered by the Court *continue in force for a period to be specified in the award*, not exceeding five years from the date of the award. (2) After the expiration of the period so specified, the award shall, *unless the Court otherwise orders*, continue in force until a new award has been made." The distinction here made between the specified period and the time after the specified period, is very marked. The award, with any variations made as to the matters in dispute under sec. 38 (*o*), is to continue in force for the period specified by the Court in making the award; but *after* the period specified, it is to continue in force until a new award has been made—*unless the Court otherwise orders*. It is true that the period has to be specified in the award document; but this direction would be unnecessary, superfluous, if the period specified were already part of the award. The powers of the Court being purely statutory—non-existent unless given by statute—

(1) (1908) 6 C.L.R. 647.

where is there to be found in the statute any power to increase or decrease the period specified? Under sec. 24 the award "determines the *dispute*"; and under sec. 38 (*o*) the power to vary is limited thus: "as regards every industrial *dispute* of which it has cognizance—(*a*) to hear and determine the *dispute* in manner prescribed . . . (*o*) to vary its orders and awards and to reopen any question." So the power to vary awards contained in sec. 38 (*o*) applies only to the words of the document so far as they settle matters in dispute; and it is not pretended here that the period for continuance of this award was ever in dispute. Counsel for the owners has called attention to some remarks of mine to the same effect in the *Gas Case* (1). These remarks were only obiter, and it will be seen that I gave my decision in that case irrespective of the remarks, as the point had not been argued. Counsel for the owners, naturally, did not in the present case support the remarks, as they tended against his contention; and, for various reasons, the views which I stated in that case have not been discussed. The point is fine; but, I ask, what words in the Act are relied on as giving any express power to the Court to vary—not the terms of the award in the strict sense, but—the period specified in the award for the continuance thereof? We have no right to say that because we think we should give power to vary the period as well as the award the power is to be implied. I see nothing to displace the result which follows the marked change in language between sec. 28 (1) and sec. 28 (2); and my answer to the question is No.

RICH J. I cannot usefully add to the reasons stated in the judgments of the Chief Justice and my brother *Isaacs*.

STARKE J. The President and the Deputy-Presidents of the Arbitration Court have authority under the *Commonwealth Conciliation and Arbitration Act* to state a case in writing for the opinion of the High Court upon any question arising in any proceeding before the Arbitration Court which, in the opinion of the President or his Deputies, is a question of law (see secs. 14 and 31). And

(1) (1919) 27 C.L.R., at p. 89.

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jurisdiction is conferred upon this Court to hear and determine the question. Mr. Deputy-President *Webb*, purporting to act under these provisions, stated a case for this Court containing no less than ten questions. Some of these questions do not arise, or call for decision, in the proceedings before the Arbitration Court, notably questions 3, 6, and 9 (b), and some are not questions of law but questions seeking the advice of this Court as to the manner in which the Deputy-President should exercise the authority confided to him under the Acts, notably questions 5, 9 (a), and 10. This Court has no jurisdiction to hear and determine these questions, and the Deputy-President had no authority to state them. But there are some questions which may properly be, and have already been, determined by this Court. It only remains to state shortly my reasons for concurring in this determination.

Two questions, 1 and 2, state, for the opinion of this Court, the question whether the Arbitration Court has power to cancel the registration of the organization known as the Seamen's Union. The Act (sec. 60) is explicit: "If it appears to the Court, on the application of any organization or person interested or of the Registrar . . . that for any reasons the registration of an organization ought to be cancelled . . . the Court may, if in its discretion it thinks fit, order the registration of the organization to be cancelled, and thereupon it shall be cancelled accordingly." My brother *Higgins*, when he was President of the Arbitration Court, and also my brother *Powers*, who is now President of the Court, have heard applications under this section, and apparently never doubted their authority to cancel the registration of an organization in a proper case (see *Waterside Workers' Federation*; *Ex parte Attorney-General of the Commonwealth* (1); *Australasian Coal &c. Federation*; *Ex parte Metropolitan Coal Co of Sydney* (2)). But Mr. Deputy-President *Webb* "announced that, having regard to the nature of the proceedings and of the grounds therefor and to the provisions of sec. 60 of the Act," he "was of opinion that the powers which" he "was invited to exercise were judicial powers," and that no such powers were or could be conferred upon the Arbitration Court (*Alexander's*

(1) (1917) 11 C.A.R. 600, 821. (2) (1917) 11 C.A.R. 984.

Case (1); *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (2)). The provisions of the Arbitration Act permitting the registration and incorporation of organizations under the Act have been upheld in this Court as a valid exercise of the power conferred by sec. 51, pl. xxxv. and pl. xxxix., of the Constitution (*Jumbunna Case* (3)). But if the Parliament has authority under the arbitration power to permit the registration and incorporation of organizations, then that power necessarily extends to the control and regulation of those organizations, and to the cancellation or suspension of the registration or incorporation in such manner and by such means as Parliament provides. Provisions to that end are in no sense an exercise of the judicial power of the Commonwealth, and the opinion of the Deputy-President is quite untenable.

Another question is whether the Deputy-President has power to ascertain whether the grounds upon which the application for cancellation was made exist in fact. If the Court has authority to hear the application, it follows that it has power to ascertain facts for the purpose of forming its opinion under sec. 60. Some of the grounds suggest that the Union has disregarded orders of the Supreme Court and of this Court, and it is therefore necessary to add that the unreversed decision of a Court exercising judicial power is, as between the parties to it, final and binding.

Question 7 is: Does the clause of the award mentioned in the case which prescribes the period for which it is to remain in force form part of the award for the purposes of variation within the meaning of sec. 38 (*o*) of the Act? My brother *Higgins*, in the *Gas Company's Case* (4), expressed the opinion that it did not. But sec. 28 requires the period for which the award is to continue in force to be specified in the award, and, being specified in the award, it forms part of the award and is subject to variation under sec. 38 (*o*).

Finally, question 8 asks whether the Arbitration Court has power to determine the said award or to alter the period for which it is to remain in force. It is sufficient to refer to the terms of sec. 28 (3) of the Act: "Notwithstanding anything contained in this Act, if the Court is satisfied that circumstances have arisen which

(1) (1918) 25 C.L.R. 434.
(2) (1925) 35 C.L.R. 422.
(3) (1908) 6 C.L.R. 309.
(4) (1919) 27 C.L.R., at p. 89.

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affect the justice of any terms of an award, the Court may, in the same or another proceeding, set aside or vary any terms so affected."

Questions answered as stated in the judgment of Knox C.J.

Solicitors for the applicants, *McLachlan, Westgarth & Co.*, Sydney, by *Blake & Riggall*; *Malleson, Stewart, Stawell & Nankivell.*

Solicitors for the respondent, *Frank Brennan & Co.*

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

B. L.

Foll *Clyne* v *Bowman* 90 FLR 225 | Foll *Clyne* v *Bowman* 33 ACrimR 280 | Cons *National Companies & Securities Commission* v *Falk* (1993) 9 WAR 1 | Appl *Hookham* v *R* (1994) 29 ATR 1 | Cons *R* v *Buckett* (1995) 132 ALR 669 | Cons *R* v *Buckett* (1995) 79 ACrimR 302 | Appl *MIMA* v *Ndege* (1999) 59 ALD 758

Foll *Clyne* v *Bowman* (1987) 11 NSWLR 341 | Foll *Lewis, J.B.P.* 18 ACrimR 243

[HIGH COURT OF AUSTRALIA.]

WALSH . . . . . APPELLANT;
DEFENDANT,

AND

SAINSBURY . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *May* 12-14.

SYDNEY, *Aug.* 17.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Industrial Arbitration—Offence—Urging commission of offence—Strike—Strike in relation to dispute settled by award—Limits of prohibition of strike—Aiding, abetting or counselling—Crimes Act 1914-1915 (*No.* 12 *of* 1914—*No.* 6 *of* 1915), *secs.* 5, 7A—*War Precautions Act Repeal Act* 1920 (*No.* 54 *of* 1920), *sec.* 11—*Commonwealth Conciliation and Arbitration Act* 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *secs.* 4, 6, 6A, 87.

By an award of the Commonwealth Court of Conciliation and Arbitration, to which the Waterside Workers' Federation was a party, it was provided (*inter alia*) that the organization and its members should not join in any total or partial cessation of work, or any refusal to take work, by its members acting