H. C. OF A. 1924-1925.

SCHNELLE v. DENT.

Isaacs J.

In my opinion, on the whole case, the appeal should be allowed and judgment entered for the appellant, without prejudice to any proceeding that may be advised or desired, whether on the taking of the accounts or otherwise, to reopen the transaction on the ground of excessive interest or charges as provided by sec. 1 of the Money-lenders Act.

Appeal dismissed with costs.

Solicitors for the appellant, *W. D. Schrader & McFadden.*

Solicitors for the respondent, *Dawson & Herford.*

B.L.

Dist *Vic Employers Fed v Registrar of Industrial Relations* [1983] 2 VR 395

Cons *R v Sweenwy; Ex p Northwest Exports* (1981) 147 CLR 259

Cons *AMIEU, Re; Ex parte Aberdeen Beef Co* (1993) 67 ALJR 363

Cons *AMIEU, Re; Ex parte Aberdeen Beef Co* (1993) 176 CLR 154

Expl *R v Graziers Association of NSW; Ex parte Aust Workers Union* (1956) 96 CLR 317

Appl *Amalgamated Engineering Union v Metal Trades Employers' Assoc* (1935) 53 CLR 658

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

Cons *Metal Trades Employers Assoc v Amalgamated Engineering Union* (1935) 54 CLR 387

[HIGH COURT OF AUSTRALIA.]

BURWOOD CINEMA LIMITED AND OTHERS APPLICANTS;

AGAINST

THE AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES' ASSOCIATION . . . . . RESPONDENT.

H. C. OF A. 1924-1925.

SYDNEY, *Dec.* 8, 9, 1924; *May* 1, 1925.

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

Industrial Arbitration—Industrial dispute—Demand by organization of employees—Employer not employing members of organization—Employees satisfied with conditions of labour—Constitutional law—Extent of legislative power of Commonwealth—The Constitution (63 & 64 *Vict.* c. 12), *sec.* 51 (XXXV.)—*Commonwealth Conciliation and Arbitration Act* 1904-1920 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *secs.* 4, 29, 40.

Held, by *Isaacs, Powers, Rich* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting), that where a demand as to wages and conditions of labour is made on behalf of its members by an organization, registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1921, of employees in a particular industry upon a number of employers engaged in that industry, the fact that certain of those employers do not employ any members of the organization or that all

the employees of certain of the employers are satisfied with their wages and conditions of labour, does not prevent the dispute constituted by the non-compliance with the demand from being an "industrial dispute," within the meaning of sec. 51 (xxxv.) of the Constitution and of the *Commonwealth Conciliation and Arbitration Act*, to which those employers are parties in respect of whom a binding award may be made by the Commonwealth Court of Conciliation and Arbitration.

Holyman's Case, (1914) 18 C.L.R. 273, in part overruled.

CASE STATED.

On an application made under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1921 by Burwood Cinema Ltd., Walter Firth and William James Lillyman and Rodney David White, trading as Lillyman & White, to which the Australian Theatrical and Amusement Employees' Association was respondent, *Starke* J. stated, for the opinion of the Full Court of the High Court, a case which was substantially as follows :—

1. The Australian Theatrical and Amusement Employees' Association is an organization duly registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1920.

2. The organization about November 1923 served a log of wages and conditions of work upon a considerable number of employers in the theatrical industry in the various States of Australia, including the applicants above named.

3. The said employers did not accede to the claim made in the log, and compulsory conferences of representatives from the organization and from employers (but not including the applicants) were summoned pursuant to sec. 16A of the *Commonwealth Conciliation and Arbitration Act* 1904-1920.

4. No agreement was reached at these conferences and ultimately the claims made in the log—"the dispute," as it is called—were referred to the Arbitration Court pursuant to sec. 19 of the said Act.

5. The dispute so referred to the Arbitration Court duly came on for hearing before that Court, and amongst others the applicants were duly summoned to attend the hearing.

6. An industrial dispute within the meaning of the Constitution and the Arbitration Act in respect of the matters mentioned in the said log did exist between the said organization and its members

H. C. OF A. 1924-1925.

BURWOOD CINEMA LTD. v. AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES' ASSOCIATION.

and a large number of employers in the theatrical industry in the various States of Australia, but the applicants deny that they or their employees are parties to or are in any way concerned in such dispute.

7. On 24th July 1924 the applicants, pursuant to sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*, gave notice of application to this Court for a decision on the question whether the dispute or any part thereof exists, and upon other questions.

8. No award or order affecting the applicants has yet been made by the Arbitration Court in the matter of the dispute so referred into that Court as aforesaid.

9. The aforesaid application to this Court came for hearing before me.

10. The said log of claims was prepared by the executive of the said Association. "At the annual conference of the Association held in August 1923 in Melbourne at which representatives from all over Australia were present the following resolution was passed: 'That the log of wages and conditions that have been drawn up and agreed to by the Federal Council be claimed from the respondents bound by our award and new respondents, asking them to meet us in conference and discuss same, and failing a settlement they be submitted to the Commonwealth Court of Conciliation and Arbitration, and that the General Secretary is hereby authorized to act on behalf of the Association.'" And in September 1923 the Federal Council of the Association passed the following resolution: "That the log of wages and conditions of labour read by the General Secretary are fair and reasonable and are hereby adopted, and that the General Secretary and President are hereby instructed to take all necessary steps to have such log of wages and conditions adopted as the ruling wages and conditions of the industry." The log referred to in these resolutions is that mentioned in par. 2 hereof.

11. The claims put forward in this log were real and genuine in the sense that the executive and representatives of the Association desired the wages and conditions set forth in the log applied throughout the theatrical industry and in particular to the applicants herein, and considered them to be fair and reasonable.

12. The claims in the log were directed and authorized to be made by many members of the Association engaged in the theatrical industry upon the employers in that industry made parties to the proceedings before the Arbitration Court. Further, these claims represented real and genuine claims and grievances on the part of these members of the organization.

13. But the claims in the log did not at any time in fact represent any real or genuine claims or grievances on the part of any member or members of the Association who was or were at the time of the service of the log or thereafter employed by the applicants or any of them in the theatrical industry.

14. Members of the Association who were employed by the applicants or any of them at the time of the service of the log or thereafter were in fact satisfied with the wages paid to them and with their conditions of employment.

15. At the time of the service of the said log and at the time of the references into the Arbitration Court of the dispute, the applicants, Lillyman & White and the New South Wales Olympic Theatres Ltd., had no members of the Association in their employ, but have had since the date of the said service and of the said reference a few members of the said Association in their employ in the theatrical industry.

16. The applicants, in giving employment in the theatrical industry, give preference of employment to persons who are not members of the said Association.

17. The applicants employed persons upon work within some of the classes of work mentioned in the log, such as biograph operators, electricians, cleaners, ushers, ticket-takers, ticket-sellers and door-keepers.

18. At the hearing of the application before me the applicants tendered in evidence certain declarations by their employees setting forth that the said employees had no dispute actual or threatened with their employers and were satisfied with their wages and employment generally.

19. These declarations were prepared by the applicants and procured by them for the purpose of placing the same before the

H. C. OF A. 1924-1925.

BURWOOD CINEMA LTD. v. AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES' ASSOCIATION.

Arbitration Court in support of their allegation that no dispute existed between them and their employees.

20. The said declarations were made freely and voluntarily and without any pressure or improper influence.

The questions for the consideration of and argument before the Full Court are as follows :—

(1) Do the facts stated constitute any evidence fit to be submitted to or considered by me (a) of the inclusion of the applicants or any of them in the dispute referred to the Arbitration Court in manner hereinbefore mentioned; (b) of the applicants or any of them being parties to such dispute; (c) of the jurisdiction of the Arbitration Court to make an award in the said dispute binding the applicants or any of them ?

(2) Can the applicants who had no members of the Association in their employ (a) at the time of the service of the log, (b) at the time of the said reference of the dispute to the Arbitration Court, be parties to or included in the dispute so referred to the said Court ?

(3) Are the declarations referred to in pars. 18, 19 and 20 hereof admissible in evidence ?

Bavin A.-G. for N.S.W. (with him *Ferguson*), for the applicants. The result of the judgments of this Court is that, if an employer had no members of an organization of employees in his employment at the time a log of demands was served on him by the organization, he could not be subject to the jurisdiction of the Commonwealth Court of Conciliation and Arbitration, and that this was so even if, at the time a dispute based on that log was referred into Court, he was employing some members of the organization (*Holyman's Case* (1); *Tramways Case* [*No.* 2] (2)). An industrial dispute within sec. 51 (xxxv.) of the Constitution is a real dispute between real existing persons in the sense that one disputant is claiming something and the other is refusing to grant it. Therefore, a mere possibility or probability of a contractual relationship arising in the future between a member of an organization

(1) (1914) 18 C.L.R. 273, at pp. 280, 288, 304.
(2) (1914) 19 C.L.R. 43.

and an employer is outside the power conferred by sec. 51 (xxxv.). As to those employers whose employees were satisfied with their conditions of employment there could be no industrial dispute (*Holyman's Case* (1); *Tramways Case* [*No.* 2] (2); *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co.* (3)). The declarations referred to in question 3 are admissible as evidence to show the absence of authority on the part of the organization to make the claim on behalf of the employees who made the declarations. [Counsel also referred to *Australian Workers' Union* v. *Pastoralists' Federal Council* (4); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Allen Taylor & Co.* (5); *Builders' Labourers' Case* (6).]

Piddington K.C. (with him *Cantor*), for the respondent. A demand made by an organization of employees upon an employer may be an industrial dispute within the meaning of the Constitution although that employer does not employ any members of the organization. *Holyman's Case* (7) is distinguishable as being a decision merely that an alleged employer was not an employer. The term "industrial disputes" in sec. 51 (xxxv.) of the Constitution covers disputes arising out of a demand by a union that its members shall be free from discrimination against them or shall have preference of employment. The dispute may be one with an employer who does not employ members of the union as to whether he shall employ them (see *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (8); *Federated Saw-mill &c. Employees' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (9); *George Hudson Ltd.* v. *Australian Timber Workers' Union* (10)). The decision in *Colliery Employees' Federation of the Northern District, New South Wales*, v. *Brown* (11), that there is not an industrial dispute unless it exists between employees and their actual employers, is distinguishable because the Act of New South Wales on which that

(1) (1914) 18 C.L.R., at pp. 280, 284, 289, 294.
(2) (1914) 19 C.L.R., at pp. 78, 107, 115, 162.
(3) (1921) 29 C.L.R. 290, at p. 303.
(4) (1917) 23 C.L.R. 22.
(5) (1912) 15 C.L.R. 586.
(6) (1914) 18 C.L.R. 224.
(7) (1914) 18 C.L.R. 273.
(8) (1918-19) 26 C.L.R. 508, at pp. 556, 557.
(9) (1909) 8 C.L.R. 465, at pp. 514, 515.
(10) (1922-23) 32 C.L.R. 413, at p. 453.
(11) (1905) 3 C.L.R. 255.

H. C. OF A. 1924-1925.

BURWOOD CINEMA LTD. v. AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES' ASSOCIATION.

case was decided (No. 59 of 1921, sec. 2) defined "employee" as "person employed in any industry" and there is no such limitation in the Constitution or the Arbitration Act (see *Australian Workers' Union* v. *Pastoralists' Federal Council* (1)). The meaning of the term "industrial disputes" in the Constitution is quite unrestricted, and includes disputes arising out of claims by unions "for the benefit of all their members, employed and unemployed, present and future" (per *Starke* J. in *George Hudson Ltd.* v. *Australian Timber Workers' Union* (2)). In all the cases since 1911 where the matter of actual employment of members of a union by employers has been discussed, it has been in connection with whether the dispute was genuine, not with the constitutional power of the Parliament. As to the admissibility of the declarations in evidence, there is nothing about them to make them admissible as admissions of parties. They are merely secondary evidence.

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

Cur. adv. vult.

May 1, 1925.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. Question 1.—In *Holyman's Case* (3) *Griffith* C.J. and *Barton*, *Gavan Duffy*, *Powers* and *Rich* JJ. concurred in granting a prohibition against the enforcement of an award of the Commonwealth Court of Conciliation and Arbitration, as against James Rowe & Sons Ltd. and the Huon Channel and Peninsula Steamship Co., on the ground that when the award was made there was in fact no dispute between those respondents and their respective employees or any of them. In the matter now before us pars. 13 and 14 of the case stated are in the words following :—"(13) But the claims in the log did not at any time in fact represent any real or genuine claims or grievances on the part of any member or members of the Association who was or were at the time of the service of the log or thereafter employed by the applicants or any of them in the theatrical industry. (14) Members of the Association

(1) (1917) 23 C.L.R., at p. 27. (2) (1922-23) 32 C.L.R., at p. 453.
(3) (1914) 18 C.L.R. 273.

who were employed by the applicants or any of them at the time of the service of the log or thereafter were in fact satisfied with the wages paid to them and with their conditions of employment." We think that the facts stated in these paragraphs cannot be distinguished from those on which the decision of the Court in *Holyman's Case* (1) was founded, and that we should, therefore, follow that decision.

Question 2.—The dispute referred to the Arbitration Court was constituted by the refusal of the employers on whom the log was served to comply with the demands contained in it. These demands were made by the Association on behalf of its members, and it seems to us to follow that applicants who had no members of the Association in their employ at the time of the service of the log cannot be parties to or included in the dispute so referred.

Question 3.—In our opinion the declarations are admissible in evidence for the purpose of establishing that the declarants were satisfied with the terms and conditions of their employment. Satisfaction is a mental condition, and, where the existence of such a condition is, as we think it is in this case, relevant to the subject of inquiry, declarations by the person whose state of mind is in question are not hearsay, but original evidence (see *Taylor on Evidence*, 11th ed., p. 416, par. 606, and p. 399, par. 580). The declarations are not evidence of the truth of the fact stated in them, but the making of the declarations is evidence of the declarants' satisfaction with the terms and conditions of their employment. It appears that some of the persons who made declarations were members of the Association. These declarations are, we think, admissible on another ground, namely, as admissions by parties or by persons who are represented in the litigation by the Association.

ISAACS J. The main question arising in this case is of high importance. It seriously concerns the power of the Commonwealth Arbitration tribunal to settle national industrial disputes efficaciously, completely and justly. The question is whether, upon the true construction of the Constitution and the *Commonwealth Conciliation and Arbitration Act*, an employer who employs no union labour

(1) (1914) 18 C.L.R. 273.

H. C. of A. 1924-1925.

BURWOOD CINEMA LTD. v. AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES' ASSOCIATION.

Isaacs J.

whatever can be a party to an "industrial dispute" with an organization of employees, or whether by simply refusing to employ a single unionist he can, so far as his industrial operations are concerned, entirely exclude the Federal power. It is obvious that if he can maintain the latter position the means do not exist anywhere in Australia of preventing or adequately remedying an admitted evil of the first magnitude—the disruption of industry beyond the limits of a State. If the Commonwealth tribunal, in making awards, is compelled to exclude all employers declining to employ unionists, and thereby to leave them free from Federal arbitration as to wages, hours and other conditions of labour, a formidable obstacle exists to awarding terms which are just to the actual parties and to the public, without giving the employers who discriminate against unionists an unfair advantage over their competitors. That in itself must produce inequalities and naturally cause dissatisfaction and instability, and so contribute materially to the disturbance of industrial peace. It is evident that State laws can never provide a sufficient remedy for such a case. Even if no Federal award were made in relation to an inter-State dispute, no State law—as has been frequently pointed out from this Bench (see, for instance, the *Builders' Labourers' Case* (1))—can deal with an industrial inter-State dispute as an entity, because no State law can operate beyond the State. The divergent State regulations of industry, so far from adjusting national necessities of industries that spread over the continent, accentuate inequalities and militate in a very practical way against that commercial freedom of inter-State trade which the Constitution broadly declares. Where a Federal award has dealt in part with the dispute, the discordance is still more striking. It is therefore apparent that the main question we are called upon to determine vitally affects not merely the present state of Australian relations but also their evolutionary development.

The problem for us, then, is how the Constitution and the Act as they stand require the question as I have stated it to be answered. If the legislative provisions, constitutional and statutory, are so explicit—as I think they are—as to lead at once to a clear jurisdiction in the case before us, we need go no further. But if, as has been

(1) (1914) 18 C.L.R., at pp. 242-247, 254, 255, 263.

contended, those provisions are susceptible of more than one interpretation, then two principles are of the highest value:—The first is that it is now clearly established, since *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1), that the affirmative words of the power contained in sec. 51 (xxxv.) must receive their natural force undiminished by any doctrine of implied prohibition, which largely affected some prior decisions. The other is that stated in *Brunton* v. *Commissioner of Stamp Duties for New South Wales* (2). There Lord *Parker*, in delivering the judgment of the Privy Council, said: "Where in a statute words are used capable of more than one construction the results which would follow the adoption of any particular construction are not without materiality in determining what construction ought to prevail."

It was argued that in *Holyman's Case* (3) this Court had already determined the question adversely to the jurisdiction of the Federal tribunal. If that were true in the strictest sense, the fact remains that this present case arises before a Full Bench of six Justices, the only member of the Court not sitting being my brother *Higgins*, who was then out of Australia. It would still be our duty to consider for ourselves the Constitution and the Act, aided, and even influenced, by the reasoning in the earlier case, but also assisted by the experience of the last ten years and the decisions within that period, to arrive at the true interpretation of the statute law. But, when the report of *Holyman's Case* is carefully examined, it is found that no argument was addressed to the point, and that the relevant provisions of the law received no express exposition. The parties apparently acted on a notion adverse to the jurisdiction now asserted, and that view was not challenged in Court or directly pronounced upon—the view was simply acted on *sub silentio*. Indeed, to a considerable extent attention was directed to ascertaining whether the alleged dispute with the given employers was a real one. That case, then, can hardly be said to be a decision which ought to weigh heavily with this Full Bench, now for the first time directly and pointedly called on to expound the law and to declare it on a subject affecting so extensively the future of the Commonwealth. But, further, it is

(1) (1920) 28 C.L.R. 129. (2) (1913) A.C. 747, at p. 759.
(3) (1914) 18 C.L.R. 273.

H. C. OF A. 1924-1925.

BURWOOD CINEMA LTD. v. AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES' ASSOCIATION.

Isaacs J.

to be noted that only three years after *Holyman's Case* (1) was decided the point was directly raised, and decided by a single Justice in favour of the jurisdiction. In 1917 *Higgins* J. so held in *Australian Workers' Union* v. *Pastoralists' Federal Council* (2), and again in 1919 in *Australian Timber Workers' Union* v. *John Sharp & Sons Ltd.* (3). An opportunity was given in both cases for obtaining the opinion of the Full Court, but was declined. It is apparent that even then *Holyman's Case* was not regarded as a definite and final interpretation of the law on the present point; it was not even cited. On the other hand, eight years have now passed since the first clear and direct decision was given, and that in favour of the jurisdiction; and five years have passed since the second. The Arbitration Court, no doubt, rightly pursued the earlier decision; but we are now, as the Full Bench of the High Court, confronted with the question which of the two lines of judicial decision is the right one to follow. Upon an independent consideration of the Constitution there can be no real doubt that its words are wide enough to include the present case. The term "industrial disputes" cannot by any possibility be limited to disputes between persons standing in the actual present contractual relation of employer and employee. Such a limited construction would in effect exclude demarcation disputes, which are substantially between different classes of employees, and would exclude all disputes by organizations, which *ex natura rerum* can never be employees. It is no answer to say that an organization could represent its members for the purpose of litigating the dispute, for that would still exclude the organization as a party to the dispute *before* litigation, and would exclude as principals all present members of the organization who were not actually employed by the respondents and would further exclude all future members of the organization. In the case of an organization of employers, the doctrine would similarly exclude employers. And, to be consistent, the doctrine based on the notion that an employer cannot be in dispute except with his own employees would as to each employer exclude all employees of other employers at the time of the dispute, even though they were members of the organization and afterwards entered the service of the first mentioned employer.

(1) (1914) 18 C.L.R. 273. (2) (1917) 23 C.L.R. 22.
(3) (1919) 26 C.L.R. 302.

The construction contended for as adverse to the jurisdiction, is therefore impossible, inconsistent and, as applied to the well-known subject of "industrial disputes," absurd. If adopted in this case as a basis of decision and consistently applied, it would reduce Federal arbitration to futility. And, what is very pertinent in this case, it would—unless distinctions are to be created that I am at present unable to draw—run counter to a vast body of decisions much more distinct than *Holyman's Case* (1), and to the principal part of the statute, recognizing relative rights and duties between persons who did not at the time of the dispute stand in contractual relation to each other. The "broad construction" of sec. 51 (xxxv.) is now so firmly established in this Court that it is sufficient simply to state, as instances, the following references: *Merchant Service Guild Case* (2), *Australian Tramway Employees' Association* v. *Prahran and Malvern Tramway Trust* (3), *Federated Municipal &c. Employees' Union of Australia* v. *Melbourne Corporation* (4) and *George Hudson Ltd.* v. *Australian Timber Workers' Union* (5).

Approaching, then, the matter by the light of the three leading principles — namely, those of (1) the *Engineers' Case* (6), (2) *Brunton's Case* (7) and (3) the cases establishing the broad construction of pl. xxxv.—it is clear that that placitum embraces whatever at a given moment answers the essential conception of an "industrial dispute" in 1900. Industry itself is constantly changing: scientific, social and other causes bring about great transformations. Disputes will necessarily vary accordingly. Causes, forms of manifestation and subjects of difference will change; organization may become more or less complete, or may become more or less detailed; but, so long as the fundamental concept of "industrial dispute" is present, none of these evolutionary modifications prevent the matter from being within the ambit of power. Indeed, it is of the essence of a Constitution that it is intended by its generality to adapt itself to the growth of the nation. "Industrial disputes" certainly include conflicts of greater or less intensity among those

(1) (1914) 18 C.L.R. 273.
(2) (1912) 15 C.L.R., at pp. 607 et seqq.
(3) (1913) 17 C.L.R. 680, at pp. 700, 701.
(4) (1918-19) 26 C.L.R., at pp. 550, 587, 588.
(5) (1922-23) 32 C.L.R., at p. 454.
(6) (1920) 28 C.L.R. 129.
(7) (1913) A.C. 747.

H. C. OF A. 1924-1925.

BURWOOD CINEMA LTD. v. AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES' ASSOCIATION.

Isaacs J.

co-operating in a given industry with reference to the conditions of their co-operation. " Co-operation " in the industry is not from the standpoint of the Constitution restricted to actual contractual relations. Every employer that enters the competitive field of the industry is co-operating to carry it on, in the broader sense in which the people of the Commonwealth are interested. That sense is national service and supply, the interruption of which is the evil dealt with in pl. xxxv. So also is every employee a co-operator in the same sense, for his labour is not to be looked on as a mere commodity, as if he were a machine, animate like the horse or inanimate like a steam-engine. The nexus of all the co-operators is the industry itself, irrespective of how its ownership or its operative arrangements are subdivided. If we confine our attention for the moment to disputes between employers and employed, we have to visualize the disputants respectively as portions of groups representing capital and labour. " Employer " and " employee " are terms which denote, not individuals contracting with each other whose industrial relations arise out of and are limited by their specific contracts, but membership of a group with which the individual has indentified himself in relation to a given industry. The concept has grown out of the necessity for collective bargaining and collective action, involving organization more or less formal and more or less complete. Long before 1900 the identification of the individual with the group was thoroughly established. In 1892 in Dr. Garran's Report on New South Wales it was stated, that " the federation of labour and the counter-federation of employers is the characteristic feature of the labour question in the present epoch." Without such identification there never can be effective action to meet the difficulties of modern industrial life. Without troubling about a mass of intermediate opinion, I may at once quote one paragraph from the unanimous interim report, dated 8th March 1917, of the Reconstruction Committee on Joint Standing Industrial Councils presented to Mr. Lloyd George when Prime Minister (Cd. 8606). That Committee was under the presidency of the Right Honourable J. H. Whitley M.P., and it included many other eminent and representative men. Par. 23 is as follows :—" It may be desirable to state here our considered opinion that an essential condition of

securing a permanent improvement in the relations between employers and employed is that there should be adequate organization on the part of both employers and work-people. The proposals outlined for joint co-operation throughout the several industries depend for their ultimate success upon there being such organization on both sides; and such organization is necessary also to provide means whereby the arrangements and agreements made for the industry may be effectively carried out." Why is "organization" an "essential condition"? Plainly, because an "industry or some selected branch of it" is for the purpose regarded as one entity. It is impossible to isolate the competitors and segregate their industrial interests. Every competitor acts and interacts, and more or less affects the rest of those on the same field. If, then, sec. 51 (xxxv.) of the Australian Constitution is to be faithfully applied in the broad sense already adopted, so as to be effective to cope with the destructive evil of industrial warfare—an evil which, if unchecked, would threaten all national welfare—it must necessarily be competent to provide by conciliation and arbitration for the "essential condition" referred to. That is to say, while the "common rule" as one extreme is excluded, so a limitation to individual contract as the other extreme is also excluded. Employers who voluntarily enter and compete on the same field of industry and thereby affect the industrial relations of all others on that field—unionist and non-unionist—cannot escape the result of their voluntary action by merely excluding union labour. So far as the Constitution is concerned, the objection to the jurisdiction fails.

It remains to be seen whether Parliament has framed its statute in sufficiently wide terms to meet, or in such restricted terms as to fail to meet, the "essential condition" of the Whitley Report. It is difficult to see any standing-ground for the parliamentary limitation suggested. The definition of "industrial dispute" (sec. 4) is "an industrial dispute extending beyond the limits of any one State," which is as wide as the Constitution. It includes any dispute as to "industrial matters," and the expression "industrial matters" is expressly stated to "include," among other subjects of difference, "the employment, preferential employment, . . . or non-employment of . . . persons, . . . being or not being

H. C. OF A. 1924-1925.

BURWOOD CINEMA LTD. v. AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES' ASSOCIATION.

Isaacs J.

members of any organization, association, or body." "Industry" includes the avocations of employers, apart from those of employees, and also, and independently, the avocations of employees apart from those of employers. Sec. 29 declares that the award of the Court shall be binding not merely on the parties to the dispute, successors and members of organizations bound by the award, but also, if the Court thinks fit, on organizations and persons as a common rule. The latter provision, though ineffectual in law, is important as to intention. It indicates the desire of Parliament to cover the whole field of arbitral power. Sec. 40, dealing specifically with "preference," evidences the same intention.

The result is that, if *Holyman's Case* (1) can be regarded as a decision negativing jurisdiction in this case, it cannot be supported and should to that extent be regarded as overruled and the questions should be answered in the affirmative.

As to question 3, technically the facts referred to are admissible, but only as to the reality of the dispute, and, in view of the other facts, are negligible.

POWERS J. In this case the individual members of the union employed at the times mentioned by the respondents to the proceedings in the Arbitration Court who are the applicants here, were not in dispute with their employers, those respondents, but the union as a union *on behalf of all its members*, and not on behalf of the few members then and at present employed by those respondents, made a general demand on such respondents, and on a very large number of other respondents employing members of the union in the theatrical industry, for rates and conditions of work for all members of the union employed by them at any time during the award, and a special demand for preference of employment to its members. The employers, the respondents in question, refused to comply with the demands made for rates and conditions of work or any of them or for preference for the present or future members of the union. The union insisted upon its claims, and pressed for an award of the Arbitration Court binding on the respondents refusing the demand. The position is that the union

(1) (1914) 18 C.L.R. 273.

insists (*inter alia*) that "any of the respondents who employs, now or hereafter, any of its members in the theatrical industry shall be forbidden to pay him or her less than the rates or grant conditions of work other than set out in the log of claims." That is the dispute. That dispute has not been settled by the union.

The question to be decided by the Court in this case really is whether the union can have a dispute which can be dealt with by the Commonwealth Court of Conciliation and Arbitration with employers engaged in an industry, (1) even if they do not, at the time of service of demands or at the date of the reference of the dispute into the Arbitration Court, employ any members of the union making the demand, or (2) if they do employ members and the members for the time being employed are not dissatisfied with their conditions. That must, I think, depend on whether the disputes to be settled by the Court are the disputes between individual employees and their employers, or between employers in an industry and the union on behalf of all its present and future members, if and when employed by the respondents, during the term of the award.

The decision of the Full Court in *Holyman's Case* in 1914 (1) was referred to, in which decision I concurred. That decision was in accordance with the principles previously laid down by a majority of this Court on the assumption that the individual members for the time being employed—not the union—must be in actual dispute with the employer at the time an award is made. It is contended that this Court should follow that decision and answer the question submitted in the negative. I have, as a Judge of the Arbitration Court, followed the decision in *Holyman's Case*, but the question of law now before this Full Bench (for the first time) must, in my opinion, be answered in accordance with the opinion of the majority of the Court, taking into consideration the Constitution, the Act and all decisions of this Court since *Holyman's Case* was decided. Since *Holyman's Case* the Act has been amended and this Court has, as a Full Court, decided, as a constitutional question, that a binding award can be made where no dispute actually exists—if there is a probable or impending dispute. This Court has also decided other questions which are,

(1) (1914) 18 C.L.R. 273.

H. C. OF A. 1924-1925.

BURWOOD CINEMA LTD. v. AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES' ASSOCIATION.

Powers J.

in my opinion, inconsistent with the decision in *Holyman's Case* (1). I have had the privilege of reading what my brother *Isaacs* intends to say about *Holyman's Case* in his judgment, and his reasons why this Full Bench ought to decide the question of law now raised in accordance with the Constitution and the Act, and should not answer it in the negative simply on the decision in *Holyman's Case*; and I agree with those reasons. Since the decision given by this Court in *Holyman's Case*, my brother *Higgins* decided—as a High Court Judge—in *Australian Workers' Union* v. *Pastoralists' Federal Council* in 1917 (2), that there is nothing in the Constitution or in the Act forbidding the finding of a dispute between a union and employers even if no members of the union are actually in the employment of the respondents; and, even if this view be incorrect, there is a probable dispute if members of the union would probably apply to the respondents for employment. Those decisions, I understand, caused the submission of the question to be decided in this case to the Full Bench of this Court for its opinion.

The question, therefore, before this Court for consideration and decision is as to whether a union can have a dispute or a probable dispute (with which the Commonwealth Court of Conciliation and Arbitration can deal—make a binding award) with employers who do not, at the time of the demand or at the time the reference of the dispute into Court is made, employ any members of the union at all, or who only employ at the times mentioned members who are not dissatisfied with the rates and conditions granted by their employers. I think it necessary to turn to the Act to see whether such a dispute can arise between a union and persons engaged in the union's industry not at the time employing members at all or, if they are employing them, whose employees are not dissatisfied with the rates and conditions granted to them. The Act was passed to allow collective bargaining and settlement of disputes, and not individual bargaining and settlement of disputes between employers and employees. As my brother *Higgins* put it in the case of *Australian Workers' Union* v. *Pastoralists' Federal Council* (3), "the Act recognizes unions, and makes unionism

(1) (1914) 18 C.L.R. 273. (2) (1917) 23 C.L.R. 22.
(3) (1917) 23 C.L.R., at p. 26.

a part of its scheme. One of the 'chief objects' of the Act is 'to facilitate and encourage the organization of representative bodies of employees' (sec. 2 (VI.)); and Part V. of the Act is specially devoted to the constitution of organizations for the purposes of the Act. No plaint can be submitted to the Court except by an organization (sec. 19*b*); it is the organization that is empowered, in the case of a plaint, to make any agreement for the settlement of the dispute (sec. 24). The organization cannot be treated as a mere agent, or as the nominal claimant (as in the case of the public officer of a bank); for it is bound by the award, with all its members; it is liable in its funds for breaches of the award (secs. 29, 38 (*c*) (*d*) (*e*)). The remedy of arbitration being substituted for the remedy of strike, the organization, as well as the actual employees, is made liable to a penalty for anything in the nature of a strike (sec. 6)."

The Act provides that before the dispute is submitted to the Court the Registrar may require the union to show that the consent of the organization to the submission has been given by resolution of *a general meeting of members convened* in manner prescribed for the consideration of the question, or as a result of a poll of the members of the organization on the question taken in manner prescribed (sec. 22 (1) (*b*)); but, once there is a dispute between the union and employers and the union (as a registered organization) files a plaint and the Court has cognizance of it, the union is, in my opinion, a party, and the only party, that can settle the dispute or any part of it with the employers (the respondents). The dispute having arisen between the union in this case and the present applicants, if the union can have a dispute under the Act with employers who do not employ members of the union or members who do not join in the claim of the union, the union can settle it, and the union only.

In this claim the demands include one for preference of employment of members of the union. Clause 16 of the special case is as follows: "The applicants, in giving employment in the theatrical industry, give preference of employment to persons who are not members of the said Association." Special authority is given by the Act to the Court to grant preference of employment to a claimant union (sec. 40). Such claims are only made when employers refuse to employ members of the union or only employ a very few members,

H. C. OF A. 1924-1925.

BURWOOD CINEMA LTD. v. AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES' ASSOCIATION.

Powers J.

preferring to employ persons generally who are not entitled to the benefits of an award of the Court and can be employed at lower rates. In the interests of all members the union claims that its members should be granted preference of employment, other things being equal, as members of a union registered under the Act, against non-unionists. Claims for preference of employment are common subjects of industrial disputes, and have been so for very many years, sometimes against employment of coloured labour; and a union can, in my opinion, have a dispute with employers who refuse to employ members of a registered organization and prefer to employ non-unionists or coloured labour. Whether the Court should grant the claim in any particular case is another question altogether. There are also industrial disputes about rates and conditions to be paid for seasonal work, such as shearing, fruit-picking, sugar culture and manufacture and similar seasonal work. These disputes arise before members of the union start the season's work, and therefore before the actual relationship of employers and employees exists. Such industrial disputes have been and can legally, in my opinion, be settled by awards of the Court, although the members of the union are not at the time employees. Disputes arise as they did lately, when the seamen endeavoured to obtain claims by direct action; the seamen and all other employees were legally discharged by the employers and the vessels were put out of commission in all important ports of the Commonwealth. In such a case there were not any employers and employees, but it was an industrial dispute which the Court could, in my opinion, settle. The dispute as to preference in *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (1) was in respect of a claim by the union for preference against the overseas shipowners, because they would not employ its members but employed "loyalists" and others registered at a bureau. The Arbitration Court made an award as to preference and the respondents applied to this Court for an order of prohibition against the Arbitration Court. This Court refused prohibition and issued an injunction against the respondents who were disobeying the award.

The answer to question 2 submitted should be in the affirmative. It is not necessary to answer the other questions.

(1) (1924) 34 C.L.R. 482.

RICH J. The case stated by *Starke* J. raises two questions: the first relates to the admissibility of evidence, and the second to the jurisdiction of the Court of Arbitration. The first question is only important in the event of a negative answer being given to the second. As I am of opinion (for reasons to be presently stated) that the second question should be answered in the affirmative, I shall only say as to the first that theoretically the evidence referred to is admissible on the issue of reality, though, so far as I can see, its effect would be infinitesimal. As to the second question, this depends on the correct interpretation of the Constitution and the statute. The Arbitration Court is limited in the first place by the statute, but the statute, both by its general scheme and its specific language, appears to me to deal with industrial disputes as coextensive with industrial disputes in the Constitution. For convenience of treatment organizations are introduced, but they are introduced only for convenience and effective treatment and not for curtailing the area upon which the Court can act. I cannot see anything in the statute which would justify me in accepting the argument contended for by the applicants in the summons that Parliament intended employers in their position to be immune.

With respect to the Constitution there is, as has been more than once stated, no qualification of the words "industrial disputes." Unless, therefore, there is an inherent restriction in those words qualifying the arguments of the applicants, the argument must fail. We have been pressed, on behalf of the applicants, with *Holyman's Case* (1), or rather with that part of the case by which the Court made absolute the order for prohibition with respect to respondents whose employees stated they were not in dispute with their employers. I was one of the members of the Court, and joined in that decision. I have carefully considered it for the purposes of this case, and, so far as that part of it which is relevant to this case is concerned, I am satisfied that it should not be followed. I cannot find in the report of the case any trace of an argument as to the construction either of the Act or of the Constitution. There was, no doubt, an assumption of law and then a careful scrutiny of the facts. But, as there was no such scrutiny of the law, I am satisfied

(1) (1914) 18 C.L.R. 273.

H. C. OF A. 1924-1925.

BURWOOD CINEMA LTD. v. AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES' ASSOCIATION.

Rich J.

from the examination of the law that has now been required that the relevant decision in *Holyman's Case* (1) was given under a misconception. I am quite clear that the assumption then made cannot be sustained. Since that decision was given, the nature of industrial disputes has been several times closely investigated and the general construction of the Constitution as a whole has been better defined. In my opinion the relevant part of *Holyman's Case* should be formally considered as overruled and the second question in the present case answered in the affirmative.

STARKE J. Industrial disputes are, as a rule, collective disputes. They may arise between two sets of workmen, as in the case of demarcation or discipline disputes. Or, as is more common, between employers or a class of employers on the one side and a large aggregation of workmen on the other. In the latter case the dispute often relates to the terms on which future employment shall be given, not only to men then employed, but to all men who may subsequently be engaged in the trade or calling in which the dispute has arisen. Thus the dispute may be whether preference shall be given by those employing a certain class of labour to the members, present and future, of some association of employees, or whether all members of that association, present and future, shall, if employed, have the benefit of better terms and conditions, and so forth. It is clear, therefore, that the existence of an industrial dispute does not depend upon the actual relation of employer and employee or of master and servant, between the participators in the dispute. It is equally clear that absolute definiteness of the individuals engaged in the dispute cannot be essential, for in industrial disputes, claims and demands are usually made for the benefit of "the ever changing body of workmen that constitute the trade" (see *Hudson's Case* (2)). An industrial dispute is constituted, both historically and in point of fact, where a difference exists between workmen themselves, or perhaps between employers themselves, or between employers or classes of employers, and workmen engaged in some common industry or calling, concerning industrial conditions affecting a class so engaged and not merely affecting

(1) (1914) 18 C.L.R. 273.

(2) (1922-23) 32 C.L.R., at p. 454.

individual and definite members thereof. An industrial relationship, and not a contractual relationship, is all that is necessary to constitute an industrial dispute. The nexus is to be found in the industry or in the calling or avocation in which the participators are engaged. This description does not, perhaps, exhaust the constitutional power of the Commonwealth in relation to industrial disputes (cf. *Commonwealth Conciliation and Arbitration Act* 1904-1920, sec. 4—" industrial dispute "), but it covers most of the field and is a sufficient guide for the determination of the main questions stated in this case. Associations of large bodies of men are, however, defective in legal personality, and it is expedient, at least for the purposes of legal representation, and probably also for the purpose of " collective bargaining," that they should be organized in some form.

All this was recognized, in my opinion, by this Court in the *Jumbunna Coal Mine, No Liability*, v. *Victorian Coal Miners' Association* (1), which upheld the provisions of the Arbitration Act relating to the incorporation of associations of workmen, and also of employers, or organizations, as they are termed in the Act. Such organizations, to my mind, " represent and stand in the place of their members " and must, to be effective, have " right and authority to act on their account " (see *Encyclopædia Britannica*, 11th ed., *sub* " Representation ").

But this Court has not yet, I think, adopted so broad a view. A series of cases suggests that this principle of representation does not enable an organization itself to raise an industrial dispute. The acts of the individuals constituting the organization were, in each case, examined in detail for the purpose of determining whether the workmen themselves, before the institution of proceedings in the Arbitration Court, made common cause, common demands, and took concerted action in support of their demands (see *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Pty. Co.* (2); *Woodworkers' Case* (3); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (4); *Merchant Service Guild Case* (5)). And in *Holyman's Case* (6), in which an

(1) (1907-08) 6 C.L.R. 309.
(2) (1909) 8 C.L.R. 419, at p. 432.
(3) (1909) 8 C.L.R., at p. 488.
(4) (1910) 11 C.L.R. 1, at p. 40.
(5) (1912) 15 C.L.R., at p. 594.
(6) (1914) 18 C.L.R. 273.

H. C. OF A. 1924-1925.

BURWOOD CINEMA LTD. v. AUSTRALIAN THEATRICAL AND AMUSEMENT EMPLOYEES' ASSOCIATION.

Starke J.

organization had submitted an industrial dispute to the Arbitration Court, this Court (*Griffith* C.J., *Barton*, *Gavan Duffy*, *Powers* and *Rich* JJ.) prohibited the making of an award against employers whose employees had signed a statement that they had no dispute with their employers and were satisfied with their conditions of labour. Again, in the *Tramways Case* [*No.* 2] (1), in which an organization had submitted or purported to submit an industrial dispute to the Arbitration Court, my brothers *Isaacs* and *Powers* were of opinion that that Court had no jurisdiction to make an award against employers in respect of some employees who had abandoned or withdrawn from the dispute. Thus, *Isaacs* J. said at p. 107: "I am forced to the conclusion that, as regards these 39 men, the dispute ended when it was announced *by their* agents in open Court that they no longer desired to proceed—in other words, that they abandoned the dispute" (and see also p. 108). Again, *Powers* J. said (2):—"As to 65 Brisbane members who withdrew from the plaint: this Court has held in *Holyman's Case* (3) that parties to a dispute may, after plaint filed, settle the dispute without the Court's consent or award, or withdraw from the proceedings. I hold that the members referred to made a claim which they did not intend to persist in, because when it was refused they attempted to resign as members, to withdraw from the plaint and to prevent the claim being pressed. *There was not, therefore, any existing dispute.*" The basis of these decisions is, in my opinion, the doctrine of agency and not the principle of representation. The principals can control their agents and abandon or withdraw from the dispute in whole or in part. If so, I agree with the Chief Justice and my brother *Gavan Duffy* that *Holyman's Case* is decisive of this case. It is true that my brother *Higgins*, in the *Pastoralists' Case* (4), in *Federated Seamen's Union of Australasia* v. *Belfast and Koroit Steam Navigation Co.* (5) and in *John Sharp & Sons' Case* (6), reached the conclusion that an organization is not excluded by the Act from being a party to a dispute for the purposes of the Act—"a party principal, not a mere agent or figurehead" (7). But he could not

(1) (1914) 19 C.L.R. 43.
(2) (1914) 19 C.L.R., at p. 162.
(3) (1914) 18 C.L.R. 273.
(4) (1917) 23 C.L.R. 22.
(5) (1918) 24 C.L.R. 462.
(6) (1919) 26 C.L.R. 302.
(7) (1917) 23 C.L.R., at p. 26.

depart from or overrule the principle of *Holyman's Case* (1). Now, however, three members of the Court, who took part in *Holyman's Case* or applied its principle in other cases, have reached the conclusion that *Holyman's Case* cannot be supported, and my brother *Higgins*, sitting alone, has also, I think, departed from the principle of that case.

Under these circumstances, I feel free, and, indeed, bound, to give effect to my own view. *Holyman's Case* was, in my opinion, wrongly decided. An organization registered under the Arbitration Act is not a mere agent of its members: it stands in their place, and acts on their account and is a representative of the class associated together in the organization. It is, as my brother *Higgins* said, "a party principal," and "not a mere agent or figurehead." The acts and conduct of its members are relevant, no doubt, upon the question whether the dispute submitted to the Court by the organization or referred to it by other means is real or illusory, but otherwise their acts and conduct are immaterial.

The questions should, I think, be answered as follows:—(1) (a) Yes; (b) Yes; (c) Yes. (2) (a) Yes; (b) Yes. (3) Yes.

All the questions answered in the affirmative.

Solicitors for the applicants, *Windeyer, Fawl & Osborne.*
Solicitor for the respondent, *Marsland & Co.*

B. L.

(1) (1914) 18 C.L.R. 273.