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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

in combination as a means of enforcing compliance with demands made by any other employees or any other union. Certain overseas ships, of which the Australian Commonwealth Shipping Board, a party bound by the award, was the charterer, arrived at Fremantle, and the defendant, who was the President of the Federated Seamen's Union, urged X, a member of the Waterside Workers' Federation and its general secretary, to refuse the wharf labour necessary to unload those ships, with the object of enforcing a demand by the Federated Seamen's Union that Australian rates of wages and conditions of labour should be paid and granted to the crews of all ships chartered by the Shipping Board. On a prosecution of the defendant under sec. 7A of the *Crimes Act* 1914-1915 (enacted by sec. 11 of the *War Precautions Act Repeal Act* 1920) for urging X to commit an offence against a law of the Commonwealth,

Held, by *Knox* C.J., *Rich* and *Starke* JJ. (*Isaacs* and *Higgins* JJ. dissenting), upon the evidence, that it might properly be found that the acts which the defendant urged X to do would, if done by X and the other members of the Waterside Workers' Federation, have been a breach of the above-mentioned provision of the award, and would also have constituted a strike in relation to the dispute settled by that award and consequently a strike within the meaning of sec. 6A of the *Commonwealth Conciliation and Arbitration Act* 1904-1921, and therefore that the defendant might properly be convicted of urging X to commit the offence charged.

Per Isaacs J.: Neither sec. 5 of the *Crimes Act* 1914-1915, which provides that any person who aids, abets, &c., the commission of any offence against that Act or any other Act shall be deemed to have committed that offence, nor sec. 87 of the *Commonwealth Conciliation and Arbitration Act* 1904-1921, which provides that every person who counsels, takes part in or encourages the commission of any offence shall be deemed to have committed that offence, creates an offence unless the principal offence has been committed.

APPEAL from a Court of Petty Sessions of Victoria.

At the Court of Petty Sessions at Melbourne, before a Police Magistrate, Thomas Walsh was prosecuted on two informations by Herbert William Sainsbury, one charging that between 10th December 1924 and 23rd December 1924 he did unlawfully urge one Joseph Hayes Morris, the General Secretary of the Waterside Workers' Federation of Australia and a person bound by an award of the Commonwealth Court of Conciliation and Arbitration, to do something in the nature of a strike contrary to the provisions of the *Crimes Act* 1914-1915; the other charging that between 5th December 1924 and 21st December 1924 he did unlawfully incite one John O'Neill to counsel the Waterside Workers' Federation of Australia, an organization bound by an award of the Commonwealth

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Court of Conciliation and Arbitration, to do something in the nature of a strike contrary to the provisions of the *Crimes Act* 1914-1915. At the close of the evidence the Magistrate convicted the defendant on both charges and fined him £100 on the first charge and £50 on the second charge, with 25 guineas costs in each case.

From those convictions the defendant now appealed to the High Court by way of order nisi to review, and the appeals were consolidated.

The material facts are stated in the judgments hereunder.

Latham K.C. (with him *Foster*), for the appellant. The word "strike" in sec. 6A of the *Commonwealth Conciliation and Arbitration Act* means a strike in relation to an industrial dispute which has been settled by an award of the Commonwealth Court of Conciliation and Arbitration (*Metropolitan Gas Co.* v. *Federated Gas Employees' Industrial Union* (1)). That being so, there is no evidence of any industrial dispute settled by an award to which the strike that Morris was alleged to have been urged to take part in can be said to have had relation. That strike could only have had relation to some dispute between the Federated Seamen's Union and the Australian Commonwealth Shipping Board. A demand by the Waterside Workers' Federation on their employers, who owned ships, that they should pay Australian rates of wages to seamen employed by them would not have been an industrial dispute (*Metropolitan Coal Co. of Sydney* v. *Australian Coal and Shale Employees' Federation* (2)). The provisions in clause 27 (*e*) of the award of 23rd May 1924 (see *Commonwealth Steamship Owners' Association* v. *Waterside Workers' Federation of Australia* (3)) prohibiting strikes were not part of the dispute in respect of which the award was made, so that it cannot be said that the strike in which Morris was urged to take part was in relation to that dispute. If clause 27 (*e*) cannot be supported as a means of protecting the award, then it is invalid. It is consistent with the evidence that the strike which was urged was in support of a dispute between the

(1) (1925) 35 C.L.R. 449.
(2) (1917) 24 C.L.R. 85.
(3) (1924) 19 C.A.R. 353, at p. 383.

Federated Seamen's Union and the Australian Commonwealth Shipping Board as to whether seamen on ships chartered by the Board should be paid Australian rates of wages. That is not an industrial dispute, for the claim by the Union could not have been granted by the Board (*Federated Clothing Trades of the Commonwealth of Australia* v. *Archer* (1)). The only dispute existing at the relevant time was one in Fremantle, and that was not a dispute extending beyond one State (see *Builders' Labourers' Case* (2); *Holyman's Case* (3); *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* (4)). Sec. 6A of the Arbitration Act is *ultra vires*, for it prohibits strikes of all kinds, and *Metropolitan Gas Co.* v. *Federated Gas Employees' Industrial Union* (5) should not be followed. That the section prohibits strikes of all kinds is shown by the omission of the words "on account of any industrial dispute," which are in sec. 6. The words of sec. 6A are in themselves perfectly plain, so that the heading cannot be brought in; and the provision as to strikes is not one-sided, for a corresponding provision is made as to employers in reference to lock-outs. The arguments in support of the limitation of the word "strike" go to the policy of the enactment rather than to its legal interpretation.

Owen Dixon K.C. (with him *Russell Martin*), for the respondent. On the evidence the strike that was urged was a refusal by members of the Waterside Workers' Federation, in combination, to accept employment in connection with the ships at Fremantle for the purpose of assisting the Seamen's Union in their claim in respect of the wages and conditions of labour on ships chartered by the Commonwealth Shipping Board. One object of clause 27 (*e*) of the award of 23rd May 1924 was to prohibit such a strike. The strike was, therefore, in direct relation to that award and, consequently, to the dispute in which the award was made. As to the second information, neither sec. 5 of the *Crimes Act* 1914-1915 nor sec. 87 of the Arbitration Act requires the principal offence to

(1) (1919) 27 C.L.R. 207.
(2) (1914) 18 C.L.R. 224, at pp. 242-244.
(3) (1914) 18 C.L.R. 273.
(4) (1913) 16 C.L.R. 664.
(5) (1925) 35 C.L.R. 449.

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have been committed (*R.* v. *Bentley* (1); *Brousseau* v. *The King* (2)).

[ISAACS J. referred to *Du Cros* v. *Lambourne* (3).]

If sec. 6A applies only to strikes in relation to a dispute extending beyond the limits of any one State, then there was a dispute so extending, for there was a claim for certain terms applicable all over the Commonwealth.

Latham K.C., in reply, referred to *R.* v. *Norfolk County Council* (4).

Cur. adv. vult.

Aug. 17.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. This is an appeal by Thomas Walsh against his conviction for two offences against the *Crimes Act* 1914-1915, sec. 7A, enacted by the *War Precautions Act Repeal Act* 1920, sec. 11, coupled with the Arbitration Act 1904-1920. The evidence was very meagre, and might easily, we think, have been both amplified and clarified. But, piecing together the oral and documentary evidence, the Police Magistrate who convicted Walsh had material before him which justifies the following conclusions or inferences of fact:—(1) The Commonwealth Court of Conciliation and Arbitration made an award on 23rd May 1924, in proceedings between the Commonwealth Steamship Owners and the Waterside Workers' Federation (*Commonwealth Steamship Owners' Association* v. *Waterside Workers' Federation of Australia* (5)). By this award the Federation, its branches and members, including one Joseph Hayes Morris, were bound, as also were various inter-State and oversea shipping companies and the Australian Commonwealth Shipping Board, under the name of the Australian Commonwealth Line of Steamers. (2) After this award came into operation, some controversy arose between the Federated Seamen's Union and the management of the Australian Commonwealth Line of Steamers as to the rates payable to seamen engaged upon ships chartered by the Line and the conditions of employment which

(1) (1923) 1 K.B. 403.
(2) (1917) 56 Can. S.C.R. 22.
(3) (1907) 1 K.B. 40.
(4) (1891) 60 L.J. Q.B. 379, at p. 380.
(5) (1924) 19 C.A.R. 353.

should be observed upon the Australian coast. The Seamen's Union demanded that what were called Australian rates and conditions should be respectively paid and observed on the coast by these ships. (3) The Waterside Workers' Federation also had some controversy with the owners of oversea shipping lines as to the employment of wharf labour through a shipping bureau established by these owners. The Federation demanded the abolition of this bureau. (4) The Seamen's Union and the Waterside Workers' Federation arranged to support each other in these demands. On the one hand, the members of the Federation agreed to refuse to either unload the ships or accept work upon them, unless Australian rates and conditions were conceded to the seamen. They carried out their arrangement, and by this means several ships chartered by the Commonwealth Line were held up. On the other hand, the Seamen's Union was to support the Waterside Workers' Federation in its controversy by inducing seamen to cease work upon or by refusing to supply seamen to ships engaging wharf labour through the bureau. (5) Several vessels chartered by the Commonwealth Shipping Board entered the port of Fremantle in Western Australia towards the end of 1924. The men on these vessels, who were probably not members of the Seamen's Union, had been engaged abroad, and were not entitled, under the agreements entered into with the crews of these ships, to Australian rates and conditions. (6) Walsh, the President of the Seamen's Union, thereupon incited and urged Morris, the General Secretary, and a member, of the Waterside Workers' Federation, to refuse the wharf labour necessary for the purposes of unloading these ships. He also despatched telegrams to one O'Neill, who is described as Branch Secretary of the Seamen's Union, urging him to see Morris and to induce him and his Federation to refuse wharf labour to such ships.

In these circumstances Walsh was charged upon two informations, one alleging that he did unlawfully urge Morris, a person bound by an award of the Arbitration Court, to do something in the nature of a strike: the other that he unlawfully incited O'Neill to counsel the Waterside Workers' Federation, an organization bound by an award of the Arbitration Court, to do something in the nature of a strike. The first information was based upon the *Crimes Act*

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1914-1915, sec. 7A, coupled with sec. 6A of the Arbitration Act, and the second information was based upon the same Act combined with secs. 6A and 87 of the Arbitration Act. The prosecution, in the course of the argument, disclaimed any charge of incitement to commit an offence under sec. 6 of the Arbitration Act, owing to the form in which the respective informations were laid. So the construction of sec. 6A becomes critical. The section prohibits any person bound by an award of the Arbitration Court doing anything in the nature of a strike. But that prohibition must, owing to the constitutional limitation on the power of Parliament, be confined to a strike in relation to some industrial dispute extending beyond the limits of any one State (The Constitution, sec. 51, pl. xxxv.; *Gas Company's Case* (1); *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union* (2)). And, in the *Gas Company's Case* (3), it was said that all that was prohibited by sec. 6A was anything in the nature of a strike "*in relation to the industrial dispute settled by the award.*" Accepting that as the right construction of the section—although, to our minds it takes some liberty with its words—did Walsh incite or urge a strike in relation to the industrial dispute settled by the Waterside Workers' award? No evidence was led to show what the dispute was upon which this award was founded. But the award was in evidence, and clause 27 prescribes, *inter alia*, that "*the Union and each of its branches and its members* . . . shall not . . . join in, order, encourage, and consent to, or directly or indirectly be party or privy to any total or partial cessation of work by members of the Union acting in combination as a means of enforcing compliance with demands made by the Union, or by any of its branches, or by any of its members, *or by other employees or Unions*, on any respondent, or in a total or partial refusal, of members of the Union acting in combination, to accept work on the terms and conditions of the award as a means of enforcing compliance by any respondent with demands made by the Union, or any of its members, not set out in the award or in any variation thereof, *or by other employees or any other Union.*" Now, that award must, in the absence of any evidence

(1) (1925) 35 C.L.R. 449. (2) (1925) 35 C.L.R. 462.
(3) (1925) 35 C.L.R.. at p. 458.

to the contrary, be treated as valid and binding, and possibly sec. 31 of the Arbitration Act prohibits its being challenged or called in question in these proceedings (see *Australian Commonwealth Shipping Board* v. *Federated Seamen's Union* (1); *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (2)).

Thus is established some industrial dispute extending beyond the limits of any one State, of which the Arbitration Court had cognizance (Arbitration Act, sec. 19), and that the provisions of clause 27 of the award were within the ambit of that dispute and the jurisdiction of the Arbitration Court. Still, if the conviction of Walsh upon the first information is to be maintained, it must be established that he urged and incited Morris to do acts which contravened the provisions of clause 27, and that this conduct of Walsh constituted in point of law an incitement to commit an offence, contrary to sec. 6A of the Arbitration Act. It was said that the cessation of or refusal to accept work must relate to work required to be done by a respondent to the award. Even so, it was open, in our opinion, upon the evidence, for the Police Magistrate who tried the case to find that the Commonwealth Line of Steamers did require wharf labour for the purpose of unloading ships chartered by it. Walsh's own statements and acts supply the necessary evidence. He and his Union demanded of the Line that Australian rates and conditions should be paid and observed on the chartered boats. This may be reasonably taken to imply that the Line was not paying and observing such rates and conditions, and was asked to do so. And that is some evidence that the Line was employing the crew and had control and management of the ships. Again, Walsh urged Morris to order the cessation of wharf labour upon, or to refuse wharf labour to, these ships, because the Line was not paying and observing Australian rates and conditions. The request to refuse labour to these ships because of a dispute with the Line is some evidence that the Line required such labour and desired to obtain it. The Magistrate convicted Walsh, and it must be taken that he found all relevant facts of which there was evidence necessary to support his judgment. It is quite true that we do not know whether the chartered ships were or were not demised to the Commonwealth

(1) (1925) 35 C.L.R., at p. 482, *per Higgins* J. (2) (1924) 34 C.L.R. 482, at p. 520.

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Line, or whether they were carrying the charterers' own goods or were general ships, or whether bills of lading were signed by the charterers or their agents or by the masters of the ships. All those questions, however, are matters to be weighed in connection with Walsh's acts and assertions. But if it be a reasonable conclusion, as we think it is, that Walsh was asserting that his Union had a dispute with the Line as to rates and conditions of seamen, and that the Line required wharf labour, and that he was urging Morris to refuse this labour to the Line, why should not a jury or a magistrate or a Judge conclude that the Line required and employed such labour?

Consequently, in our opinion, there is sufficient evidence to justify a finding that the acts which Walsh urged and incited Morris to do would, if done by Morris and the members of his Union, have contravened the provisions of clause 27 of the award. But would such acts if done by Morris and the members of his Union have constituted a strike within the meaning of sec. 6A? It was said that a cessation or a refusal of work by wharf labourers for the purpose of obtaining Australian conditions for seamen would not constitute a strike in connection with any industrial dispute over which the Commonwealth had, or had asserted by its legislation, any power or authority, and *Metropolitan Coal Co. of Sydney* v. *Australian Coal and Shale Employees' Federation* (1) and *Archer's Case* (2) were relied upon. The construction put upon sec. 6A of the Arbitration Act in the *Gas Company's Case* (3) destroys very largely the basis of this argument. The strikes prohibited by sec. 6A are any strikes in relation to the industrial dispute settled by the award. But, as already pointed out, the award itself precludes the denial either of the existence of a dispute within the cognizance of the Arbitration Court or of the validity of clause 27 of that award. It is true that an award cannot transcend the Constitution, but we see nothing in either of the cases cited which confines the constitutional power of Parliament in relation to industrial disputes within the limits assigned by the argument. Therefore, in our opinion, Walsh incited and urged Morris to commit an offence against a law of the Commonwealth, and was rightly convicted of that offence.

(1) (1917) 24 C.L.R. 85. (2) (1919) 27 C.L.R. 207.
(3) (1925) 35 C.L.R. 449.

The information in relation to O'Neill raises still another point. The charge is that Walsh incited and urged O'Neill, not to commit an offence, but to counsel the Waterside Workers' Federation to commit an offence, namely, the offence created by sec. 6A of the Arbitration Act. Do the acts so alleged constitute any offence? That depends upon the construction of sec. 87 of the Arbitration Act. The section enacts that "Every person who . . . is directly or indirectly concerned in the commission of any offence against this Act, or counsels takes part in or encourages the commission of any such offence, shall be deemed to have committed that offence." One view is that sec. 87 relates to participators in the offence—in other words, that it is a section dealing with aiders and abettors of the actual offence; the other, that it covers a whole range of acts, including not only committing, but also counselling and inciting the commission of, offences. But it is unnecessary in this case to determine that question because the evidence on this second charge is very loose and unsatisfactory. Some telegrams from Walsh to O'Neill were put in evidence, but whether O'Neill received them is left in doubt. Some telegrams purporting to be from O'Neill to Walsh in answer to these telegrams were also put in evidence to prove that he did receive them, but, if the transcript of the proceedings be accurate, they were never properly proved. One may suspect that O'Neill did receive the telegrams, but it is the duty of the informant to conduct his case with care and to see that his evidence is properly tendered and regularly proved. On the evidence as it stands, the conviction of Walsh upon the information in relation to O'Neill ought to be set aside and the information dismissed.

ISAACS J. The appellant was summarily convicted by a Police Magistrate upon two charges laid under sec. 7A of the *Crimes Act* 1914-1915. That section was added to the *Crimes Act* by sec. 11 of the *War Precautions Act Repeal Act* 1920. Sec. 7A, so far as material, enacts that "If any person incites to" or "urges . . . the commission of offences against any law of the Commonwealth . . . he shall be guilty of an offence. Penalty: One hundred pounds or imprisonment for twelve months, or both." The word "offences"

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may, by virtue of sec. 23 of the *Acts Interpretation Act* 1901, be read in the singular.

One charge—which will be referred to as the Morris charge—was that the appellant "between the tenth day of December 1924 and the twenty-third day of December 1924 at Melbourne . . . did unlawfully urge on Joseph Hayes Morris the General Secretary of the Waterside Workers' Federation of Australia and a person bound by an award of the Commonwealth Court of Conciliation and Arbitration to do something in the nature of a strike contrary to the provisions of the *Crimes Act* 1914-1915." The other—the O'Neill charge—was that the appellant "between the fifth day of December 1924 and the twenty-first day of December 1924 at Melbourne did unlawfully incite one John O'Neill to counsel the Waterside Workers' Federation of Australia which is an organization bound by an award of the Commonwealth Court of Conciliation and Arbitration to do something in the nature of a strike contrary to the provisions of the *Crimes Act* 1914-1915." The hearing extended over 6th, 7th, 9th and 10th February 1925. The oral evidence covers sixty-five pages of printed matter; the other evidence included an award and twenty documents of importance. The findings of the Police Magistrate are confined to these words: "I think the case so far as O'Neill and Morris are concerned has been proved; therefore, Mr. *Foster*, I convict your client." The penalties inflicted were £100 in the Morris case and £50 in the O'Neill case for reasons assigned. Walsh now seeks a reversal of the conviction on grounds both of law and of fact.

This case, howsoever viewed, is a strong reminder of the necessity of maintaining the supremacy of the law. On the one hand, in a matter so closely concerning the welfare of the Commonwealth as the preservation of industrial peace and the continuance of public services undisturbed by individual strife, it is important to uphold every lawful mandate of the national Parliament directed to that end. On the other hand, it is equally the duty of the Court before exerting its judicial powers to see that it does not step beyond the limits which Parliament has marked out for the interposition of the Courts. Particularly is that so when criminal consequences are involved. It is the law which is to be obeyed, and the law alone is

to be the standard both of action and of inaction. Concerning myself, therefore, with nothing but the ascertainment of the relevant law and its application to the facts as they appear, I examine the position.

The principal questions of law are two, both touching the criminal law. One is whether sec. 5 of the Commonwealth *Crimes Act* and sec. 87 of the Commonwealth Arbitration Act create substantive offences or are ancillary to other sections creating principal offences; the other specially concerns arbitration. Reducing the question to its simplest elements, it amounts to this:—Before getting any award disputants in an industrial dispute are by sec. 6 of the Arbitration Act forbidden under penalty to strike or lock out. That is plainly a necessary provision requiring disputants to bring their quarrels to the Court instead of interrupting public services. But sec. 6 provides for exceptional cases, as where life is in danger or the circumstances otherwise excuse the step. Before prosecution the President must examine into the matter and give in his discretion leave to prosecute. And, if he does, the step may still be justified for good cause independent of the dispute. If he does not, no prosecution can be instituted. But, supposing an award is once made, then, though sec. 6A properly forbids under penalty any strike opposed to that award, does it—and this is the question—also, as a sort of "penalty" for getting an award at all, absolutely forbid strikes about utterly independent and unconnected matters, possibly with independent and distinct employers, without affording, whatever may be the circumstances, the same protection as the strikers would have had if they never had an award at all? In other words, are men to seek an award on one subject with one set of employers, only at the peril of forgoing in case of dispute with other employers on totally different matters the personal protection they would otherwise have had? The decision of the second point in effect determines this case. Decided one way, it means the acquittal of the appellant because, as will be seen, the facts on that basis establish no substantive offence. Decided the other way, the dismissal of the appeal follows with equal certainty because, as it will be shown, the facts on that basis leave no reasonable doubt that a substantive offence existed. But, important

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as that is to the parties immediately concerned, it is manifestly vastly more important to those engaged in industrial occupations in Australia and who either already are parties to a Federal award or may have any intention to seek an award.

The first step is to construe the section under which the informations are laid, and to lay down the essentials of the offence. Sec 7A of the *Crimes Act* creates a new and substantive offence. The mere fact that A "incites to" or "urges" the commission of an offence or offences against a Commonwealth law is enough to constitute A an offender. He may "incite" or "urge" a particular person or generally, but, the "incitement" or the "urging" once proved, the offence is complete. Withdrawal does not obliterate it, though no doubt it may affect the measure of punishment. But to be itself an offence the "incitement" or the "urging" must be to the commission of some "offence." If, for instance, A "incites to" or "urges" a direct breach of sec. 6 or sec. 6A of the Conciliation and Arbitration Act he would be guilty of an offence whether his incitement or urging were adopted or rejected. That is because what he "incited to" or "urged" would, if done, be necessarily an "offence against a law of the Commonwealth."

Judged by this test, the "Morris" information discloses an offence by Walsh provided the facts proved establish the averments. But, judged by this test, does the "O'Neill" information disclose an offence? It avers inciting O'Neill to "counsel" the Waterside Workers' Federation to strike, and, as very properly admitted by Mr. *Dixon*, the "strike" there averred is in contravention of sec. 6A of the Act and not of sec. 6. What "offence" is O'Neill incited to commit according to the information? That brings into consideration the legal force of the word "counsel." To find the offence, if any, we must look at the Commonwealth enactments as to offences where the word "counsel" occurs. They are sec. 5 of the *Crimes Act* 1914-1915 and sec. 87 of the *Commonwealth Conciliation and Arbitration Act*. Sec. 5 says: "Any person who aids, abets, counsels, or procures, or by any act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against this Act or any other Act whether passed before or after the commencement of this Act, shall be

deemed to have committed that offence and shall be punishable accordingly." That section, construed in accordance with a long-continued and consistent judicial and legislative view, is merely an "aiding and abetting" section. It creates no new offence. It does not operate unless and until the "offence"—which may be called, for convenience, the principal offence, though it really is the only substantive offence—has been committed. Then, and then only, does the section operate to make any person falling within the terms of the section a principal participating in that offence. Since this view of sec. 5 is not contested by learned counsel for the respondent, it will be sufficient to refer to the authorities and sources of information mentioned during the argument. They are —*Russell on Crimes*, 7th ed., p. 143 (note); *Archbold's Criminal Law and Practice*, 26th ed., pp. 1456-1457, and particularly the words on p. 1457, "prove that the principal offence was committed, and that the defendant aided, abetted, counselled, or procured its commission"; *Stephen's Digest of Criminal Law*, arts. 40-43 inclusive and the various cases there cited. Art. 43, dealing with the effect of "withdrawal," is specially important here.

The other section, namely, sec. 87, is in slightly different terms. It, however, was pressed as creating a substantive offence. I am not sure, but I think it was urged as partaking of two characters, that is, partly substantive and partly aiding and abetting. I am of opinion it is purely of the latter character. It runs thus: "Every person who, or organization which, is directly or indirectly concerned in the commission of any offence against this Act, or counsels takes part in or encourages the commission of any such offence, shall be deemed to have committed that offence and shall be punishable accordingly." I am unable to discern any distinction between the effect of sec. 5 above quoted and sec. 87 now in hand. In each there is supposed to be an "offence" committed and the section deems any person answering the given description "to have committed that offence," and to be punishable "accordingly," that is, as having actually as a principal committed the offence. It does not create a new and substantive offence. It does not say, for instance, that a person who "counsels" or "encourages" a person to lock out his workmen is deemed to have locked out the

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workmen even though the employer has refused to accept the counsel or yield to the encouragement. No special penalty is provided for the offence of counselling or encouraging apart from the punishment for actually committing the offence. Sec. 88, for example, is different: it does create a new and independent offence. It says: "Any attempt to commit an offence against this Act shall be an offence against this Act punishable as if the offence had been committed." If the offence be committed, all attempts are, of course, merged. The O'Neill information, however, does not state that there had been anything in the nature of a strike of the Waterside Workers' organization. I am not attaching, at this stage, any legal importance to the absence of a material averment from the charge. That has passed without objection and the case has been fought throughout without reference to it. But it is an important circumstance when the facts are considered, because it is clear that neither side turned its attention to directly proving or disproving the fact of an actual strike of the Waterside Workers' organization or, indeed, of members of the organization. Whatever evidence exists appears incidentally, and indeed accidentally, for it occurs *alio intuitu*, and therefore has to be very carefully watched.

The Issues.—The issues in the Morris case are:—(1) Was Morris a person bound by a Commonwealth award? (2) Did Walsh urge Morris to do something in the nature of a strike within the meaning of the word "strike" in sec. 6A of the Conciliation and Arbitration Act? The issues in the O'Neill case are: (1) Did Walsh incite O'Neill to counsel the *organization* of the Waterside Workers (2) that that organization should do something in the nature of a strike within sec. 6A; and (3) did the organization—not individual members of the organization—strike within the meaning of sec. 6A?

"*Strike*" *within Sec.* 6A.—How far does the word "strike" extend for the purpose of sec. 6A? In the recent *Gas Company's Case* (1) the majority of the Court, with the temporary approval of the other members of the Court, held that when sec. 6A is read in conjunction with the rest of the Act it applies only to what was not previously covered by legislation, namely, to striking in relation to an industrial dispute as settled by the award. The unsuccessful

(1) (1925) 35 C.L.R. 449.

argument in that case was that the word "strike" in sec. 6A was unqualified—that it applied to any strike, whether it had reference to the old dispute settled by the award or to an entirely new dispute and whether the new dispute was inter-State or intra-State, or, indeed, whether there was any dispute at all. The majority judgment held that sec. 6A was the counterpart of sec. 6. It was shown that the contrary argument, if acceded to, without any express words requiring the Court so to hold, would indicate that the Act read as a whole, as it must be, made in sec. 6A a provision wholly one-sided: that is, it would punish a party bound by an award for striking against an "outsider" in relation to an extraneous dispute while leaving the outsider entirely free and beyond the possible reach of the Court or the Parliament. That is not only one-sided and therefore unjust—it is absurd on the face of it. So inherently unjust and absurd a rule is not to be attributed to Parliament unless it uses words that are too clear to avoid the accusation.

Then authorities of unquestionable force, including Privy Council decisions, were cited to show that, unless words are quite clear and unambiguous, considerations of uncertainty, friction and confusion in working a system are important, and so even the consequences of alternative possible interpretations. All those considerations, particularly "friction," "confusion" and "consequences" are present here, and, on the authority of such jurists as Lord *Haldane*, Lord *Shaw* and Lord *Parker*, with many others, those considerations are applied in this judgment. Particularly on the subject of "injustice" as a material element in resolving an ambiguity, even when the words are general, there may be added the following: Lord *Cairns* in *Hill* v. *East and West India Dock Co.* (1), Lord *Loreburn* in *Attorney-General* v. *Till* (2) and Lord *Atkinson* in *Perth Gas Co.* v. *Perth Corporation* (3). A very distinct and appcsite application of restricting general words in one section by the effect of other sections in the same Act is found in *Le Leu* v. *Commonwealth* (4). The natural generality of the words "every officer" in sec. 74 of the *Commonwealth Public Service Act*—utterly

(1) (1884) 9 App. Cas. 448, at p. 456.
(2) (1910) A.C. 50, at p. 51.
(3) (1911) A.C. 506, at p. 517.
(4) (1921) 29 C.L.R. 305, at p. 312.

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uncontrolled by anything found in that section—was cut down because another section, namely, sec. 60, was thought inconsistent with the full meaning being given to the word "every" in sec. 74. The judgment referred to "the well-recognized rule of construction which requires that all parts of a statute shall, if possible, be construed so as to be consistent, one with the other." I entirely agree with that. But it is not necessary to have absolute inconsistency. Lord *Herschell* in *Cox* v. *Hakes* (1) said: "It cannot, I think, be denied that, for the purpose of construing any enactment, it is right to look not only at the provision immediately under construction, but at any others found in connection with it, which may throw light upon it, *and afford an indication that general words employed in it were not intended to be applied without some limitation.*" That is, that the Court has to ascertain the true meaning of the actual words used, having regard, among other things, to their associated context. In that case the words considered were "any judgment or order," just as here "a strike." There the section itself did not cut down the force of "any" but the rest of the Act and the existing general law of the Court were considered to see what was the extent of the new law expressed in general terms. The word "any" was cut down accordingly. The present case, for reasons to be presently given, is one which is a stronger example of the necessity of applying the rule than even *Le Leu's Case* (2), and approximates *Cox* v. *Hakes*, in that both cases affect personal security and liberty.

In order properly to ascertain the intention of Parliament in enacting sec. 6A it is necessary to observe the manner in which it was introduced into the Act. It was enacted in 1920 by the amending Act No. 31 of that year. At that time sec. 6 was in operation. That section says that "No person or organization shall, on account of any industrial dispute, do anything in the nature of a lock-out or strike, or continue any lock-out or strike." A penalty of £1,000 as a maximum is provided by the section. The words "on account of" indicate that the direct action prohibited is for the purpose either solely or partly of enforcing the claims or the resistance to the claims made in the dispute. But

(1) (1890) 15 App. Cas. 506, at p. 529. (2) (1921) 29 C.L.R. 305.

Parliament recognized, as an ordinary sense of regard for one's fellow creatures requires, that even industrial peace may be purchased too dearly if criminal consequences are insisted on at the expense of humanitarian considerations. It defined "strike" as including two distinct things: (a) "the total or partial *cessation* of work by employees acting in combination, as a means of enforcing compliance with demands made by them or other employees on employers," and (b) "the total or partial *refusal* of employees, acting in combination, to accept work, if the *refusal* is unreasonable." The "cessation" of work has no qualification as to its being "unreasonable." That is left for sec. 6. Sec. 6 provided in this way for all cases where criminal consequences would be too harsh a measure to apply to industrial disputes.

First of all, sub-sec. 2 says: "No proceeding for any contravention of this section shall be instituted *without the leave of the President.*" Then sub-sec. 3 says: "This section shall not apply to anything proved to have been done *for good cause independent of the industrial dispute,*" and broadly speaking throws the onus on the strikers to establish the "good cause." But the purpose is plain. Many possible instances will suggest themselves on the side of employers as well as of employees where risks and dangers to person or property are too great to make it reasonable to drift until an award is made. Other circumstances, not so emergent but still affording very good cause, may easily be imagined which would impel the President to refuse leave. Confining ourselves for the moment to very emergent circumstances—suppose seamen in dispute and waiting for an award as to many matters including safety provisions, are they to be compelled meanwhile to embark in an unseaworthy ship or one which they reasonably think unseaworthy merely because they are in dispute? It would, in my opinion, be outside the limits of humanity to insist on that. It was suggested during the argument that the *Navigation Act* 1912-1920 was a security against that. But that is no answer or no sufficient answer. In the first place, when we come to sec. 6A, it is a later section. But, apart from that, the *Navigation Act* does not cover all the ground of sec. 6 of the Arbitration Act either as to persons or subjects. It is confined to inter-State and foreign navigation, and the danger I speak of applies

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to all navigation within the arbitral power of the Commonwealth. Again, there are many risks beside unseaworthiness which seamen might reasonably think imminent and great enough to avoid at once. But, after all, the *Navigation Act* does not in any way affect the position with regard to the Arbitration Act, even as to sailors. And, of course, it does not touch the multiple other forms of occupation in the Commonwealth. Miners working in dangerous or unhealthy surroundings, factory operatives exposed to dangerous machinery, builders' labourers working on shaky or treacherous erections, merely because they are seeking better conditions by means of an award, are they necessarily to be made "offenders" if to protect their lives or limbs they cease work in concert? Parliament, in sec. 6, said: "No." Before even being exposed to the jeopardy and expense of a prosecution under legislation cutting down a common law right, the President of the Arbitration Court was interposed. He has to look into the matter and, unless he is satisfied the case is proper for taking criminal proceedings, they are incompetent. And further, even if he assents to the matter proceeding, the accused may still show "good cause" to the Court hearing the case. "Good cause independent of the . . . dispute," as I understand it, means that apart from the mere dispute as to whether or not the demands are reasonably to be granted, it was reasonable not to incur the danger in the meantime—that is to say, that it was reasonable for the employer to lock out the men or for them to cease working for that particular employer.

Now, in 1920, when Parliament came to enact sec. 6A, did it, as contended, desert all these plain dictates of humanity? In my opinion, it did not. First of all, it did not amend sec. 6. That is to say, it left industrial disputes undetermined by award just where they were. But in sec. 6A it dealt with cases already determined by award, that is, where the President (or his deputy) had already interposed and investigated the matter and pronounced his decision. The central principle, so far as this point is concerned, is that in relation to *both sec.* 6 *and sec.* 6A the Legislature requires before punishing a strike or a lock-out that *the President (or deputy) shall have investigated the matter and given his opinion.* That is common to both classes of disputes, the undetermined and the determined.

But, for the respondent in this case, it is urged that there is now a third class: That is to say, if any organization—say, that of the engineers—gets an award in relation, let us assume, to ships, and if afterwards an independent industrial dispute arises between that organization and totally different employers, as in sawmills, factories or railways, then, notwithstanding the most imminent danger, concerted cessation of work involves prosecution under sec. 6A, without the humanitarian safeguards of sec. 6.

For the reasons stated in the *Gas Company's Case* (1), supplemented by what I have here added, I unhesitatingly reject the contention, unless either Parliament expressly says the contrary or a majority of this Court so decides. In my opinion, the only "industrial dispute" in this case in relation to which the "strikes" referred to in the two informations are relevant is the industrial dispute on which the Waterside Workers Federation award was made, namely, the award of 23rd May 1924 (2). If, as here held, sec. 6A is limited to the industrial dispute settled by the award, both as to what is granted and as to what is refused, there is no evidence establishing a breach or even a contemplated breach of the award. And whatever evidence as to the ambit in fact of the industrial dispute so settled might have been given, none was in fact given except what appears from the award itself. There are three ships referred to—the *Clan Munroe*, the *Volumnia* and the *Baron Polwarth*. The owners of those ships are unknown, so far as the evidence is concerned. In any case, it is conceded that the owners, whoever they are, are not parties to the award. Consequently, however wide the prohibition in the award as to strikes, it has no relation to the owners of the ships in question. But it is said that the Commonwealth Line was the charterer of these ships and that, as the Commonwealth Line is a party to the award, a breach of the award is established. But, to arrive at the essential conclusions for this purpose, it is not necessary to dip too deeply into the bowl of conjecture. That probably arises from the circumstance that the true function of sec. 5 of the *Crimes Act* and sec. 87 of the Arbitration Act was not fully regarded at the hearing by either side. A principle that finds deep root in our legal institutions is that, before any person can be lawfully convicted of an offence

(1) (1925) 35 C.L.R. 449. (2) (1924) 19 C.A.R. 353.

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against the criminal law, the tribunal of fact must not act upon a mere balance of probabilities—as it may in civil cases—but it must have no reasonable doubt: it must come to its conclusions morally convinced of the guilt of the accused.

It is an essential factor of Walsh's guilt, if a breach of the award is a necessary element, that the Commonwealth Line itself was the employer or prospective employer of the waterside workers in respect of those three ships or one of them. That is, if the men engaged, the Commonwealth Line would be the employer and would be bound to pay the wages, and would be liable under the award for a breach of it, in respect of these ships. But if so, the Commonwealth Line would have to be, not merely the charterer, but the charterer under terms that would make it for the time the owner of the vessel, when the master and crew would be to all intents its employees. Merely acquiring by charter the right to have goods conveyed by a particular vessel has not that effect. The law may be conveniently found in *Scrutton on Charter Parties*, 11th ed., at pp. 4 *et seqq.* There it is said (p. 5): "The modern tendency is against the construction of a charter as a demise or lease." Reference is also made to a statement by *Vaughan Williams* L.J. in *Herne Bay Steam Boat Co.* v. *Hutton* (1) that "it is very rarely that a charter-party does contain a demise of the ship." There is no trace of the necessary terms. There is not a particle of evidence beyond the reference to "charter" in Walsh's telegrams, and it is quite impossible, in my opinion, for anyone to say that he has no reasonable doubt, having regard to the evidence, that the Commonwealth Line was the employer actual or prospective of the waterside workers in respect of these ships. Would anyone say, for instance, there was no reasonable doubt that the Commonwealth Line was the employer or the prospective employer of the masters and seamen on those vessels? It is inconceivable to me that the Commonwealth Line, if it were or were to be the employer of the seamen, would object to pay them Australian wages. It is quite another matter that the Line would not force the true employers to do so. But, if that reasoning be applied throughout, there is no breach of the award. There being no other respect suggested in which, in relation to the industrial

(1) (1903) 2 K.B. 683, at p. 689.

dispute settled by the award, the strike took place, the whole prosecution in my opinion fails, because sec. 6A has not been shown to be contravened.

If, however, sec. 6A is held, when properly construed, to extend outside the awarded dispute and to apply to other industrial disputes, even to industrial disputes where the organization or person charged under sec. 6A is a stranger to the new dispute, then the evidence completely satisfies the requirement. In saying this, the three telegrams from O'Neill to Walsh are excluded, except for the exclusive purpose for which they were allowed to be put in, namely, to establish the receipt by O'Neill of Walsh's telegrams. There seems to be no escape from the broad fact that the Commonwealth Line was in dispute with the Seamen's Union as to the rates of wages to be paid on any vessels it chartered on any terms, anywhere in Australia in its business. In some way it seems to have been assumed, and the fact is not challenged, that the Commonwealth Line—quite outside its own award with the Waterside Workers' Federation—could in fact secure to the federated seamen Australian conditions in the ships it chartered, and the *Baron Polwarth* is stated to have been chartered, though on what terms is unknown. If, then, as assumed, the Commonwealth Line could in fact, and yet would not, secure those industrial conditions in the course of its business, an industrial dispute arose. That it was an inter-State dispute there can be no manner of doubt. The Commonwealth Line is established by Act No. 3 of 1923 as a Commonwealth body corporate "to carry on the general business of a shipowner, and any business incidental thereto." On mere construction of that Act, it is clear that the business of the Line extends beyond the limits of any one State and all over Australia. The *dispute* with the Commonwealth Line, it is quite clear, extended to all Australia. The *strike*, even if confined to one State, does not affect the extent of the dispute. It follows as a matter of course, as already stated, that, once extend sec. 6A in the way suggested, the appeal must be dismissed with the wider consequences above stated. But still more organizations and members in similar position to the Waterside Workers' Federation in this case could be prosecuted for cessation of work, however reasonable, without the protection.

In my opinion the appeal should be allowed as to both cases.

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HIGGINS J. 1.—As to the conviction of the appellant for unlawfully urging Morris to strike:—Mr. *Latham* has attacked this conviction on many grounds, including the improper reception of evidence, the effect of the evidence, the invalidity of sec. 6A of the Conciliation and Arbitration Act, &c. But there is one ground which, in my opinion, and even if all the evidence for the prosecution was properly admitted, is fully established, and is fatal to the conviction—the ground that the dispute in relation to which Morris was urged to strike (or rather, to persuade others to strike) was, upon the evidence adduced, a dispute in one State only—Western Australia. The dispute, so far as relevant, was with the Federal Government or, more specifically, the Commonwealth Shipping Board which controls the Commonwealth Line of Steamers. Walsh, the President of the Seamen's Union, hoped (as he professes) by strike to get the Government to give Australian conditions to the seamen on the *Volumnia*, the *Clan Monroe*, the *Baron Polwarth* and the *Orvieto*, *all in Fremantle*. Walsh was himself in Fremantle, and had ordered the seamen there to declare these vessels, or some of them, " black " ; and he wanted Morris, as General Secretary of the Waterside Workers' Federation, to induce the members of that Union to do likewise, in aid of the seamen's dispute. But there is not, so far as I can find, the slightest evidence that the same dispute was carried on in other ports or elsewhere in Australia, or affected other owners or other ships in other States, or even that these vessels went to other ports in Australia or that there were any other vessels chartered by this Line in Australia, or trading to or from Australia. We have no right to import into the evidence information supplied by newspapers, without oath and without cross-examination. Apparently, the informant and his advisers contented themselves with the easy task of producing from the telegraph office and the post-office telegrams, &c., which were under Federal Government control, and did not take the trouble of making the case complete against the defendant. By this time those responsible for such prosecutions should know that to get a conviction which can be upheld under these novel sections is a task requiring the greatest care and attention.

2.—As to the conviction for inciting O'Neill to counsel the Waterside workers to strike, the same objection applies as there was no two-State dispute. But I agree also with my brothers the Chief Justice and *Starke* J. that the evidence as to the alleged offence in the case of O'Neill is quite insufficient for a conviction, even if the dispute were extending over more than one State.

This opinion involves, of course, as a matter of law, that sec. 6A of the Conciliation Act must be read as confined to industrial disputes within the meaning of the Act and the Constitution—to industrial disputes extending beyond the limits of any one State. If sec. 6A applied to single-State disputes as well as to two-State disputes, it would be invalid (see *Stemp* v. *Australian Glass Manufacturers Co.* (1)). Assuming that Morris, as member of the Waterside Workers' Federation, was bound by as well as entitled to the benefit of the Federation's award; assuming that Walsh incited him to refuse (in combination with others) to accept work on these vessels at Fremantle, and that the refusal would be unreasonable (see definition of "strike" in sec. 4); assuming that Morris by so refusing would be guilty of "strike" in the ordinary sense: yet he would not be guilty of "strike" in the sense of the Act—for it would not be a strike "in relation to industrial disputes" —industrial disputes as defined by the Act (see heading of Part II.). I rather think that the words of sec. 6 "on account of any industrial dispute," are to be implied in sec. 6A; but even if they are not the heading of Part II. "in relation to industrial disputes" is quite enough. The dispute in aid of which Morris is asked to strike is the dispute of the seamen with their employers. There is no industrial dispute within the Act unless it extend beyond the limits of any one State (sec. 4, "industrial dispute"); and to strike in a single-State dispute, or to incite to such a strike, is not an offence. Even if the award in the Waterside Workers' Case expressly included an order against striking in a single-State dispute, the award, to the extent of that order, would be obviously and utterly invalid. But the words of clause 27 of the award ought to be read as applying only to such demands and disputes as are within the purview of the Act and the Constitution.

(1) (1917) 23 C.L.R. 226.

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No one has been able to point to any evidence whatever that this dispute extended to more than one State; and, in my opinion, the order nisi should be made absolute as to both the convictions.

Rich J.

RICH J. In my opinion Walsh was rightly convicted of inciting and urging Morris to commit an offence against a law of the Commonwealth; but I think his conviction on the O'Neill information should be set aside.

Appeal dismissed so far as relates to conviction for unlawfully urging Morris to do something in the nature of a strike. Appeal allowed so far as relates to conviction for unlawfully inciting O'Neill, and conviction on that charge quashed. Appellant to pay one-half of the costs of the appeal.

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

Solicitor for the respondent, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.