[HIGH COURT OF AUSTRALIA.]

CLYDE ENGINEERING COMPANY LIMITED . APPELLANT;
DEFENDANT,

AND

COWBURN . . . . . RESPONDENT.
PLAINTIFF,

METTERS LIMITED . . . . . APPELLANT;
DEFENDANT,

AND

PICKARD . . . . . RESPONDENT.
INFORMANT,

LEVER BROTHERS LIMITED . . . . APPELLANT;
DEFENDANT,

AND

PICKARD . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS AND THE CHIEF INDUSTRIAL MAGISTRATE'S COURT OF NEW SOUTH WALES.

H. C. OF A. 1926.

MELBOURNE, *Mar.* 9-12, 15-16.

SYDNEY, *April* 19.

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

Constitutional Law—Conflict between Federal and State laws—Test of inconsistency—Validity of State Act—Industrial arbitration—Federal award—Minimum wages—Maximum hours—Overtime payment—State Act enacting forty-four hours week—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (xxxv.), 109—*Commonwealth Conciliation and Arbitration Act* 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *secs.* 4, 24, 28, 29, 30—*Forty-four Hours Week Act* 1925 (*N.S.W.*) (*No.* 16 *of* 1925), *secs.* 6*, 12*, 13*, 14.

* The *Forty-four Hours Week Act* 1925 (N.S.W.), by sec. 6, provides that "(1) The ordinary working hours in all industries other than coal mining and shipping, with respect to vessels trading beyond the limits of a port, to which the Principal Act" (the *Industrial Arbitration Act* 1912 (N.S.W.)) "applies shall be as prescribed in or under this section, and the following directions shall be observed by the Court and the boards in making awards, and by the parties in making agreements—(a) In all industries subject to the

Held, that, when an award has been made by the Commonwealth Court of Conciliation and Arbitration pursuant to the *Commonwealth Conciliation and Arbitration Act* 1904-1921, the Parliament of a State cannot alter the terms of the award or confer or impose on the parties to it rights or obligations which are inconsistent with such terms.

Held, also, by *Knox* C.J., *Isaacs*, *Gavan Duffy*, *Rich* and *Starke* JJ. (*Higgins* and *Powers* JJ. dissenting), that the possibility of obeying a law of the Commonwealth and a law of a State without disobeying either is not a test of the inconsistency of the two laws.

Per Isaacs J.: (1) The settlement of an inter-State industrial dispute on such terms as the Federal arbitrator thinks just cannot be prevented or impeded by any State law; (2) an award once validly made prevails over any inconsistent State law; (3) a State law is inconsistent, and is therefore invalid, so far as its effect, if enforced, would be to destroy or vary the adjustment of industrial relations established by the award with respect to the matters formerly in dispute.

Held, further, by *Knox* C.J., *Isaacs*, *Gavan Duffy*, *Rich* and *Starke* JJ. (*Higgins* and *Powers* JJ. dissenting), that secs. 12 and 13 and (if and so far as it applies to parties to awards of the Commonwealth Court of Conciliation and Arbitration) sec. 6 of the *Forty-four Hours Week Act* 1925 (N.S.W.) are inconsistent with the *Commonwealth Conciliation and Arbitration Act* and also with awards made under it such as are specified in secs. 12 and 13, and are therefore invalid to the extent of the inconsistency.

Australian Boot Trade Employees' Federation v. *Whybrow & Co.*, (1910) 10 C.L.R. 266, overruled in part.

Amalgamated Society of Engineers v. *Adelaide Steamship Co.*, (1920) 28 C.L.R. 129, followed.

provisions of this section, the number of ordinary working hours of an employee shall not exceed—(1) eight hours during any consecutive twenty-four hours; or (2) forty-four hours per week; or (3) eighty-eight hours in fourteen consecutive days; or (4) one hundred and thirty-two hours in twenty-one consecutive days; or (5) one hundred and seventy-six hours in twenty-eight consecutive days" &c. Sec. 12 provides that "Where in any award or order made under any Act of the Parliament of the Commonwealth of Australia or in any industrial agreement made pursuant to any such Act, for any industry to which the Principal Act applies other than coal mining and shipping, with respect to vessels trading beyond the limits of a port, provision is made that the standard or ordinary weekly hours of work or duty of an employee shall not exceed a number stated in the award, order, or agreement greater than forty-four, or where in any such award, order, or agreement expressions of a like significance occur, then in such a case the standard or ordinary hours of work or duty of such employee shall not exceed those prescribed by or under section six of this Act." Sec. 13 provides that "Where in any award or order made under any Act of the Parliament of the Commonwealth of Australia, or in any industrial agreement made pursuant to any such Act, for any industry to which the Principal Act applies other than coal mining and shipping, with respect to vessels trading beyond the limits of a port a minimum rate of wage at either an hourly, daily, or weekly rate is provided for and the standard or ordinary weekly hours of work or duty of an employee exceed forty-four, then there shall be payable

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APPEALS from a Stipendiary Magistrate and from the Chief Industrial Magistrate of New South Wales.

In the Court of Petty Sessions at Parramatta before a Stipendiary Magistrate a complaint was heard whereby John William Cowburn sought to recover from the Clyde Engineering Co. Ltd. the sum of 9s. 4d., being the difference between the sum of £5 12s. 6d., which was alleged to be the amount of the weekly wages payable to the plaintiff, and the sum of £5 3s. 2d., which was the sum paid to the plaintiff, for the week ending 13th January 1926. Cowburn was a member of the Amalgamated Engineering Union, which was the claimant in an award of the Commonwealth Court of Conciliation and Arbitration made on 22nd December 1924, and during the week in question was employed by the defendant, who was a respondent bound by the same award. By the award (see *Amalgamated Engineering Union* v. *Adams* (1)) minimum weekly rates of wages were prescribed. Clause 3 (a) of the award provided that "The ordinary hours of duty shall not (without payment for the overtime) exceed 8 hours and 45 minutes on each of the 5 days in the week between 7 a.m. and 5.15 p.m. and 4 hours 15 minutes on Saturdays between 7 a.m. and noon . . . Provided also that in the case of members employed by any of the respondents in any industry in which the recognized standard hours for the general body of employees are 44 hours a week, the hours of duty before members are entitled to overtime in any such industry shall be 44 hours a week and not 48, to be worked at the same time as the employees generally are required to work in the said industry . . . (c) For all time of duty in excess of 8 hours 45 minutes on any of the five

to the employee and paid by the employer in addition to wages at the minimum rate specified in the award, order, or agreement, further wages in accordance with the following scale: (a) for every hour worked up to forty-four in any week at the rate ascertained by the formula $M H R \times \frac{S W H - 44}{44}$ in which formula M H R represents the minimum hourly rate and S W H represents the standard working hours prescribed in the award, order, or agreement; (b) for every hour worked in excess of forty-four in any week up to four, at a rate equal to the difference between the minimum hourly rate and any overtime hourly rate provided for in the award, order, or agreement. . . . Where the award, order, or agreement specifies a minimum weekly rate the minimum hourly rate shall be deduced therefrom by the formula $\frac{M W R}{S W H}$ in which M W R represents the minimum weekly rate, and S W H the standard weekly working hours specified in the award, order, or agreement."

(1) (1924) 20 C.A.R. 982.

days, Mondays to Fridays, or of 4 hours 15 minutes on Saturdays, employees shall be paid at the rate of time and a half for the first 4 hours and at double rates thereafter" &c. Clause 13 provided that "(a) Except as provided . . . all employment shall be by the week . . . (e) Any employee . . . not attending for duty shall lose his pay for the actual time of such non-attendance" &c. During the week in question Cowburn worked for 44 hours only, and the company deducted from his wages the sum of 9s. 4d. under clause 13 (e) of the award.

The Magistrate upheld the validity of the *Forty-four Hours Week Act* 1925 (N.S.W.), and gave a verdict for the plaintiff for the amount claimed.

From that decision the defendant now, by special leave, appealed to the High Court.

Before the Chief Industrial Magistrate of New South Wales a complaint was heard whereby Harry Pickard, a member of the Commonwealth Council of the Amalgamated Engineering Union, an organization registered under the provisions of the *Commonwealth Conciliation and Arbitration Act* and bound by the above-mentioned award, charged that Metters Ltd. had committed a breach of that award in that it did not pay to Walter Bagley, a member of the Union employed as a fitter, for the week ending 14th January 1926 the wages prescribed by the award. The Magistrate found that on and after 4th January 1926 the "recognized standard of hours" in the stove-making industry carried on by the Company was 44 hours per week, and that on and after that date the hours of duty for members of the Union before they were entitled to overtime were 44 hours per week. He also found that Bagley had during the week in question worked 44 hours, and that the Company had paid him in respect of that work at a rate based on the amount of £5 12s. 6d. for 48 hours, but failed to pay him at a rate based on £5 12s. 6d. for 44 hours "as prescribed by the award." The Magistrate therefore made an order imposing on the Company a penalty of one pound.

From that order the Company now, by special leave, appealed to the High Court.

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Before the Chief Industrial Magistrate a complaint was also heard whereby Harry Pickard charged that Lever Brothers Ltd. had committed a breach of the same award in that it did not pay to Christopher Samuel McAdam, a member of the Union employed as a fitter, for the week ending 12th January 1926, the wages prescribed by the award. The Magistrate made similar findings to those in the case against Metters Ltd., and he made an order imposing the same penalty.

From that order the Company now, by special leave, appealed to the High Court.

The three appeals were argued together.

The other material facts are stated in the judgments hereunder.

Owen Dixon K.C. (with him *K. W. Street* and *Robert Menzies*), for the appellants. Secs. 12 and 13 and, so far as it is ancillary to those sections, sec. 14 of the *Forty-four Hours Week Act* 1925 (N.S.W.) are inconsistent with the *Commonwealth Conciliation and Arbitration Act* 1904-1921. Secs. 18, 23, 24, 28, 29 and 30 of the latter Act disclose a clear intention that the arbitrator shall arrive at a conclusion as to what is the proper measure of rights and duties on matters which are the subject of dispute, and shall embody his conclusion in an award which shall have the force of law in respect of the parties. His determination is to be expressed and is to take effect according to the tenor of the expression. Secs. 12 and 13 of the *Forty-four Hours Week Act* purport to give to an award so made a new operation producing rights and obligations other than those which it was intended to produce. If sec. 12 stood alone, its effect, if valid, would be that overtime rates would come into operation after 44 hours work although the award provided that overtime rates should not come into operation until after 48 hours work. Sec. 13 provides not only for increased rates for ordinary working hours but also for payment of overtime after 44 hours work. The sections are simply amendments of the award, and for that reason are inconsistent with the Arbitration Act. Secs. 12 and 13, even if not inconsistent with the *Commonwealth Conciliation and Arbitration Act*, are inconsistent with the award itself. The award

fixes the measure for determining when overtime is to become payable. Secs. 12 and 13 fix an entirely different measure from that established by the award. The test of inconsistency under sec. 109 of the Constitution is not whether the Commonwealth law and the State law can each be obeyed without disobeying the other. Since the decision in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1) the case of *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (2) cannot be relied on in support of that test (see *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (3)). There is an inconsistency if there is a conflict between the wills of the two Legislatures. The validity of sec. 6 of the *Forty-four Hours Week Act* does not come into consideration, for it is directed to State industrial agreements and awards. As to the prosecutions for breaches of the award, the recognized standard hours referred to in clause 3 (a) of the award are the standard hours for the particular industry which are recognized throughout Australia. Any attempt to alter those standard hours would be in conflict with sec. 18A (4) of the *Commonwealth Conciliation and Arbitration Act.*

Ham, for the Commonwealth intervening. Secs. 12 and 13 of the *Forty-four Hours Week Act* are void as being in conflict with the Federal award, for they take up the Federal award and fix upon it an operation different from that which was intended by the award. [Counsel referred to *Federated Saw Mill &c. Employees' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (4).]

Piddington K.C. (with him *Cantor*), for the respondents. It would be subversive of the entire scheme of the Australian Constitution to assume that any point of internal self-government was withheld from Australia (*Attorney-General for Ontario* v. *Attorney-General for Canada* (5)). The power to establish by direct and generic statute any desired standard of civilization in respect of maximum hours or minimum wages is a necessary point of internal self-government. That was recognized by State legislation before Federation. That power has not been exclusively vested in the Federal Parliament or

(1) (1920) 28 C.L.R. 129.
(2) (1910) 10 C.L.R. 266.
(3) (1924) 34 C.L.R. 482.
(4) (1909) 8 C.L.R. 465, at pp. 527, 530, 533.
(5) (1912) A.C. 571, at p. 581.

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withdrawn from the State Parliaments, and therefore belongs to the State Parliaments, which are the competent authority for the enactment of such legislation within the meaning of art. 405 of the Treaty of Versailles. The *Forty-four Hours Week Act* is an Act for establishing by direct statute a desired standard; and it is not solely a law for the settlement of industrial disputes whether confined to New South Wales or extending to Australia. There is no inconsistency between it and the *Commonwealth Conciliation and Arbitration Act.* Sec. 12, being limited to cases where the Commonwealth law has prescribed maximum hours of work for the actual disputants, is not inconsistent with the award, because such of the disputants as are in New South Wales can obey both Act and award, and because the particular award in this case does not cover the whole field of the regulation of hours but leaves open for agreement or for State legislation the establishment of a fixed working week or a shorter working week. Sec. 13, being limited to cases where a Federal award has prescribed a minimum rate of wages, is not inconsistent with any law of the Commonwealth, for the same reason. Secs. 12 and 13 must be read together and with the other sections of Part III. to discover the intention of the enactment. Sec. 12 is not superfluous but it is necessary to form a basis for the operation of secs. 13 and 14. Sec. 13 does not entitle an employee to wages in respect of time which he has not worked, but its effect is to increase the minimum rate of wages in order to make up for the decrease in the maximum hours. The provision in clause 13 (e) of the award, providing that an employee not attending for duty is to lose his pay for the time of non-attendance, refers to an employee who does not come to work and not to an employee who leaves work before he should. In clause 3 (a) the words "recognized standard hours for the general body of employees" mean recognized in a particular industrial undertaking and not necessarily standard hours recognized as such throughout Australia. The State Act has the effect of making a new wage in addition to that payable under the award, the new wage being recoverable under the State Act. If either of the propositions laid down in *Whybrow's Case* (1)—namely, that a Federal award cannot be made which is inconsistent with a State

(1) (1910) 10 C.L.R. 266.

law and that the test of inconsistency between a Commonwealth law and a State law is whether both can be obeyed—is correct, then secs. 12 and 13 of the *Forty-four Hours Week Act* can stand. Both of those propositions should be upheld. [Counsel referred to *Federated Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association* (1); *Union Steamship Co. of New Zealand* v. *Commonwealth* (2); *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Adelaide Chemical and Fertilizer Co.* (3); *Federated Clothing Trades of the Commonwealth of Australia* v. *Archer* (4).] As to the cases of Lever Bros. Ltd. and Metters Ltd., which were proceedings for breaches of the award under sec. 44 of the *Commonwealth Conciliation and Arbitration Act*, the words "recognized standard hours," at their lowest, mean recognized as such by employers in the industry, and when the *Forty-four Hours Week Act* was passed it was not competent for an employer to say that the standard hours were not those enacted by that Act. [Counsel also referred to *Australian Timber Workers' Union* v. *John Sharp & Sons Ltd.* (5); *Federated Storemen and Packers' Union of Australia* v. *Australian Mercantile Land and Finance Co.* (6).]

Flannery K.C. (with him *E. M. Mitchell* K.C. and *De Baun*), for the State of New South Wales intervening. There is no inconsistency between the *Forty-four Hours Week Act* and the *Commonwealth Conciliation and Arbitration Act* or the award made under it. There would be an inconsistency if the *Forty-four Hours Week Act* varied the award. But sec. 13 does not purport to vary the award. That section is not dependent upon sec. 12, and, although sec. 12 may fall, sec. 13 may still stand. Sec. 13 has the effect that an employer bound by an award which fixes maximum weekly hours shall pay a further sum by way of wages. It should not be construed as depriving the employer of a right to deduct from the wages of an employee a sum measured by the difference between the number of hours worked in a week and 48 hours. It is only where an employee is employed at the minimum rate of wages that the amount which the employer is entitled to deduct in respect of hours not worked is the same as

(1) (1922) 30 C.L.R. 144.
(2) (1925) 36 C.L.R. 130, at p. 149.
(3) (1920) 28 C.L.R. 1.
(4) (1919) 27 C.L.R. 207.
(5) (1920) 14 C.A.R. 811, at p. 846.
(6) (1920) 14 C.A.R. 1058, at p. 1066.

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the amount of the extra wages which the employer has to pay under the State Act. The provisions of the award do not give to an employer the right to secure labour on the terms that he need not pay overtime unless the employee has worked 48 hours. Those provisions give no more right than does the provision for minimum wages. The State Parliament can impose on its citizens additional rights and duties outside the prohibition of Federal law and awards made under it. The award leaves the parties free to agree within certain limits, and the State Parliaments can legislate within those limits. The word "inconsistent" in sec. 109 of the Constitution has the same meaning as repugnant (*Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1); *Pirrie* v. *McFarlane* (2)). Sec. 13 attempts to bring into line those persons who are bound by Federal awards with those other subjects of New South Wales who are not so bound, and therefore cannot be said to have any discriminatory effect which invalidates it. (See *Caron* v. *The King* (3); *Great West Saddlery Co.* v. *The King* (4); *Pirrie* v. *McFarlane* (5)). An award made under the *Commonwealth Conciliation and Arbitration Act* is not a law of the Commonwealth within the meaning of sec. 109 of the Constitution, although sec. 30 of that Act attempts to make it so. It merely fixes rights and duties between the parties to the dispute. (See *Whybrow's Case* (6); *Federated Seamen's Union of Australasia* v. *Commonwealth Steamship Owners' Association* (7)).

Owen Dixon K.C., in reply, referred to *Houston* v. *Moore* (8).

Cur. adv. vult.

April 19.

The following written judgments were delivered:—

KNOX C.J. AND GAVAN DUFFY J. *Clyde Engineering Co. Ltd.* v. *Cowburn.*—In this case the plaintiff sues the defendant for £5 12s. 6d. as the amount of a week's wages. He gives credit for the payment of £5 3s. 2d. made under the provisions of an award of the Commonwealth Court of Conciliation and Arbitration,

(1) (1920) 28 C.L.R., at pp. 154, 155.
(2) (1925) 36 C.L.R. 170.
(3) (1924) A.C. 999, at p. 1005.
(4) (1921) 2 A.C. 91.
(5) (1925) 36 C.L.R., at pp. 215, 216.
(6) (1910) 10 C.L.R. 266.
(7) (1922) 30 C.L.R. 144.
(8) (1820) 5 Wheat. 1, at p. 22.

and seeks to recover the balance by virtue of the provisions of an Act of the Legislature of New South Wales entitled the *Forty-four Hours Week Act* 1925. The question which arises for our determination is whether, when such an award has been duly made, the Parliament of a State can alter its terms, or confer or impose on the parties to it rights or obligations inconsistent with such terms. The question has not yet been expressly determined, and we proceed to discuss it by considering, first, the provisions of the State statute, and, then, the powers given to the Parliament of the Commonwealth by the Constitution and those given to the Court of Conciliation and Arbitration by the Commonwealth statute which erected it. We think it unnecessary to refer to the terms of the award under which the plaintiff's claim is made. The *Forty-four Hours Week Act* 1925, by sec. 12, among other things, provides that, where in any award made under any Act of the Parliament of the Commonwealth of Australia for any one of a certain class of industries provision is made that the standard or ordinary weekly hours of work or duty of an employee (that is to say, the hours during which he works without the payment of an overtime rate) shall not exceed a number stated in the award greater than 44, or where in any such award expressions of a like significance occur, then in such a case the standard or ordinary hours of work or duty of such employee shall not exceed those prescribed by or under sec. 6 of the Act, namely, 44 hours per week. The section purports to relieve the employee from the liability to work without payment for overtime for more than 44 hours a week, but leaves him in possession of any and every advantage that may have been granted to him by the award because of the prescription of a longer period of labour. Sec. 13 provides among other things that, where in such an award a minimum rate of wage at either an hourly, daily or weekly rate is provided for, and the standard or ordinary weekly hours of work or duty of an employee exceed 44, then there shall be payable to the employee and paid by the employer, in addition to wages at the minimum rate specified in the award, further wages in accordance with a scale prescribed in the section. The exact operation and effect of these provisions on the relations between employer and employee under any award must, of course,

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depend on the terms of the award itself and the interdependence, if any, which the award establishes between their reciprocal rights and obligations; but the scheme of the two sections is this: they assume the validity of the awards with which they purport to deal, and assuming their validity proceed to impose upon the parties terms other than, and it may be wholly inconsistent with, those prescribed in the award. They prescribe a 44 hours week in every case, and they direct that, whatever may be the prescription of the award, if the employee in fact works more than 44 hours a week he shall be paid, not only the rate of wage prescribed by the award for such period, but a further sum sufficient to make his total wage as great for 44 hours as it would have been under the award for the term actually worked up to 48 hours, and in addition overtime payment at the rate prescribed by the award for any further working time up to 48 hours. To do this is to put an end to the settlement made by the award, and may therefore be an invasion of the domain of the Commonwealth Legislature. It may well be said that the State Legislature has not really attempted to regulate the rights and obligations of citizens of New South Wales as such, but has attempted to free from the obligation of the award such of the parties as are within its own territorial jurisdiction and so has substantially altered the award. It is unnecessary to rest our decision on this view; for, even if this field of legislation be open both to the Commonwealth and to the State Legislatures, the question of inconsistency between their enactments at once arises. Whatever limitations may be placed upon the power of the Parliament of the Commonwealth under sec. 51 (xxxv.) of the Constitution, it is clear that it can authorize its arbitrator to make a settlement of a dispute extending beyond the limits of any one State on any terms not inconsistent with the law of the Commonwealth or of a State. In our opinion it can also authorize him to fix a term for the existence of a lawful award, and can itself give validity to his award during such term. The phrase "the settlement of industrial disputes" necessarily implies an adjustment of the questions in dispute between the parties as complete and as permanent as the arbitrator may consider necessary. The power contained in sec. 51 (xxxv.) of the Constitution was

given to the Parliament of the Commonwealth because such a power did not exist in and could not properly be entrusted to the Parliament of any State, and it is not possible to say that the Constitution has left in each State the power of preventing the operation within its territory of an award made under the power which all the States have agreed to entrust to the Parliament of the Commonwealth. Parliament has exercised all the powers necessary for the making of a valid and permanent award, and secs. 12 and 13 of the *Forty-four Hours Week Act* 1925 seek to alter, and to that extent destroy, awards lawfully made under these powers. It is therefore, so far as secs. 12 and 13 are concerned, inconsistent with the law of the Commonwealth within the meaning of sec. 109 of the Constitution, and to the extent of that inconsistency, invalid.

It was suggested in argument that if the plaintiff could not rely upon secs. 12 and 13 of the New South Wales enactment his case might still be supported by sec. 6. There are a number of answers to this contention, but we are satisfied to rest the matter on this dilemma: If sec. 6 amounts to a prescription of 44 hours per week as the ordinary working hours in the industries specified in the section for all persons, including those who are parties to an award of the Commonwealth Court of Conciliation and Arbitration, it is invalid for the reasons which we have already stated; if, on the other hand, the section is to be construed as a general provision not applying to parties to such an award who are dealt with by the special provisions of secs. 12 and 13, then sec. 6 has no application to the present case. As the plaintiff cannot find support for his claim in any part of the New South Wales enactment, he must fail.

It is, strictly speaking, unnecessary for us to consider the validity of any decision of this Court, as the question for our determination has not yet been judicially decided; but the test as to the inconsistency between two statutes proposed by *Griffith* C.J. in the *Woodworkers' Case* (1), and adopted by the majority of the Court in *Whybrow's Case* (2), was much canvassed in argument before us and is passed upon in the judgments delivered by our brothers in the present case. In the circumstances we think we should say that it appears to us that

(1) (1909) 8 C.L.R. 465. (2) (1910) 10 C.L.R. 266.

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the test is not sufficient or even appropriate in every case. Two enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. Statutes may do more than impose duties: they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it. It has been suggested that our decision is inconsistent with a proposition laid down in *Whybrow's Case* (1). In that case it was said that arbitration was no more than a substitute for agreement, and that the award of an arbitrator must be such an adjustment as the parties to the arbitration could themselves have made by agreement, and that, as the parties could not by agreement get rid of the prescription either of an existing or of a future statute, so the award must not only be consistent with every existing statute but becomes invalid in so far as it becomes inconsistent with any future statute. In our opinion the learned Judges who decided that case had in their minds the question that then arose for decision, namely, the antinomy between an existing legislative enactment and a proposed award of the Court of Conciliation and Arbitration, and they did not intend to declare the right of a State Parliament to alter the relations established between parties to an arbitration by an award duly made. If, and so far as, the judgment in that case purported to establish such a principle, we cannot accept it as a correct statement of the law.

In the two appeals, *Metters Ltd.* v. *Pickard* and *Lever Bros. Ltd.* v. *Pickard*, which were argued with this case, the informant (respondent) must establish the validity of provisions of the *Forty-four Hours Week Act* which we have already declared to be invalid or their claim must fail.

For the reasons we have given we think that the three appeals should be allowed.

ISAACS J. The questions arising for determination are of great magnitude and far-reaching influence. They test the power of the Australian nation as one component organism to regulate or define,

(1) (1910) 10 C.L.R. 266.

by means of conciliation and arbitration, where inter-State disputes occur, the working conditions of its industries on a broad national basis, and therefore with a due regard to the general welfare of its people as a whole, free from disturbing and, in all probability, mutually opposing elements which particular States may for their own separate objects desire to introduce into the practical working of the national scheme. Ethically the elements so introduced may be more or may be less generous or humane than the conditions established by the Commonwealth authority: that depends on the existing dominant view in each particular State. But that is not the question for this Court. In view, however, of the argument that social questions are regarded by the Constitution as by their nature better left to the States, it must be said that there is no reason to limit the meaning of sub-sec. xxxv. of sec. 51 by supposing that the central authority representing the united public opinion of Australia will ever be less capable of estimating, or less just or less responsive to, the advancing claims of humanity in the treatment of industrial questions than will the authority of any one particular section of the Commonwealth. But all the Court has to concern itself with is to ascertain from the Constitution, by ordinary legal methods, which alternative is correct—whether the Commonwealth as a whole is empowered to deal with its most momentous social problem on its own broad scale unimpeded by the sectional policies of particular States, or whether its legal adjustments of the reciprocal claims and moral rights of organized labour on the one hand, and organized capital on the other, so as to secure their peaceful collaboration in the interests and on the uniform basis of the larger Australian citizenship and the larger Australian community, are to be in the first place prevented or afterwards antagonized, and in effect undone, by additions, qualifications or negations dictated by the more limited objects of a State and that in actual working vitally alter, or neutralize or even destroy them.

However the matter may be disguised by phrases or verbal distinctions or technical forms of speech, that is the real and true issue between the parties here. The very existence of any effective Federal arbitral power in relation to industrial disputes is at stake. If an award of the Arbitration Court is, as is contended, a mere

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target to be pierced at any selected point by State legislation, the whole Federal arbitration system, the Act, the Court and its awards, are all worse than useless as a protection to employers or employees or the general community.

As all the material questions involved in these appeals arise in *Clyde Engineering Co. Ltd.* v. *Cowburn*, I deal with that case specifically.

The appellant contends for the first alternative I have stated, that is, for the full and free operation of every Commonwealth adjustment of an inter-State industrial dispute, leaving it to the Commonwealth authority to make, as it is at liberty, quite as amply as any State, to make, from time to time all corrections or modifications shown to be just. The respondent contends that that adjustment can never be full or free or of any assured permanency, but is always and every moment subject in each State to be either annulled or weighted with whatever additional complications any State Parliament may see fit to enact. The arguments of Mr. *Piddington* and Mr. *Flannery* with great candour, force and consistency asserted this power of every State. They maintained that the Federal award, even though backed by the Commonwealth Act, had not the force of Commonwealth *law*. They logically drew no distinction between the civil and the criminal laws of the State or between State laws which improved the position of employees and those which deprived them of benefits conferred by Federal awards. They rightly contended that in industrial matters the power to do the one connoted equal power to do the other, and maintained that all this is in the supreme control of the States, in opposition to the Commonwealth and to each other. It follows, however, that, if that view be correct, then the industries of Australia and the rights and obligations of employers and employees alike, where they are prescribed by a Federal award, instead of being referable to that award alone as the Australian law on the subject so that he who runs may read, must always be in an utter state of uncertainty and confusion. They will be constantly liable to disintegration of industrial forces and to such distracting inequalities and distortions dictated by warring sectional policies as to make true inter-State freetrade impossible. This would certainly give much justification for Bacon's aphorism that

"there is no worse torture than the torture of laws." In my opinion, however, that view is not correct, and the first alternative should prevail. Applying the principle of that alternative, there is little room for serious doubt that this appeal must succeed. The concrete question in this case is extremely short and simple. It is whether the respondent is entitled to 9s. 4d. either (1) as a sum improperly deducted from his weekly wage of £5 12s. 6d. having regard to the terms of the Federal award alone or aided by sec. 6 of the State Act or (2) as a debt by virtue of secs. 13 and 14 of the New South Wales Act No. 16 of 1925, called the *Forty-four Hours Week Act* 1925.

(1) *Claim under Award.*—As to the first ground, it depends upon the application to the facts of the second proviso to clause 3 (a) of the award and of clause 13 (e) of the award and of sec. 6 of the State Act. The meaning of the expression "any industry" in that second proviso must be found by determining which, among the numerous senses in which the word "industry" is now used, is the appropriate sense having regard to the context. I have no doubt it does not mean either the craft industry of engineering as an indivisible whole, or the industry of one particular shop or factory. Both of those extreme limits are clearly excluded by the context. The words "any industry" mean, in my opinion, any one of the numerous groups or classes of industry in which engineers together with their respective employers are conjointly engaged. Engineers, for instance, may be co-operating with employers in carrying on the saw-milling industry or the flour-milling industry or the boot industry or the machine industry. These would respectively fall within the term "any industry." But then arises a critical question. For the respondent it is said that, assuming so much, the words "any industry" are satisfied by so many of the specific enterprises as are situated in New South Wales without regard to the rest of Australia, and, therefore, as the New South Wales Act was in force during the week in question here, the law compelled recognition of 44 hours as the standard weekly hours, thereby entitling the respondent to succed under the award. But on a true interpretation of the award the words "any industry" in clause 3 cannot be limited to any one State. Inspection of the award as a whole, shows that primarily it is general for all Australia, and that where differentiation

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is intended that expressly appears. Clause 21 begins with quite general words. The schedules A to F have at the head of each a statement of the selected clauses which apply, really indicating thereby what is excluded as to each set of respondents. As an instance of exclusion, clause 13 does not apply to schedule D, the list of general respondents in South Australia. But clause 3 applies to all. Again, there are express specific exclusions and exemptions as to States in the body of the award which indicate its otherwise general character. (See clause 2 (j), clause 12.) Other named exceptions assist to show the primary general application of the award. This results in giving to the words "any industry" a meaning not limited by any State boundary, and therefore the proviso is not to be governed by the action of any one State Parliament. It may be that, if more than one State so legislated that in substance in "any industry" considered nationally the standard hours became 44, the powers would be satisfied. But, at all events in the circumstances we are dealing with, that has not happened, and the intention of the proviso is no more fulfilled by the partial change of hours in the industry than if the Act were limited to the Sydney district instead of being general as to New South Wales. The Stipendiary Magistrate so held, and his view as to this was right.

Then it is said that the deduction was not justified, even taking the award alone as the source of the claim. The smaller amount of £5 3s. 2d. was paid by reason of the fact that the respondent during 4 hours did not "attend for duty." He would not and did not attend for the purpose of working at ordinary rates beyond the 44 hours he actually worked, although he was required to attend for 48 hours. In consequence of this failure to "attend for duty" the sum of 9s. 4d. was deducted. The deduction was made under the terms of clause 13 (e), which says: "Any employee . . . not attending for duty shall lose his pay for the actual time of . . . non-attendance." Exceptions are mentioned, but are here irrelevant. Some attempt was made to urge that, if an employee came and worked at all on a given day, even for 5 minutes, and then left for the rest of the day, it could not be said that he did not "attend for duty" for the 7 hours and 55 minutes he was absent. It was of

course conceded that, if he did not come at all, he would fail to "attend for duty." I am bound to confess my inability to appreciate the distinction. Not attending for duty means simply being absent from duty, and a person who ought to work two hours fails to attend for duty during the second hour just as clearly if he goes away on the expiration of the first hour as if he never came at all. The respondent's claim consequently fails so far as it is founded solely on the award.

But then it is contended that the claim on the award may be upheld when effect is given to sec. 6 of the Act. That section is a general and undiscriminating section applying to "hours in industries generally," which is the heading to Part II. Since it applies to all "industries," apart from coal mining and shipping beyond the limits of a port, to which the Principal Act applies, it includes the engineering industry, and, therefore, in so far as it directly prescribes the maximum working hours, it applies to this case, unless something else prevents that application. I find nothing in the Act itself to exclude such application. Indeed, sec. 4 extends its provisions to bind the Crown, and that, on the authority of *Pirrie* v. *McFarlane* (1), includes the King in right of the Commonwealth. Consequently, Commonwealth industries in New South Wales are equally subject to the direct prescriptions of sec. 6, as well as to those of secs. 13 and 14. Sec. 6 does two distinct things: first, it directly prescribes maximum hours and some other conditions; next, it gives directions as to present and future State awards and industrial agreements. It is true that Part III. expressly mentions Commonwealth awards, and makes some of them the basis of its directions. But I agree with Mr. *Piddington's* construction, and, I think, Mr. *Flannery's* construction, of that Part, that it does not *expressly* purport to affect the award itself or the parties' rights under the award itself. It proceeds to alter the personal rights and obligations of the parties, not under the award, as I read the Act, but in respect of their actual working relations. In doing that, however, the Act does unmistakably deal with the same working relations as does the award, that is, *it operates on the same field* even though independently. It purports to create, even though independently, a new legal relation in respect

(1) (1925) 36 C.L.R. 170.

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of the same industrial relations. Even at the risk of redundancy I state the position thus: The State law, while not interfering with the award but leaving to that its full operation, establishes a *rule of personal conduct* on a selected field of industrial relations, which interferes with the *rule of personal conduct* established by the Commonwealth Act on the same field of industrial relations. To illustrate my meaning by an analogy I suggested during the argument:—Suppose a Commonwealth judgment awards to A against B damages £500 for a given tort. Suppose now, in an action in the State Court in respect of the same tort, judgment is given reciting the existence of the Commonwealth judgment and awarding a further sum of £100. The State judgment would not purport to authorize execution for £600 on the Commonwealth judgment or to alter that judgment in any way. It would purport to create a new and independent personal right to a new £100. Its vice would be that it assumed to operate on a field of personal relations already occupied and exhausted by the earlier judgment, and to establish on that field a personal obligation excluded by the first determination. I apply those considerations to sec. 6. That section not professing to deal with Commonwealth awards but with industrial duties of individuals considered as *New South Wales citizens* is—apart from any effect upon Federal awards—perfectly valid and binding. That must be clearly understood. But it must also be understood that it does not say that employees must not work more than 44 hours a week. On the contrary, it says overtime may be permitted by award or agreement. But broadly it says that 44 hours shall be the *ordinary* working hours for a week. That is, that where that number of hours is exceeded, as it may be, the excess is to be overtime and must be paid for accordingly. But valid, as it so far is, it cannot be allowed to apply—and this is the only contest—so as to operate validly on the very field of industrial relations that is occupied by the award, and so as to alter the adjustment of the duties of the same individuals *as Australian citizens* in relation to the same matters—namely, *ordinary* hours prescribed by Commonwealth law—so as to regulate the payment of overtime. It is true, I think, that as a matter of pure construction sec. 6 does when applied to this case include precisely the same industrial relations as are covered specially

by secs. 12 and 13, though, as I read the Act, in the latter sections a modification is introduced. Even duplication of legislative directions may be for precaution sake, or because different methods of approach, even if complete, require or make desirable that duplication. And so I see nothing from the standpoint of pure construction to exclude the application of sec. 6 from the mutual rights and obligations of the parties here. But it was strenuously suggested that on reading the Act as a whole the proper conclusion is that, not duplication of similar provisions, but differentiation of application of similar or somewhat similar provisions, is intended by the Act. I do not think the New South Wales Parliament so intended. I read sec. 6 so far as material to this point in this way:— As to all the industries dealt with, when employers are making voluntary agreements with employees certain limits of ordinary working hours shall be observed beyond which it shall not be lawful to go. The parties may agree for (1) not more than 8 hours in any consecutive 24 hours; or they may agree for (2) not more than 44 hours in a week; or they may agree for (3) not more than 88 hours in 14 consecutive days; or they may agree for (4) not more than 132 hours in 21 consecutive days; or they may agree for (5) not more than 176 hours in 28 consecutive days. If it were a rigid maximum of 44 ordinary hours in every week, there would be neither occasion for, nor sense in, the succeeding provisions as to 14, 21 or 28 days. But beyond 176 hours in 28 days the parties cannot go. Up to that point elasticity is allowed to accommodate varying industries. That is what is prescribed *by* sec. 6. But some provision is also made for varying even those hours, either up or down; as, for instance, in sec. 6, par. (f) of sub-sec. 1, and in sub-sec. 2 of that section. If those powers are exercised the hours are prescribed *under* sec. 6. Now, when we come to sec. 12, the position postulated is that a Federal award prescribes the standard or ordinary hours on a *weekly basis only*, and therefore the agreement is necessarily for a weekly hiring. Sec. 12 simply modifies the generality of sec. 6 *pro hac vice* by reducing the weekly basis to 44 hours, the number prescribed *by*, or to such other numbers as is prescribed *under*, sec. 6. It does not, as does sec. 6, contemplate any agreement other than a weekly hiring, because the award is treated as establishing a weekly

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hiring. Sec. 12 then qualifies sec. 6 by restricting the statutory directions to the weekly basis, or, in other words, *cutting out the other possibilities*. Sec. 12 is to all intents and purposes a proviso to sec. 6 for the purposes of the particular case described. The one direction is given, an ordinary 44 hour week is substituted for the ordinary 48 hour week, and no elasticity as to 14, 21 or 28 days is allowed. In all other cases of Federal awards—for instance, where 44 hours are prescribed, which would be the case here in certain circumstances, having regard to clause 3 (a), second proviso—neither sec. 12 nor sec. 13 applies. But sec. 6 would apply. Even as to this award and treating the matter as one of legislative intention, I see no reason for attributing to the New South Wales Parliament the *intention* to exclude in all circumstances the humane provision in sec. 6 (1) (b) as to employees working in a heated and exhausting temperature. On the contrary, the general tenor of the Act is to apply its provisions as broadly as possible; and this its actual language does. There is not a syllable which expressly or by interpretation cuts down the generality of sec. 6. That can only be done by a conjecture which, in my opinion, is not only inadmissible but is, as I have said, opposed to the manifest general tenor of the enactment. I apprehend that sec. 6 is intended primarily to cover all industrial occupations in New South Wales with the exceptions stated in the section, limited only by such qualifications as are found elsewhere, as in sec. 12 for example. Its direct operation as to hours is not based on the present or past existence of any dispute, or of any award, but rests on general public policy for New South Wales. Consequently, if sec. 12 is valid it applies, if it is not valid sec. 6 applies, and that is expressly provided for in sec. 1 (3) of the Act. Sec. 6 is manifestly separable from secs. 12 and 13. If, then, sec. 6 is to be regarded as valid and operative in respect of those rights and obligations, it altered the ordinary hours of the respondent by reducing them to 44. In that case the deduction of 9s 4d. for not attending for duty was unjustified, since it was not his "duty" to attend more than 44 hours, except for overtime pay, which was not intended. If sec. 6 could be maintained as a binding legislative direction notwithstanding the legislative direction arising from the award, I should be of opinion the respondent ought to succeed

quite apart from secs. 13 and 14 of the Act. Whether it can be so maintained I shall examine presently after noticing the second ground of claim.

(2) *Claim under State Act.*—The second ground of claim is under secs. 13 and 14 of the Act. Like the legal effect of sec. 6 this, as applied to this case, raises a distinct conflict as to the limits of Commonwealth and State powers. As a matter of pure construction of secs. 13 and 14 of the New South Wales Act, no doubt can exist that the statutory conditions were fulfilled necessary to entitle the respondent to succeed. Those conditions were: (a) A Commonwealth award exists; (b) a minimum rate of wage at a weekly rate of £5 12s. 6d. is provided for; (c) the standard or ordinary weekly hours of work or duty prescribed by the award exceed 44; (d) the respondent worked 44 hours in the specified week; and (e) he was paid as stated only £5 3s. 2d. as his "wages at the minimum rate specified in the award," that is, at a 48 hour rate. The State Act, in sec. 13, says very plainly and with perfectly frank distinctness that in those circumstances the respondent was entitled to 9s. 4d. more than he received and also that, if he had worked the disputed 4 hours, he would have been further entitled to overtime though the award said the contrary. The way in which the Act provides for the 9s. 4d. is, not by providing that he shall be paid that sum for the 4 hours he did not work, but by declaring that for each hour of the 44 that he did work there should be added to whatever wages he is entitled to under the award such a proportion of the Commonwealth weekly minimum wage as corresponds to the excess of the Commonwealth maximum working week over 44 hours. It would manifestly have been impossible, consistently with the scheme of the Act, to provide for payment of the 9s. 4d. for the 4 hours not worked as if they had been worked, because for that period, had the respondent worked, not 9s. 4d. but 14s. would under the State Act have been payable (sec. 13 (b)). Assuming secs. 13 and 14 to be binding on the parties, the respondent's claim should succeed, using the award merely as evidence of statutory conditions, and quite independently of his claim under the award as the source of obligation.

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The legal effectiveness of the State Act has to be considered. The position, so far, is this: Clause 13 (e) expressly provides that in the circumstances the respondent should "lose his pay"—that is, his minimum wage, supplemented by whatever the parties might agree to—because he declined to work more than 44 hours, the amount so lost being 9s. 4d. The State Act, on the other hand, says that, notwithstanding he declined to work more than 44 hours, he shall have 9s. 4d. more than he received. Which is to prevail—the Commonwealth provision or the State provision?

(3) *Validity of State Act.*—The State Act is enacted under the powers declared in the Constitution of New South Wales (No. 32 of 1902). Sec. 5 of that instrument provides: "The Legislature shall, subject to the provisions of the *Commonwealth of Australia Constitution Act*, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever." I omit immaterial restrictions. Then follows sec. 106 of the Commonwealth Constitution. Sec. 107 of the Constitution excludes from the power of the State Parliament whatever is "exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State." The exclusive vesting of powers in the Commonwealth Parliament must be found in the language of the Constitution and not in what were once regarded as implied prohibitions apart from any language of the instrument (*The Engineers' Case* (1)). Consequently, the State legislation in secs. 6, 12, 13 and 14 is, in my opinion, primarily within the State parliamentary powers and, but for what follows, would support the claim. But even as to matters within State parliamentary powers sec. 109 declares that "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." It needs only to add reference to covering sec. V., which declares that Commonwealth laws made under the Constitution "shall be binding on the Courts, Judges, and people of every State . . . *notwithstanding anything in the laws of any State.*" It is, therefore, beyond controversy that, if the State Act be inconsistent with a law of the Commonwealth competently made, it must yield.

(1) (1920) 28 C.L.R. 129.

The respondent, however, contends: first, that there is no inconsistency between sec. 13 of the State Act and the award; next, that there is no relevant Commonwealth law, and that the Commonwealth cannot under sec. 51 (xxxv.) of the Constitution competently make a law to override a State law, whether the State law is passed before or after a Federal award. I take each of these points in order.

(*a*) *Inconsistency.*—As to the first there arises on the threshold a question as to the proper test of inconsistency. It is said that the State Act concedes to the Federal award its full operation, since it says nothing about the deduction for hours not worked, and merely creates a new and independent right to a further payment for the hours actually worked. The infallible test of whether in so providing there is inconsistency is said for the respondent to be whether the two provisions of deduction on the one hand and extra payment on the other could both be obeyed. No doubt the employer *could* obey both, that is physically. So he *could* if the State Act required him after deducting the 9s. 4d. to return it immediately. That, it is gravely argued, avoids inconsistency. If an Act of Parliament, for instance, prescribed 25 lashes for robbery under arms and a later Act prescribed that such an offender should be punished with 20 lashes, it could, of course, with equal truth be said that both provisions *could* be obeyed, and therefore, applying the suggested test, the offender must receive 45 lashes. But surely the vital question would be: Was the second Act on its true construction intended to cover the whole ground and, therefore, to supersede the first? If it was so intended, then the inconsistency would consist in giving any operative effect at all to the first Act, because the second was intended entirely to exclude it. The suggested test, however useful a working guide it may be in some cases or, in other words, however it may for some cases prove *a* test, cannot be recognized as *the* standard measuring rod of inconsistency. If, however, a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field. This was the opinion in *Whybrow's Case* of *Griffith* C.J. (1) and of myself (2). The principle was

(1) (1910) 10 C.L.R., at p. 286. (2) (1910) 10 C.L.R., at p. 330.

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repeated by *Griffith* C.J. in *Cullis* v. *Ahern* (1) with the concurrence of my brother *Powers* and myself. It is the principle adopted by the Privy Council with reference to the Canadian Constitution in such cases as *Grand Trunk Railway Co. of Canada* v. *Attorney-General of Canada* (2), to which I shall refer later. It stands on the basis of natural common sense and does not depend necessarily on express words (see *Story on the Constitution*, vol. II., sec. 1837). If such a position as I have postulated be in fact established, the inconsistency is demonstrated, not by comparison of detailed provisions, but by the mere existence of the two sets of provisions. Where that wholesale inconsistency does not occur, but the field is partly open, then it is necessary to inquire further and possibly to examine and contrast particular provisions. If one enactment makes or acts upon as lawful that which the other makes unlawful, or if one enactment makes unlawful that which the other makes or acts upon as lawful, the two are to that extent inconsistent. It is plain that it may be quite possible to obey both simply by not doing what is declared by either to be unlawful and yet there is palpable inconsistency. In the present case there is inconsistency in both of the senses I have described. Mr. *Dixon* thought it unnecessary to go beyond the intrinsic effect of secs. 12 and 13, which, as he rightly contends, necessarily involves inconsistency since it operates only where the award provides one sum as the minimum and the Act proceeds to declare another in relation to the very subject matter dealt with by the award. The argument, to my mind, is unanswerable as to those sections. There is manifest inconsistency from the standpoint of totality *dependent, however, entirely on the view taken as to the effect of establishing a minimum wage or maximum hours.* But in view of sec. 6, as I have stated it, I do not agree that it is therefore unnecessary to go further. Both for that reason and because the issue is so generally important I shall examine it more closely on principle and also from the aspect of internal or detailed inconsistency. In the first place, the Commonwealth Act not only empowers its tribunal to settle an inter-State dispute, but by secs. 23, 24, 25, 28 and 29 indicates its intention that, however extensive the dispute may be, the Arbitration Court is to investigate and decide it and

(1) (1914) 18 C.L.R. 540, at p. 543. (2) (1907) A.C. 65.

every part of it so as to end the dispute and thereby conclude the parties. This is subject to the qualification found in par. (*h*) of sec. 38, which, however, is irrelevant here. Assuming the existence of an inter-State dispute, the Federal law is to be obeyed. No State law can in the presence of sec. 109 of the Constitution be permitted to stand in the way of the settlement so authorized or directed. No State law can prevent that settlement by direct prohibition, either wholly or partly. *And what it cannot do directly it cannot do indirectly.* That, as Lord *Halsbury* L.C. said for the Privy Council in *Madden* v. *Nelson and Fort Sheppard Railway Co.* (1), " is a very familiar principle." Where, therefore, a Federal dispute exists, no existing State law, whatever its terms, can indirectly or to any extent be regarded as presenting a legal bar to the full exercise of the Federal arbitral power. And equally, when in the absence of a State law on the subject a Federal award has been made, *no State law can disturb or vary or affect the Federal adjustment of the dispute.* In brief, no State law can affect the personal obligations of Australians with reference to the matters involved in their inter-State industrial disputes, either during the continuance of the disputes or during the continuance of an award settling those disputes. Apart from those disputes and awards the State law may well operate. But whatever the Arbitration Court in making an award decides by way of fully determining the dispute amounts, in my opinion (apart from what may be done pursuant to par. (*h*) of sec. 38), *both as to what is granted and what is refused*, to a conclusive settlement of the subject matter, subject only to the possible reopening or variation by the Arbitration Court itself. It is as if the President said in so many words : " With regard to the claim for a 44 hours week and the objection that it should remain 48 as at present, I decide that it shall remain as at present and shall not be reduced to any lower figure, and as to the claim for a minimum of £7 a week and the objection that it remain at £5, I decide that it shall stand at £5 12s. 6d. and not higher or lower." And so as to all other matters in dispute. As to the industrial conditions in dispute, an award by force of the Act covers the field, even where a wage is stated as the minimum or where hours are stated as the maximum, and establishes what

(1) (1899) A.C. 626, at pp. 627, 628.

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on that field are to be the reciprocal rights and obligations of the parties bound. Any entry, therefore, of a State upon this field is an intrusion upon occupied Federal territory and inconsistent with the award, regardless of the specific terms of the State legislation whether direct or indirect. *Erle* C.J., in *Daw* v. *Metropolitan Board of Works* (1), dealt with the question whether two Acts were inconsistent, each by merely affirmative words empowering different bodies to number houses. He said : " I think that where the same power is given to two different bodies to number houses, the exercise of these powers concurrently by both bodies would be *entirely destructive of the object for which they were conferred ; they cannot therefore exist together.*" That settled the question of inconsistency, although, of course, both laws could in fact have been obeyed. That was necessarily conceded by the Court. The question of supremacy, of course, depends on other considerations. The basic reason given by *Erle* C.J. applies much more forcibly to such a case as the present. The Constitution clearly intended that, once the Commonwealth " settled " an inter-State dispute, that settlement should stand, and that its terms should be framed by the one hand, other hands being necessarily excluded. In this particular case the position is specially clear. The log submitted and made the subject of dispute was headed " General log of wages and conditions of employment." It set out elaborately and categorically and with great minuteness a code, with sub-heads as to wages, as to hours, as to overtime, as to payment of wages. Under the sub-head of wages were the detailed claims for a minimum wage, and under that of hours was the specific claim " (a) that 44 hours shall constitute a week's work. No day's work to exceed 8 hours without payment for overtime," &c. Reference to the award will show how elaborately the tribunal examined and adjusted the matters in dispute. It prescribed, not " a " minimum wage, but " the " minimum rates of pay, consisting of a basic wage and certain marginal rates, and provided for their periodical adjustment. If a sum is fixed as " the " minimum wage, a State Act fixing another sum as compulsorily payable, necessarily fixes that other sum as " the " minimum wage (whether also the maximum or not), because

(1) (1862) 31 L.J. C.P. 223, at p. 224.

it means that sum *at least* shall be paid. It is only saying "the minimum" more verbosely. This fact once grasped and appreciated, the matter is simplified. If an award fixes the obligation of the employer at (say) £5 as "the" minimum wage and a State Act then fixes "the" minimum wage at another sum, whether £4 or £6, there is necessarily inconsistency. Apply the question to the ordinary affairs of life. If I contract to buy a horse for £5, that is the minimum price. I can be compelled to pay that, but not more. It is not the maximum I may give. I can, no doubt, give more if I please. But if some competent authority says I must pay £6 as minimum, it seems to me hardly possible any person could be found to assert there was no inconsistency between my obligation as stated by the contract and my obligation as declared by the outside authority. But that is precisely what is maintained for the respondent in the present case; that is, that there is no inconsistency. And the reason given is that I *could* obey both by giving £6. So far, then, as wages are concerned *the only compulsive wages*—that is, *compulsive by law*—are those required by the award. Mutual consent may provide for more without limit. It resembles the contract postulated. Then as to the standard or ordinary hours. Clause 3 (a) distinctly provides that these, as far as *compulsion by law* is concerned, are to be *the maximum* of 48, unless an industry falls within the second proviso, in which case they are to "be 44 hours a week and not 48." That is the clear meaning of the very words of the award, and, when read with the claim, as they should be, it seems to me hopeless to suggest the contrary. The award consequently exclusively occupies the relevant field as to "standard or ordinary hours" for a week's work and as to "the" minimum wage for those hours. It does the same as to overtime payment beyond those hours. When, therefore, as in the present case, a State Act proceeds to enact that there shall in relation to the very matters dealt with by the award be another minimum wage and other standard or ordinary hours, there is manifest and inescapable inconsistency. It is immaterial whether the change is up or down: in either case *the limits are shifted.* Another boundary is aligned to divide lawful from unlawful hours for the minimum wage, and another boundary is aligned to divide lawful from unlawful wages

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for the ordinary week's work. I would add that a State Act prescribing the same obligation would still be invalid if, either expressly or by implication, it purported to empower enforcement in a manner opposed to the method created by the Federal Arbitration Act.

It was vigorously contended that there were no prohibitive words—that all were in the affirmative. But it is trite law that the form of the provision does not conclude the matter. An affirmative contract may carry with it a negative implication. In *Garnett* v. *Bradley* (1) Lord *Blackburn* says that " when the new affirmative words are, as was said in *Stradling* v. *Morgan* (2), such as by their necessity to import a contradiction, that is to say, where one can see that it must have been intended that the two should be in conflict, the two could not stand together." I repeat that as the State Act shifts the boundary of lawful minimum it is in conflict with the award and, if it can be said that it is therefore inconsistent with a Commonwealth law, it is *pro tanto*, but only *pro tanto*, invalid. The second proposition in *Whybrow's Case* (3) is not maintainable, and this should now be specifically declared.

(*b*) *Relevant Commonwealth Law.*—As to this the position taken up by the respondent and by the State of New South Wales, which has intervened, is that an award of the Federal Arbitration Court is not " a law " and therefore the State law stands altogether free from the provisions referred to. This must be dealt with from the standpoint of the jurisdiction *conferred* as well as from that of the jurisdiction when *exercised*. Assuming, as I have said, the existence of an inter-State industrial dispute, the Commonwealth Parliament insists that there shall be no dislocation of industry by strike or lock-out, and it substitutes Federal conciliation and arbitration as *the* means of settling the dispute, failing mutual arrangement. From that moment the supremacy of the Commonwealth Act operates under sec. 109 of the Constitution. State legislation is incapable of arresting Federal action or of limiting Federal discretion, and the Federal tribunal must proceed to perform its functions, and in this way. The Federal Arbitration Court is not a law-maker,

(1) (1878) 3 App. Cas. 944, at p. 966.

(2) (1560) Plowd. 199, at p. 206.

(3) (1910) 10 C.L.R. 266.

but it is an "award-maker," just as the Governor in Council is an "order-maker" or a municipal council is a "bylaw-maker," or a Court of law is a "rule-maker." And if Parliament, unable or unwilling—it matters not which—to legislate in detail or with reference to a specific instance, but having authority to empower, does empower a named functionary to formulate what he thinks a proper rule, Parliament, it may be, hedging his authority with whatever principles or conditions it pleases, his formulation, though not a law, may be adopted by Parliament so as to be law. The legislative adoption of the formulation is itself legislation on the subject matter, and the formulation is then part of the law, not by force of the formulation, but by force of the adoption. There is very relevant authority. In *Willingale* v. *Norris* (1) Lord *Alverstone* C.J. said of a regulation made by the Commissioners of Police under the authority of the *Hackney Carriages Act* 1850 :—"If it be said that a regulation is not a provision of an Act, I am of opinion that *R.* v. *Walker* (2) is an authority against that proposition. I should certainly have been prepared to hold apart from authority that, where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done." If the Commonwealth Parliament were plenary as to the settlement of inter-State disputes, it might adopt either arbitration or any other method or machinery of settlement. If it chose the present system of arbitration, the effect of its legislation would be exactly as in the case of the State or of the British Parliament. In *R.* v. *Burah* (3) Lord *Selborne* states the whole position with the utmost clearness. Adapting what is there said, it may be said here with equal truth : "It is a fallacy to speak of the powers thus conferred on the Arbitration Court as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Commonwealth Parliament." The "acts done" are the awards, and, by parity of reasoning, when adopted by Parliament are part of its

(1) (1909) 1 K.B. 57, at p. 64. (2) (1875) L.R. 10 Q.B. 355.
(3) (1878) 3 App. Cas. 889, at p. 906.

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legislation, being the completion of the conditions it has prescribed with respect to arbitration. The case of *Institute of Patent Agents* v. *Lockwood* (1) is similar in principle. It is, however, urged that *Whybrow's Case* (2), by its first proposition, is antagonistic. That is true, but that first proposition upon further consideration of the Constitution has long since disappeared from the accepted doctrines of this Court. The proposition was from the first unstable, because *O'Connor* J. agreed that in some respects State laws must be disregarded. The two points of union of the majority opinion were the theory of residual powers in the Commonwealth, which is not now entertained, and the theory that the arbitration mentioned in pl. xxxv. of sec. 51 is attributable to the judicial department of Government and not to the legislative department. That theory also has been departed from (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (3)). Indeed, if it were true, this case could and should be instantly determined in favour of the appellant, because the arbitration tribunal would have been all these years functioning invalidly, with the consequence that there is no valid award and therefore no basis on which to measure the respondent's claims. The *Engineers' Case* (4), *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (5), *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co.* (6), and *Federated Gas Employees' Industrial Union* v. *Metropolitan Gas Co.* (7) seem decisive in point of authority.

Before dealing with this on principle, it is well to say that the more recent pronouncements of this Court are entirely opposed to the argument (see *Alexander's Case*, per *Rich* J. and myself (8), per *Higgins* J. (9), per *Powers* J. (10)). Indeed, the *Waterside Workers' Case* (5), and still more the *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* [*No.* 2] (11), would be utter nonsense if this argument of the respondent were sound. On principle it leads to the inquiry what is meant by the expression in sec. 109 of the Constitution "a law of

(1) (1894) A.C. 347.
(2) (1910) 10 C.L.R. 266.
(3) (1918) 25 C.L.R. 434.
(4) (1920) 28 C.L.R. 129.
(5) (1920) 28 C.L.R. 209.
(6) (1920) 28 C.L.R. 456.
(7) (1919) 27 C.L.R. 72, at p. 97.
(8) (1918) 25 C.L.R., at p. 464.
(9) (1918) 25 C.L.R., at p. 476.
(10) (1918) 25 C.L.R., at p. 485.
(11) (1920) 28 C.L.R. 436.

the Commonwealth." It means, of course, a law within what is described in covering sec. V. as "all laws made by the Parliament of the Commonwealth under the Constitution." Why is not the Arbitration Act, enacting as in sec. 29 that an award shall bind certain persons, and as in sec. 28, that its binding effect shall continue, a law in the sense mentioned? I must confess I have never been able to see anything but nebulosity in any reasons ever advanced to the contrary except one, namely, that "arbitration" mentioned in pl. xxxv. of sec. 51 was part of the judicial power of the Commonwealth. But that, as stated, is now settled to be wrong. The Arbitration Act presents all the indicia of a law, including the provisions referred to. Covering sec. V. and sec. 109 of the Constitution not only make it binding, but make it supreme. On the corresponding provisions of the United States Constitution, *Story*, in his *Constitution* (vol. II., sec. 1837), treats the matter most clearly. He says:—"A law, by the very meaning of the term, includes supremacy. *It is a rule which those to whom it is prescribed are bound to observe.*" I would stop there for a moment to say that the "law" is not the piece of parchment or paper, nor is it the letters and words and figures printed upon the material. It consists of the "rule" resolved upon and adopted by the legislative organ of the community as that which is to be observed, positively and negatively, by action or inaction according to the tenor of the rule adopted. Constitutions may prescribe, and do prescribe, how that rule shall be arrived at and how evidenced. But "the law" is essentially the rule itself, and not the material evidence of it. This at once disposes of the main ground on which is rested the contention that the "award" is not a law because it refers back the whole matter to the statute. So a regulation is not a law. Nor is the statute itself a presently operating law, in the sense of creating specific obligations or rights, until its own conditions are fulfilled. When these are fulfilled the "law" is complete; that is, the "rule" is stated which "those to whom it is prescribed are bound to observe." The "laws of England" include the common law (*Cooper* v. *Stuart* (1)). *Story* then says: "If individuals enter into a state of society, the laws of that society must be the supreme

(1) (1889) 14 App. Cas. 286, at pp. 291, 292.

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regulator of their conduct." That, I may pause to observe, is applicable to the citizens of a State as such, as well as to the citizens of the Commonwealth as such, and would include a State arbitration law. Then the learned author proceeds :—" If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent upon the good faith of the parties, and not a government, which is only another name for political power and supremacy." Those observations are, I consider, a complete answer to the view that the State's power in respect of its own citizens remains unimpaired by the exercise of Commonwealth legislative power under pl. xxxv. of sec. 51. There is a very strong analogy in the rule laid down for Canada by the Privy Council, which is expressed by Lord *Dunedin* for the Privy Council in *Grand Trunk Railway Co. of Canada* v. *Attorney-General of Canada* (1) in these words: " First, . . . there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear ; and, secondly, . . . *if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.*" One argument should be specially noticed. It was that, assuming the rule established by an award was " a law," still there could not be an " industrial dispute " as to any matter definitely provided for by State law. If, for instance, New South Wales and Victoria enacted that certain work should be done by piece-work only and New South Wales fixed that piece-work at 10s. and Victoria fixed it at 9s., there could be no inter-State " industrial dispute " involving those States to have the work done by time or to make the price 11s. So as to hours, wages, and all other conditions. The argument was quite frank and clear. It was that, however real in point of fact an industrial dispute might be, however widespread a strike or lock-out, though there was a total cessation of the industry with general loss and consequent suffering, the law must shut its eyes to it all, if only State laws stand in the way of the redress of grievances. As this is only the

(1) (1907) A.C., at p. 68.

exhumation of a theory that I thought every present member of the Court had assisted to inter with becoming solemnity, I shall do no more than refer to *Holyman's Case* (1), where, with the concurrence of my brothers *Gavan Duffy*, *Powers* and *Rich*, five propositions of law were stated as settled. The first, third and fifth are directly opposed to the resuscitated thesis, and establish that, as might be expected, the "industrial disputes" mentioned in the Constitution are disputes "in fact" and are entrusted to the Commonwealth *because* the State laws, whatever they may say, are shown when the disputes occur to be insufficient to preserve the peaceful progress of industry or to prevent the industrial disturbance from affecting a sister State. The Commonwealth Constitution says, in effect, "industrial peace, if possible, notwithstanding State legislation," and not, as the respondent's argument would have it, "State legislation, notwithstanding industrial disruption." Reason applied to the language employed ought not, I apprehend, to find much difficulty in choosing between the rival theories of interpretation. Consequently the first proposition in *Whybrow's Case* (2) cannot be maintained any more than the second.

The provisions contained in the Federal award must, therefore, be allowed their full force and effect and, as covering sec. V. says, "notwithstanding anything in the laws of any State." They have the authority of the Act, which creates the binding character of what the arbitration prescribes, as in *Powell* v. *Apollo Candle Co.* (3). Having then, in competition, two laws—the Federal Act and the State Act—on the same field, the Constitution expressly applies and declares the State Act *pro tanto* invalid.

I may summarize my constitutional conclusions as follows: (1) The settlement of an inter-State industrial dispute on such terms as the Federal arbitrator thinks just cannot be prevented or impeded by any State law; (2) an award once validly made prevails over any inconsistent State law; (3) a State law is inconsistent, and is therefore invalid, so far as its effect, if enforced, would be to destroy or vary the adjustment of industrial relations established by the award with respect to the matters formerly in dispute.

The appeals should, therefore, be allowed.

(1) (1914) 18 C.L.R. 273, at pp. 285, 286.

(2) (1910) 10 C.L.R. 266.

(3) (1885) 10 App. Cas. 282, at p. 291.

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HIGGINS J. *Clyde Engineering Co. Ltd.* v. *Cowburn.*—In my opinion, this appeal should be dismissed. For this State Act of New South Wales, in prescribing that the ordinary working hours shall not exceed 44 per week, is not inconsistent with the law of the Commonwealth which prescribes that they shall not exceed 48 per week. The two laws would be inconsistent, no doubt, if the Commonwealth law prescribed that the hours shall not be less than 48 per week.

The question turns wholly on the meaning of sec. 109 of the Constitution: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

There is no section as explicit as this in the United States Constitution or in the Canadian Constitution. For the section to operate there must be inconsistency of law with law; and even then the State law remains valid except "to the extent of the inconsistency." I am willing to assume that any command, to do or not to do a thing, in a valid Commonwealth award is "a law of the Commonwealth," by virtue of the Constitution (sec. 51 (xxxv.)) and of the *Commonwealth Conciliation and Arbitration Act*; yet a State law, on a State subject of legislation such as labour, is to be treated as valid except so far as a Commonwealth award sends its tentacles into it. The State law is like the Nile River, which covers the whole area with its flood, except that part of the area which is appropriated to the villages. The State law fills, as it were, all the sponge except the fibre. There must, under this sec. 109, as under the analogous sec. 2 of the *Colonial Laws Validity Act* 1865, be inconsistency, or repugnancy, to law, Federal law, if the State law is to be treated as invalid, and it is not invalid except to the extent of the inconsistency in the two laws. It is not enough to show that there is, or may be, inconsistency in policy or scheme or dominant intention of the award, or anything else so elusive and conjectural, or that the powers of State and Commonwealth, in their exercise, may possibly conflict. The power of the State to make labour laws is not a law of the State—it is a law of the Imperial Parliament; and such power as the Federal Parliament has to make labour laws through the Commonwealth Court of Conciliation is also a law of

the Imperial Parliament—not of the Federal Parliament. There must be a conflict *in fact*, in the ultimate directions. As *Story* J. said, as to concurrent powers under the United States Constitution, "the power of the State is restrained not in its *nature* but in its *operations*, and then only to the extent of the actual interference" (*Constitution*, 3rd ed., pp. 318-319).

The argument that the difference of policy is enough, and that the State must not touch any subject which the Federal award touches, ignores the fact that under sec. 109 the Federal award prevails even when the State Act comes first in order of time. In the *Federated Engine-Drivers' Case* (1) it was held that a Federal award was valid which prescribed a lower minimum rate of pay as against a previous State award that prescribed a higher minimum; but it was not suggested by Court or by counsel that the State Act became invalid. To use such a metaphor as that the State here is invading the domain of the Commonwealth Parliament is surely quite inappropriate where the subject of labour conditions is primarily and directly within the reserved powers of the State. What constitutes invasion of the domain of the Commonwealth Parliament? How far is the State law as to labour made invalid when the Commonwealth Court makes an award? Suppose the State Parliament pass an Act for a minimum wage for a class of workers; and that the Court afterwards make an award for a maximum of 48 hours per week: does the State Act become invalid? Suppose the State Parliament pass an Act for early closing, forbidding employees in all factories to be detained after 5 p.m.; and that the Court afterwards made an award for a maximum of 48 hours for certain factories: does the State Act become invalid for those factories? In my opinion, it does not. To say that the State here is attempting to be free from the obligation of the award tempts one to ask from what obligation? No one denies, so far as I know, that the State Legislature cannot alter the terms of the Commonwealth award, and that it cannot impose on the parties rights or obligations "*inconsistent*" with its terms; but it has yet to be shown that the Act purports to alter any terms of the award or to impose on the parties any inconsistent rights or obligations. No

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

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one, indeed, has attempted to specify any term that is altered, or to set out categorically any inconsistent propositions supposed to be involved in the two laws.

No doubt the Commonwealth award must be taken to have settled the dispute between this Union and its members and the employers cited. But it was only the concrete dispute that it settled, within the limits of the claims; it did not express necessarily any will or ideal or scheme of either Federal Parliament or Court; it did not diminish the powers of the State Legislature, although the result of the exercise of the powers of the State may be affected. There is, of course, no inconsistency *in themselves* between the Act of the State as to hours and the Act of the Commonwealth giving power to the Court to settle disputes. The mere fact that in the exercise of the respective powers by State and Commonwealth, or by State and Court, the direction given *might* collide is not enough. There must be actual collision in fact, or both directions stand. The settling of a dispute, e.g., by an agreement which, if and when filed, becomes an award, does not relieve the State of its duty to its people, even to those people who are under the award. It may take higher ground, and decide that all its workers shall have at the least a clear 8 hours day and a half holiday on Saturday; it may give something which the award did not give, but it cannot take away what the award gave. The State Legislature has power to make laws as to labour for people within the State; if it cannot make a law as to labour and hours, no other Legislature can. The Commonwealth Parliament cannot make such a law; it can only create a tribunal that can make it in a concrete dispute on the particular subject; and, unless to the extent of any actual inconsistency between the laws as to the same persons or things, the State Act must be obeyed, however obnoxious. Under the New South Wales *Constitution Act* 1902, sec. 5, "the Legislature shall, subject to the provisions of the *Commonwealth of Australia Constitution Act*, have power to make laws for the peace, welfare, and good government of New South Wales *in all cases whatsoever.*" The parties to the award are bound by it (Conciliation Act, sec. 29); but the State Legislature is not bound by it—except in this way, that if and so far as its law contradicts the Commonwealth law, the Commonwealth

law prevails. But that which prevails against the State law must be law—nothing less; and it must be inconsistent as law with the State Act.

When is a law "inconsistent" with another law? Etymologically, I presume that things are inconsistent when they cannot stand together at the same time; and one law is inconsistent with another law when the command or power or other provision in one law conflicts directly with the command or power or provision in the other. Where two Legislatures operate over the same territory and come into collision, it is necessary that one should prevail; but the necessity is confined to actual collision, as when one Legislature says "do" and the other says "don't." But in the present case the award says "don't work the employee beyond 48 hours," and the State law says, as to the State citizens, "don't work the employee beyond 44 hours." By obeying the State law the award is obeyed also.

But, by the way, there seems to be a curious misunderstanding as to the test of inconsistency laid down in the *Woodworkers' Case* (1) and in the many subsequent cases—the test that both laws cannot be "obeyed." Of course, there may be inconsistency of powers, rights, and so forth; and as to these—the word "obey" is not appropriate (I pass by the doctrine that every power, every right, involves a duty on the part of someone to submit to it). But in the cases cited, the Court was dealing with directions, commands—of Wages Board and of Court; and I cannot conceive of any better test under such circumstances.

The test is not novel. For instance, in *Kutner* v. *Phillips* (2) it was laid down that a later Act was not to be treated as repealing a former Act by implication unless the provisions of the later are "so inconsistent with or repugnant to the provisions of" the "earlier one, *that the two cannot stand together* . . . . Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied" (see also *Thorpe* v. *Adams* (3)). This is the principle which has been applied in determining inconsistency between State and Federal laws in the *Woodworkers'*

(1) (1909) 8 C.L.R. 465.
(2) (1891) 2 Q.B. 267, at p. 272.
(3) (1871) L.R. 6 C.P. 125.

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Case (1). According to *Griffith* C.J. (2) "the test of inconsistency is, of course, whether a proposed act is consistent with obedience to both directions"; and see per *O'Connor* J. (3), *Isaacs* J. (4), *Higgins* J. (5). So *Whybrow's Case* (6) and *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (7). As *Isaacs* J. pointed out in the latter case, "inconsistency," "repugnancy," "contrariety" are "interchangeable terms"; and "an adverse or inimical tendency" is not enough. Personally I examined, in that case, the meaning of "repugnant" used in the *Colonial Laws Validity Act* (8), and I adhere to that meaning on full consideration. In the *Federated Engine-Drivers' Case* (9) *Knox* C.J., *Gavan Duffy* and *Starke* JJ. followed, without reconsidering, *Whybrow's Case*, so far as it decided that the Federal Conciliation Court could not make an award inconsistent with State law; but I do not understand them as doubting the doctrine that there is no inconsistency when it is possible to obey each without disobeying either: and see *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (10). I understand that this last case is regarded as overruling *Whybrow's Case*; but *Whybrow's Case* is not even referred to in it. So far as the doctrine of inconsistency is concerned—that where the two laws can be obeyed at the same time there is no inconsistency—*Whybrow's Case* was accepted as law in *Waterside Workers' Federation* v. *Commonwealth Steamship Owners' Association* (11). Again, in *Federated Seamen's Union* v. *Commonwealth Steamship Owners' Association* (12), *Isaacs*, *Higgins* and *Starke* JJ., having construed a clause in the *Navigation Act* as imposing a duty to pay wages *not less frequently* than once a month, said that the parties might agree, or an award direct, that wages be paid fortnightly; and that the *Navigation Act* having prescribed that three-quarters of the wages be paid within 24 hours after arrival, the Arbitration Court could prescribe that one-half should be paid within 4 hours after arrival. As my brother *Isaacs* said (13):—"But while that certain

(1) (1909) 8 C.L.R. 465.
(2) (1909) 8 C.L.R., at p. 500.
(3) (1909) 8 C.L.R., at p. 513.
(4) (1909) 8 C.L.R., at p. 535.
(5) (1909) 8 C.L.R., at pp. 544-545.
(6) (1910) 10 C.L.R. 266.
(7) (1915) 20 C.L.R. 148.
(8) (1915) 20 C.L.R., at p. 178.
(9) (1920) 28 C.L.R., at pp. 8-12.
(10) (1920) 28 C.L.R., at pp. 155-157.
(11) (1920) 28 C.L.R., at p. 234.
(12) (1922) 30 C.L.R. 144.
(13) (1922) 30 C.L.R., at pp. 159-160.

minimum amount of protection to seamen was provided" (by the Act), "there is nothing inconsistent in the parties agreeing, if they think fit, to shorten the time. . . . And once recognize that agreement may shorten it, it is clear that an industrial dispute may arise on the point, which either the Arbitration Court can settle by awarding the claim, or it cannot. If it cannot, that must be because the Commonwealth Parliament has made the 24 hours inalterable as a minimum limit of duty, and has forbidden the shipowner from contracting for a less option. That, however, by what I have said is not the case either with regard to the 'monthly' payment or the 24 hours' modification. And, if not, then the Commonwealth Parliament has not either expressly or impliedly repealed, in respect of either, the power of the Arbitration Court to settle industrial disputes by awarding terms not illegal. The two Acts can and are intended to stand and operate together where not inconsistent." The statement goes to the full length of my opinion in this case. The Commonwealth award could not override Commonwealth law, just as in this case the State law cannot override the law in a Commonwealth award; and yet there was no inconsistency, no invalidity, of the subordinate law where it merely dictated that which could be the subject of agreement between the parties in this case, a lower maximum of hours than that which the dominant law had prescribed. Whatever area the superior law has left for agreement is an area to which the subordinate Legislature may apply its restrictions. Whatever field is left by the award within the scope of the wills of employer and employee is within the scope of the State Parliament's unfettered powers. Here the award has left for agreement, and therefore for the application of State legislation, the whole area below 48 hours.

So far as to the principle at stake, I now apply myself to the particular action and to the provisions of the Federal award and the State Act. It cannot be too clearly grasped that this is an action, not on the Federal award, but to enforce a New South Wales Act as to hours of labour. The action is not brought for a week's wages, as supposed, but for the sum of 9s. 4d. (see summons and particulars). The employee worked only 44 hours in the week, and the employer, ignoring the State Act, assumed that the employee lost his pay for

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the other 4 hours (under the clause 13 (e) of the award), and deducted 9s. 4d. If this assumption is correct, the 9s. 4d. cannot be recovered except under the State Act; and the Act (sec. 14) allows the amount to be recovered in any Court of competent jurisdiction.

Now, sec. 6 of the Act prescribes that the ordinary working hours in *all* industries (with certain irrelevant exceptions) "shall be as prescribed in or under this section"; and that the number of ordinary working hours of an employee shall not exceed 8 per day, 44 per week, 88 per fortnight, &c. This section applies to all employees, whether they are under a Federal award or not. It is sufficient, therefore, if valid, to justify the employee in leaving work after 44 hours, as this employee did; but it does not of itself entitle him to overtime payment, if he stay at work after 44 hours. The main object of secs. 12 and 13 was obviously to give the employee payment for overtime, and, as incidental thereto, to give him further wages for every hour worked. The week's wages remain the same, but they are divided into 44 parts instead of 48. But as there was no overtime worked here, and no question as to overtime, *secs.* 12 *and* 13 *are not necessary for the plaintiff's claim*; the only question is whether the free weekly wages prescribed, £5 12s. 6d., are payable to the plaintiff seeing that he worked only 44 hours. The minimum wages prescribed by clause 1 of the award are not made conditional on 48 hours being worked: they are payable whatever hours of duty are the proper hours, by agreement or otherwise. The minimum wage, £5 12s. 6d., would be payable if the employer and employee agreed—as they could lawfully agree—on six hours per day as the ordinary hours of duty; and if the State Parliament compelled such an agreement, the result would be the same.

If, then, 44 hours became the maximum ordinary hours per week, either by voluntary or compelled agreement (compelled by State Act), the employer has no right to deduct the 9s. 4d. from the week's wages, and he must pay it under sec. 6.

It has, by the way, been assumed on the part of the Company that it is entitled *so far as the award* is concerned, to deduct the 9s. 4d. from the weekly wage; that is assuming that the State Act making 44 hours the maximum is invalid. Clause 13 (a) makes the employment weekly; but (probably to meet the argument that

under a weekly wage the employer may not always be able to find for the employee a job suited to his special craft) the employee must "perform such work as the management shall from time to time require on the days and during the hours usually worked by the class of employee affected." That is to say, when fitters usually work in the daytime they cannot be called on to sweep the shop (e.g.) at midnight. The "hours usually worked" are the hours usually worked in fact. Then clause 13 (e) provides: "Any employee . . . *not attending for duty* shall lose his pay for the actual time of such non-attendance, unless he produces or forwards, within 24 hours of the commencement of his absence, evidence satisfactory to the management that his non-attendance was due to personal accident arising out of and in the course of his employment, or to personal ill-health, which incapacitated him for his usual work, necessitating such absence. Provided that an employee shall not be entitled to payment for non-attendance on the ground of personal accident or ill-health, or both, for more than six days in each year."

There is, of course, much in this clause to favour the view that the clause relates only to failure to *come* to duty at the time appointed, and that leaving duty before the time has to be dealt with under the power of dismissal (clause 13 (f)). But even assuming that the clause relates also to leaving work before the time of duty has ended, the right to deduct applies, not to absence during the 48 hours, but to hours in which it is the duty of the employee to continue at work. "Duty"—what is "duty"? It depends on the agreement. Or, if the employer had allowed the men to go off for the afternoon, he would not be entitled to deduct from the weekly wages for the hours of absence; as there would be no "duty" to attend. Nor, in my opinion, is the man under duty to stay at his work after 8 hours, if a valid State Act say he need not.

To my mind, indeed, it seems clear that the vague phrases about the State law "interfering with the award" and "taking away the right of the employer" or "shifting the boundary of the lawful minimum" are irrelevant. For no degree of interference with the award, conjectural or even actual, makes the State law invalid unless the interference amount to an inconsistency of law with law

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(sec. 109); and the State Parliament is entitled to reduce the right of employer as well as of employees subject only to sec. 109. I recognize to the full the inconvenience to employers of having two legislatures buzzing over their heads as to labour conditions; but, so long as the States retain the general power of regulating labour, how can the inconvenience be avoided? There is no more inconsistency between the State imposing on an employer 124 hours per week of leisure for employees and the Commonwealth imposing 120 hours, than there is between the State imposing on the employer an income tax of 5s. in the £ and the Commonwealth imposing 7s. 6d. It is quite true that there would be inconsistency, in one sense, if, in the same instrument a labour authority prescribed not less than 120 hours of leisure, and in a subsequent passage prescribed not less than 124 hours; but it would not be inconsistency in the sense of repugnancy, contrariety, contradiction (the sense admittedly required by sec. 109). As to the same instrument the full expression would probably be that it would be inconsistent (and therefore useless) to *prescribe* not less than 120 hours when the instrument prescribes not less than 124 hours. The fact that the burden of shorter hours or increased wages falls on the employer does not make the State law invalid; for if the money had to come from the State treasury the legal position would be the same. It would be the same if some philanthropist provided overtime money for men working beyond 44 hours. The State Parliament which can deprive a man of his life or his liberty can impose on him a duty to pay more than the minimum which the award obliges him to pay.

But counsel for the appellant relies on certain expressions used by *Washington* J. in *Houston* v. *Moore* (1), which certainly favour the opinion that, under the American Constitution, a State law may be invalid as against a Federal law, even though effect may be given to each law without violating the other law. Therefore, it is urged, the State law may be invalid because of inconsistency with the will, the scheme, the policy, the system, the dominant intention of the Federal law. But in using this argument, counsel cannot have been aware that in the same case *Story* J. took the opposite view, saying (2) that "in cases of concurrent authority"

(1) (1820) 5 Wheat. 1.

(2) (1820) 5 Wheat., at p. 49.

(State and Federal) " where the laws of the States and of the Union are in direct and manifest collision on the same subject, those of the Union being 'the supreme law of the land,' are of paramount authority, and the State laws, *so far, and so far only, as such incompatibility exists*, must necessarily yield." The point was not really necessary for the decision, as *Washington* J. was able to decide on other grounds in favour of the party against whom he gave this ruling; but, so far as I can find, the view of *Story* J. has always been accepted. There must be conflict of law with law, and only to the extent of the actual conflict is the State law " superseded," " suspended " (*Black's Constitutional Law*, 2nd ed., p. 174; *Sturges* v. *Crowninshield* (1); *Brown* v. *Maryland* (2); *Story's Constitution*, 3rd ed., pp. 318-319; *Cooley's Constitutional Limitations*, 7th ed., pp. 45, 416; *Ogden* v. *Saunders* (3); *Baldwin* v. *Hale* (4); and, in particular, *Commonwealth* v. *Kimball* (5); *McPherson* v. *Blacker* (6)). But the principle for which I contend was put beyond doubt, so far as concerns the United States, in *Sinnot* v. *Davenport* (7). There it was said that " in the application of this principle of supremacy of an Act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two Acts could not be reconciled or consistently stand together." This view of the law has been reaffirmed in many cases. In *Reid* v. *Colorado* (8) there had been a Federal Act passed, dealing with the transportation of live-stock from one State to another, if the owner knew them to be diseased; and there was a subsequent Act passed by the State forbidding the introduction of diseased cattle, whether the owner has that knowledge or not; and the State Act was held valid.

There is no need, however, to consider more of the United States cases. The words of sec. 109 of our Constitution are express on the subject and apply to all laws, while the words of the United States Constitution are merely " This Constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land." The express words of sec.

(1) (1819) 4 Wheat. 122.
(2) (1827) 12 Wheat. 419, at p. 448, per *Marshall* C.J.
(3) (1827) 12 Wheat. 213.
(4) (1863) 1 Wallace 223.
(5) (1837) 24 Pickering (Mass.) 359, at p 365.
(6) (1892) 146 U.S. 1, at p. 41.
(7) (1859) 22 Howard 227, at p. 243.
(8) (1902) 187 U.S. 137, at p. 148.

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109, limiting the invalidity of the State laws "*to the extent of the inconsistency*," seem to me to put the matter beyond doubt.

There has been considerable discussion as to the precise relation of sec. 12 of the Act to sec. 6. I do not think that to ascertain that relation is essential to my reasoning; but it is worthy of notice (as stated by my brother *Isaacs*) that for some reason sec. 12 does not deal with anything but awards prescribing weekly hours (the matter in question here); whereas sec. 6 deals with 88 hours per fortnight, 132 hours per three weeks, &c., as well as with 8 hours per day. I fancy, however, that the main purpose of sec. 12 was to make it clear that when a Federal award used such an expression as "standard or ordinary weekly hours" the State Act treated the expression as equivalent, for the purposes of the State Act, to the expression "ordinary working hours" used in sec. 6; so that the State Act might provide for all cases beyond 44 hours. The words of sec. 12 are: "Where in any award . . . made under any Act of the Parliament of the Commonwealth of Australia . . . provision is made that the standard or ordinary weekly hours of work or duty of an employee shall not exceed a number stated in the award . . . greater than forty-four . . . then in such a case the standard or ordinary hours of work or duty of such employee shall not exceed those prescribed by or under section six of this Act." My first impression was that sec. 12 was an attempt to give a definition to words used in a Federal award; but it is nothing of the sort. The State Parliament has striven to avoid interference with any Federal award, and to legislate only for the margins left free by the Federal award. The fear that the State Parliament might be exceeding its powers led to the unusual sec. 1 (3) of the Act; so that sec. 6 is valid if sec. 12 or sec. 13 is not.

The cases in England as to by-laws made by municipalities, tramway companies, &c., seem to me to support strongly the views which I have expressed. Where power is conferred to make by-laws, but it is provided that no by-law "shall contain matter contrary to any public law," or that the by-laws be not "repugnant to the laws," &c., a by-law is treated as not contrary or not repugnant to the laws on the ground that it touches the same subject as the

laws or touches them in a different manner. In *Thomas* v. *Sutters* (1) an Act had forbidden the assembling together of people in the streets for the purposes of betting; and the by-law provided that "no person shall frequent and use any street . . . for the purpose of . . . betting"; yet the by-law was held to be valid. The argument was rejected that Parliament had already dealt with the matter, and that the by-law should not deal with it again (2). According to *Gentel* v. *Rapps* (3) "a by-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful" (and see *White* v. *Morley* (4)). "Again, a by-law is repugnant if it adds something inconsistent with the provisions of a statute creating the same offence; but if it adds something not inconsistent, that is not sufficient to make the by-law bad as repugnant." For a competent authority to say that a man shall not work more than 44 hours in the week is not inconsistent with another competent authority saying that he shall not work more than 48 hours.

I am surprised to find that the case of *Daws* v. *Metropolitan Board of Works* (5) is cited as an authority against the hitherto established view as to inconsistency of laws. Under one Act, the Commissioners of Sewers were empowered to number the houses in a street; under a later Act, the Board of Works was so empowered, and effaced the numbers put on the houses by the Commissioners. The Court of Common Pleas, finding that from the very nature of the case both authorities could not be meant to have the same power of numbering simultaneously, decided that the later Act must be treated as having repealed the earlier. But the decision rested on the very fact which is wanting here—*that both Acts could not be obeyed at the same time*—or to use other words, that the two powers could not co-exist. Where there is only one legislature concerned, and inconsistent provisions, the earlier provision is to be treated as repealed; where there are two legislatures and inconsistent Acts, the Act of the subordinate legislature is to be treated

(1) (1900) 1 Ch. 10.
(2) (1900) 1 Ch., at p. 16.
(3) (1902) 1 K.B. 160, at p. 166.
(4) (1899) 2 Q.B. 34, at p. 39.
(5) (1862) 12 C.B. (N.S.) 161.

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as invalid to the extent of the inconsistency: but where the two legislatures have concurrent powers on the same subject—powers, which may or may not be consistently exercised—the power of the subordinate legislature is not to be treated as invalid or as repealed, but *the result of the exercise of its power* is to yield to the superior law. The case in the Common Pleas surely confirms the view which has been (to say the least) accepted and followed for years by this Court, and which has had the undoubted approval of the late Chief Justice, *Barton* J. and *O'Connor* J., as well as of two of the present Bench.

I concur in the opinion that the appeals in the cases of *Metters Ltd.* v. *Pickard* and *Lever Bros. Ltd.* v. *Pickard* must be allowed as they are based on a wrong construction of the award.

POWERS J. *Metters Ltd.* v. *Pickard* and *Lever Bros. Ltd.* v. *Pickard.*—These appeals have been fully referred to by my learned brothers in the judgments just delivered. The appellants were fined for committing breaches of an award made under the *Commonwealth Conciliation and Arbitration Act* 1904-1921, namely, of an award made on 22nd December 1924, which award is still in force. The offence alleged was in not paying 9s. 4d. which the appellants deducted for hours not worked by the employee. It was not disputed that the award was a lawful one at the time it was made, and allowed the deduction to be made. The Union, for the employees, contended that the employer committed a breach of the award by refusing to pay the 9s. 4d. under the award, because of the New South Wales Act, which came into force on 4th January last, purporting to require employers to pay employees under Commonwealth awards the full rate fixed for 48 hours by such awards, if employees worked only 44 hours, by ordering an increased rate per hour to be paid. Whether that payment can be enforced under the State Act as additional wages arises in the next appeal—*Cowburn's Case.* The State Parliament has not any authority to vary a Commonwealth award made in settlement of an inter-State dispute. The Commonwealth Court of Conciliation and Arbitration is the only authority which can vary an award made in settlement of an inter-State dispute. The Court has not varied the award. No breach of the award was committed

by deducting 9s. 4d. in the circumstances, because the award authorized the deduction; and I agree that the appeals against the conviction should be allowed.

Clyde Engineering Co. Ltd. v. *Cowburn.*—This is an appeal against a judgment of the Court of Petty Sessions by which the appellant was ordered to pay 9s. 4d. to an employee for wages. The employee was a member of the Amalgamated Engineering Union and was employed by the appellant. An award had been made by me, as President of the Commonwealth Court of Conciliation and Arbitration, in settlement of an industrial inter-State dispute which bound the appellant to pay to members of the Union referred to employed by him certain minimum wages at least and to observe certain conditions of work. Under the conditions in the award the employees were to be paid overtime rates if they worked more than 48 hours; but 48 hours were not fixed as definite hours of duty, only as hours after which the employee was entitled to overtime rates for work done. Employees were not compelled by the award to work 48 or any other number of hours—if they did work 48 hours they were entitled to the minimum wages set out in the award. The award did not, therefore, cover the whole field of rates to be paid and the hours to be worked, but it only fixed a minimum rate or lowest rate for the protection of the workers and a maximum number of hours to be worked. The rate was not an inflexible minimum wage. The hours were not minimum hours. Higher rates and minimum hours were left open to the parties, and, in my opinion, to State legislation also. The award also allowed the employer to deduct a proportionate sum from the wages fixed by the award for the employee if the employee did not attend for duty up to 48 hours a week. As the plaintiff was a fitter he was entitled, under the award, to £5 12s. 6d. if he worked for 48 hours in any week, and a proportionate part only of the £5 12s. 6d. if he worked less. Between 7th and 13th January inclusive the employee worked for 44 hours only, and he was paid £5 3s. 2d. instead of £5 12s. 6d., which he would have received if he had worked 48 hours that week. The employee (the plaintiff) sued for the difference —9s. 4d.—as additional wages due to him for the week in question.

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The claim for the 9s. 4d. was based on two grounds:—(1) That the award had in fact been varied by a New South Wales (State) Act—known as the *Forty-four Hours Week Act*—by requiring employers subject to Federal awards to pay a higher rate each hour than the rates fixed by the award to such an extent that they would have to pay employees the same amount for 44 hours as the award required them to pay for 48 hours if the employee worked for 48 hours. (2) Assuming the State Parliament had not any authority to pass an Act varying an award made by the Commonwealth Court, it had power to pass an Act fixing minimum wages and maximum hours of labour only applicable to all its citizens —whether respondents bound by a Commonwealth award or not —and consequently the 9s. 4d. was due to the employee under the State Act as an addition to the award wages, not due under the award.

The sections of the Act mentioned that are material in this case have been fully referred to in the judgments just delivered, and I do not see any use in repeating them. The Act fixed 44 hours as a working week in New South Wales, but did not prevent persons working 48 hours if overtime was paid; and it also required employers to pay an addition to the rates to be paid under Federal awards for every hour worked by employees up to 44 hours and an additional or overtime rate after 44 hours' work. The Act did not fix any minimum basic wage to be paid by employers generally.

The 9s. 4d. was, as I have mentioned, claimed at the hearing on two grounds: (1) that it was payable under the award—read with the *Forty-four Hours Week Act*; and, as an alternative, (2) that the 9s. 4d. was payable under the State Act as a debt in addition to the award rate, not under the award, and the State Parliament had the power to impose such a burden on all citizens of the State whether they were respondents bound by a Federal award or not. For the reasons given in my judgment on the appeals in *Metters* v. *Pickard* and *Lever Brothers Ltd.* v. *Pickard*, I hold that a State Act cannot legally vary a Commonwealth award. The Federal award authorized the deduction. The Federal law is supreme. The amount is not therefore recoverable under the award.

The question whether the 9s. 4d. is recoverable under the State Act in question as an addition to the award rate is a more difficult matter to decide. In considering the question to be decided in this case, it should be remembered that the Federal award in this case has not fixed an inflexible rate as the rate to be paid—only a minimum rate. The parties can therefore agree to higher rates to be paid without in any way affecting the rights of employers or employees under the award.

In the first place, I go as far as my brother *Higgins* goes as to the power of the State Parliament, and the State Parliament only, to settle State disputes and to make laws regulating within the State, in the interests of all the people of the State, a basic or living wage, the hours of labour and the conditions of work, including health conditions, to be observed by all employers of labour in New South Wales, provided it does not pass an Act which is "inconsistent" with a Federal law or an award which has the force of a Federal law. The State Parliament is the only legislature that can pass the laws referred to directly, the power to do so having been retained by the State under the Constitution, because not granted to the Commonwealth. The Commonwealth has a limited power only under the Constitution—that is, to make laws for the settlement and prevention of inter-State disputes by conciliation and arbitration, and by those methods only. It has been held by a majority of the Full Court of this Court, in *Whybrow's Case* (1), that the Commonwealth Court of Conciliation and Arbitration has no jurisdiction under sec. 51 (xxxv.) of the Constitution to make an award inconsistent with a State law (2). It has also been held in *Whybrow's Case* by the Full Court—and this is most important on this appeal—that an award of the Commonwealth Court of Conciliation and Arbitration is not inconsistent with a State law if compliance with the award is consistent with obedience to the State law. It was therefore held that an award fixing a minimum rate of wages higher than that fixed by a determination of a State Wages Board is not for that reason alone inconsistent with that determination (3). In

(1) (1910) 10 C.L.R. 266.
(2) (1910) 10 C.L.R., at pp. 267, 285, 298, 299, 307.
(3) (1910) 10 C.L.R., at pp. 267, 286, 287, 299, 309, 311.

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the *Federated Engine-Drivers' Case* it was held by a Full Bench of six Judges of this Court that the Commonwealth Court of Conciliation and Arbitration may, by an award, fix a minimum rate of wages lower than the minimum rate fixed by a Wages Board of a State (1). The following appears in the joint judgment of the present Chief Justice and my brothers *Gavan Duffy* and *Starke* (2):— "The argument was that the Arbitration Court could not make an award inconsistent with a State law, and that a Wages Board determination is a State law. The cases relied upon were the *Woodworkers' Case* (3) and *Whybrow's Case* (4), and all parties accepted these decisions, and rested their arguments upon the basis of the same. We therefore apply the rule of law enunciated in those cases; but it must not be said hereafter that we have either reconsidered the principle of those decisions or reaffirmed the same. We think the rule laid down in *Whybrow's Case* amounts to no more than this: that there is no inconsistency between an award of the Arbitration Court and the determination of a State Wages Board when it is possible to obey each without disobeying either. In *Whybrow's Case* it was held by this Court that an award fixing a minimum rate of wages higher than that fixed by a State Wages Board was not inconsistent with the determination, because it was plain, on the interpretation of the determination, that employers were not forbidden to pay more than the minimum. The present case is the converse of *Whybrow's Case*, for the lower minimum is here fixed by the Arbitration Court. The terms of the award must be considered; but, assuming that the common form is adopted, namely, 'The minimum rates of wages to be paid to employees members of the claimant union shall be,' it is plain that the employers are not forbidden to pay more than the minimum so prescribed. To use the language of *Griffith* C.J. in *Whybrow's Case* (5), it follows that the proposed award of the Arbitration Court is not inconsistent with the determination in question, nor with the statute which gave it the force of law." The same test as to inconsistency was adopted by the majority of the Court in the

(1) (1920) 28 C.L.R., at p. 2.
(2) (1920) 28 C.L.R., at p. 12.
(3) (1909) 8 C.L.R. 465.
(4) (1910) 10 C.L.R. 266.
(5) (1910) 10 C.L.R., at p. 287.

Federated Seamen's Case (1), to which my brother *Higgins* has referred.

It is, therefore, clear from the decisions of the Court referred to (one in 1910, one in 1920 and one in 1922) that, if 9s. a day is allowed by a State law as a minimum wage and 10s. a day by a Federal award as a minimum wage, they are not inconsistent laws and both can be obeyed, because the payment of a minimum wage of 9s. required by the State Act is obeyed by paying 10s. under the Federal award. In the same way, if a State law fixes 10s. a day as a minimum wage and the Federal award fixes 9s. a day as a minimum wage (*Federated Engine-Drivers' Case* (2)), they are not inconsistent laws and both can be obeyed by paying 10s. minimum under the State Act. That being the case, if the State Act in question only adds one-eleventh to the Federal minimum rate (12s. instead of 11s.), how can it be held to be inconsistent with the Federal award in question, as both orders can be obeyed by paying 12s. ? The test usually adopted by this and other Courts is whether both laws can be obeyed.

It is not, therefore, inconsistent with a Federal award for a State Act or State award or State Wages Board to order employers bound by a Federal award fixing a minimum wage only, to fix—by a State authority or a State Act—a lower or a higher minimum wage than is fixed by a Federal award. That is all the State Act, in my opinion, does; for, notwithstanding anything contained in the New South Wales State Act, the employer has to pay the minimum wage fixed by the Federal award and the minimum overtime rate fixed by the award if the employee works for more than 48 hours. The employer can and must also observe all the conditions of the award that are compulsory; so that the two laws are consistent to the extent that both can be obeyed. It is true that the employer is required to pay, by a State Act and under the State law (not the award), something in addition to the minimum rate fixed by the award—equal to one-eleventh of the Federal rate. Such an addition to the Federal rate by a State law has been held in the cases quoted not to be inconsistent with the Federal law. The employer is therefore liable under the State Act to pay a sum (in this case of 9s. 4d.) *in addition*

(1) (1922) 30 C.L.R. 144. (2) (1920) 28 C.L.R. 1.

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to the Federal minimum rate, just as he would have to do under a State arbitration award or State Wages Board decision authorized by the same State Parliament, if any one of the State authorities had made an award to that effect, or if the State had passed a general law fixing a basic rate for New South Wales which would amount to 9s. 4d. more than the minimum rates payable under the Federal award in question. The parties could agree to payment of an extra rate beyond the minimum wage without affecting rights under the award; and it is therefore open to the State Legislature to compel them to do so—as both the orders under the award and the State Act can be obeyed. The parties could agree, without affecting the rights of any of the parties under the award, to payment of overtime after 44 hours, as the maximum—not minimum—hours under the award were 48 hours.

I do not think the form in which the addition to the award rate is made should cause the Court to declare the Act invalid, if, as I think, the effect of it is only to add to the minimum Federal wage including overtime—and both orders can be obeyed. If the State Act had forbidden the employer to deduct the 9s. 4d., or if it had ordered him not to do anything the award required the employer to do, then I hold the Act would be invalid to that extent. Both orders could not be obeyed, and the Commonwealth law would prevail.

For the reasons stated, the appeal in this case should be dismissed.

This Full Bench has been asked to reconsider *Whybrow's Case* (1); but, until a majority of this Court has definitely overruled that case, I feel bound on this appeal by the decision of the Court in that case, as I do not feel justified in overruling that judgment on the point material on this appeal. I am not prepared to overrule *Whybrow's Case* on the point material in deciding this case, namely, that a law is not inconsistent with another law if both laws can be obeyed. It may be wrong, but I am supported in that view by the judgments of three eminent constitutional lawyers —the late Sir *Samuel Griffith* (the first Chief Justice of this Court), the late Mr. Justice *Barton* and the late Mr. Justice *O'Connor* (the other two members of the first High Court of the Commonwealth).

(1) (1910) 10 C.L.R. 266.

I cannot give in such fitting words as they have used my reasons for holding the view that a law is not inconsistent with another if both laws can be obeyed, and I therefore quote some of the remarks made by those learned Judges when giving judgment in *Whybrow's Case*. *Griffith* C.J. said (1):—"I pass to the second question, whether the proposed award would be inconsistent with the determinations of the State Boards. Before considering the particular points in which it is contended that it would be inconsistent, I will refer to a far-reaching argument addressed to us by Mr. *Mitchell* and Mr. *Irvine*, to the effect that, if upon a fair construction of the State Acts it appears that the State legislatures have indicated an intention to cover the whole ground, any award is necessarily inconsistent with the Acts except so far as it follows them. In one sense this contention may be sound—if, for instance, a State legislature laid down hard and fast rules of conduct, which might not be departed from on one side or the other, so that the persons subject to the law could not lawfully do anything which was not actually prescribed and defined by the Acts. But none of the Acts in question are of this kind. The determinations which they authorize are as to the minimum wage that may be paid in general, and as to the maximum number of persons receiving less than the minimum wage who may be employed under special circumstances. The whole field of voluntary agreement as to wages greater than the minimum, and as to the employment of a less number of persons receiving less wages than the minimum, is left open to the parties. It is not, therefore, necessary to pursue this argument. The points in which the proposed award is alleged to be inconsistent with the determinations are substantially two: (1) that the minimum wage to be paid to journeymen is greater than that prescribed by the determinations; and (2) that the conditions on which persons receiving less than the prescribed minimum may be employed are different. In the *Woodworkers' Case* (2) I expressed the opinion that the test of inconsistency is whether a proposed act is consistent with obedience to both directions, but in view of the arguments which have been addressed to us I will say something further on the point. What I have already said on the meaning of arbitration goes a long way to

(1) (1910) 10 C.L.R., at pp. 286-287. (2) (1909) 8 C.L.R. 465.

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solve the difficulty. If, as I think, that term connotes a settlement of differences in any way in which the parties themselves could settle them, it follows that whatever the parties could lawfully agree to do the arbitral tribunal may order them to do. Whatever view is taken of the intention of the State legislatures, it is plain that they have not forbidden employers to pay more than the minimum wage prescribed by the Wages Boards, or to agree with each other or with their employees that they will not pay less than a sum which is greater than that minimum. It follows that the proposed award is not in this respect inconsistent with any of the determinations in question, or the statutes which gave them the force of law."

Barton J. said (1) :—" The second question is whether the proposed award, annexed to the case stated by my learned brother the President, would in any of its parts be inconsistent with the determinations of the State Wages Boards. I have already stated the sense in which I understand the word 'inconsistent.' It may be of advantage to elucidate it further by a passage in the judgment of Lord *Blackburn* in the case of *Garnett* v. *Bradley* (2) :—'There is one rule, a rule of common sense, which is found constantly laid down in these authorities to which I have referred, namely, that when the new enactment is couched in general affirmative language and the previous law, whether a law of custom or not, can well stand with it, for the language used is all in the affirmative, there is nothing to say that the previous law shall be repealed, and therefore the old and the new laws may stand together. There the general affirmative words of the new law would not of themselves repeal the old. But when the new affirmative words are, as was said in *Stradling* v. *Morgan* (3), such as by their necessity to import a contradiction, that is to say, where one can see that it must have been intended that the two should be in conflict, the two could not stand together ; the second repeals the first.' The determinations of the Wages Boards and the proposed award are couched in the affirmative in respect of the material part of each, the provision as to the minimum wage. None of them prescribe an inflexible rate. The determinations name a minimum, and it is in each case lower

(1) (1910) 10 C.L.R., at p. 299. (2) (1878) 3 App. Cas., at p. 966.
(3) (1560) Plowd., at p. 206.

than the minimum named by the proposed award. By paying the latter minimum an employer will be obeying both laws. The affirmative words of the award, therefore, do not 'import a contradiction' between it and the determinations. It is impossible to say that the employer cannot obey the one without disobeying the other. Therefore, the former and the latter may stand together. Therefore, according to the proper test, they are not inconsistent." *O'Connor* J. said (1):—"Taking the section as a whole, therefore, there is nothing in it to prevent in the case of the Victorian Wages Board the application of the test to which I have so often referred—could the provisions of the proposed award which is questioned be lawfully agreed to by the disputants? It would be impossible without following out each provision of the proposed award and comparing it with all the Wages Boards' determinations to answer the second question of the learned President more in detail."

RICH J. These three cases resemble each other in one respect, but one of them, *Cowburn's Case*, contains an additional feature which must be decided separately. I think the most convenient course for me to adopt is to consider them together so far as they are alike, and then state my opinion as to the additional feature. In all the cases there is a claim for further wages than the amounts actually paid. The further wages claimed correspond in amount with the sums severally deducted by the employers because the employees insisted on working 44 hours instead of 48. According to the words of the award the deductions were properly made unless the 44 hour week was "recognized" in the industry as a proper working week within the meaning of the award itself. In my opinion, that was not so. I do not think the mere fact that the law of one State fixes for that State a 44 hour limit makes 44 hours the "recognized" week in the sense of a Federal award. This disposes of all three cases so far as any claim is made on the Federal award. As to all but *Cowburn's Case* there is nothing more to be said, but as to that case an alternative claim is made that the State law itself creates a new right independent of the award so far as obligation is concerned. It gives, it is claimed, for each hour not worked up to

(1) (1910) 10 C.L.R., at p. 310.

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48 an additional one-eleventh of the Federal rate. In reply to that it is said that the State Act is inconsistent with the award and to that extent invalid under sec. 109 of the Constitution. *Whybrow's Case* (1)—the reconsideration of which I expressly reserved in *Federated Engine-Drivers' &c. Association of Australasia* v. *Adelaide Chemical &c. Co.* (2)—establishes two propositions, and these, if correct, in effect determine the matter in favour of the respondent. I think both propositions are inconsistent with the principle of *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (3) and subsequent cases based on that principle. *Whybrow's Case* ought not to be looked on any longer as law in respect of either of its propositions. The consequence is that the State law, provided it is, when compared with the award treated as expressing the Commonwealth law, found to be inconsistent, must be disregarded. On comparing the two it seems clear to me there is inconsistency. There are different minimum wages and different maximum hours, and these seem to me to be quite inconsistent. What I have said is not to be confined to cases where an award has been made. The same principle applies where before making the award a State law would, if effective, operate so as to prevent or interfere with an award. For that purpose it must equally be treated as inconsistent with the Commonwealth law and disregarded.

For this reason I think the appeal in *Cowburn's Case* must also be allowed.

STARKE J. Apart from some general observations upon the power of the States to set up social standards within their territorial limits, the argument for the respondents was founded entirely upon the propositions advanced by *Griffith* C.J. and *Barton* and *O'Connor* JJ. for their decision in *Whybrow's Case* (1): first, that the power conferred by the Constitution upon the Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State did not justify any law or any rule of conduct established by means of conciliation or arbitration which was or

(1) (1910) 10 C.L.R. 266.
(2) (1920) 28 C.L.R., at p. 22.
(3) (1920) 28 C.L.R. 129.

became inconsistent with State laws in relation to industrial conditions; second, that there is no inconsistency between a law of the Commonwealth and a law of the State if it be possible to obey each without disobeying either. See also *Engine-Drivers' Case* (1).

But since *Whybrow's Case* (2) the interpretation of the Constitution, and particularly of sec. 51, pl. xxxv., has been reconsidered and restated (*Engineers' Case* (3)). It is now clear that sec. 51, pl. xxxv., is "in terms so general that it extends to all industrial disputes in fact extending beyond the limits of any one State" (4). And "it is a fundamental and fatal error to read sec. 107" of the Constitution "as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated. The effect of State legislation, though fully within the powers preserved by sec. 107, may in a given case depend on sec. 109. However valid and binding on the people of the State where no relevant Commonwealth legislation exists, the moment it encounters repugnant Commonwealth legislation operating on the same field the State legislation must give way" (4). It was said in *Whybrow's Case* that arbitration connotes an obligation to decide in accordance with law, that discontent with a State law cannot be described as a dispute, and that consequently the extent and limits of the authority of the Commonwealth Court of Conciliation and Arbitration are just as wide and just as narrow as the capacity of the parties themselves: "whatever the parties could lawfully agree to do, they may be ordered to do, and whatever they could not lawfully agree to do, they cannot be ordered to do." Any tribunal erected by the Parliament pursuant to its constitutional powers is necessarily bound by law. But what law? There is no express provision in the Constitution that the Federal authority is bound by the laws of the States, and powerful reasons exist against the implication of any such limitation. Any tribunal erected by the Parliament under the industrial power conferred by the Constitution necessarily operates over a field—industrial disputes extending

(1) (1920) 28 C.L.R., at p. 12.
(2) (1910) 10 C.L.R. 266.
(3) (1920) 28 C.L.R. 129.
(4) (1920) 28 C.L.R., at p. 154.

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beyond the limits of any one State—that no State law can cover. And, as my brother *Higgins* said in *Whybrow's Case* (1), "it" (the Federal power) "is not primarily a power to fix conditions of labour—it is a power to settle disputes; but if, for the purposes of settling a dispute, the Federal Court finds it necessary to fix labour conditions, it can do so; and its award, by virtue of the provisions of the Constitution, prevails over any regulations of labour made by the State on the lower plane. In other words, as the laws of the several States concerned as to wages and other conditions of labour have failed to prevent the dispute and cannot settle it, the Federal law steps in with its machinery created under the Constitution; and the Federal machinery cannot be controlled in its action by any State legislation framed for other circumstances." I concur in this view, and am of opinion that the first proposition upon which the respondents relied cannot be sustained, and is not law.

The second proposition upon which the respondents found their argument is said to be a test whereby can be resolved the question whether the law of a State is inconsistent with a law of the Commonwealth for the purposes of sec. 109 of the Constitution. Now, I quite agree that the inconsistency referred to in sec. 109 is a contrariety of laws. It is true, as Mr. *Dixon* argued, that incompatibility may be found in the Acts of the Commonwealth and of the State in question here, without examining the provisions of an award made under the Commonwealth Act. But the award operates and is effective only by reason of the sanction of the Commonwealth law. It is as if the Parliament had enacted those provisions and made them a law of the Commonwealth. Consequently, in my opinion, the Court may, in some cases, be driven to consider whether the law of the State is inconsistent with the combined effect of the Commonwealth law and an award made pursuant to its provisions. Adapting the words of my brother *Isaacs* in the *Union Steamship Co.'s Case* (2), we ought, in applying sec. 109 of the Constitution, to avoid a meticulous inquiry whether, if all the conditions in the awards of the Commonwealth Court of Conciliation and Arbitration and in the law of the State were aggregated into one Act, "they could be humanly observed or whether the parties could comply

(1) (1910) 10 C.L.R., at p. 336. (2) (1925) 36 C.L.R., at p. 147.

with all." "A much broader proposition is involved." The question is whether there is inconsistency, contrariety, repugnancy —the words are interchangeable (*Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (1)—between the State law and the scope and purpose of the law of the Commonwealth.

Whybrow's Case (2) did not involve the interpretation of sec. 109, but dealt with the question whether a proposed award of the Commonwealth Court of Conciliation and Arbitration would be inconsistent with certain awards and determinations of Wages Boards made under the laws of the States. That question doubtless involved the same legal elements as are involved in the interpretation of sec. 109, but technically *Whybrow's Case* was not an interpretation of the Constitution, and the present case directly touches its interpretation. *Whybrow's Case* is, however, an important authority and must be considered. But it is necessary, I think, to say that the Court there dealt only with the affirmative aspects of certain stipulations in awards, and neglected altogether to consider their negative aspects. An award that a person shall pay a certain minimum rate of wage involves, in its negative aspect, that he need pay no more. It is not consistent, in my opinion, with such a direction to say that he shall pay a lower or a higher rate of wage. If a wage-fixing authority prescribed a minimum rate of wage and maximum hours of labour, and subsequently prescribed a higher minimum rate of wage and lower maximum hours of labour, those two directions could not stand together: the later direction is inconsistent with the earlier and by implication repeals it. And there is a passage in the *Sawmillers' Case* (3) which, taken with the question then under consideration, lends support, I think, to this view. The question was (4): "There is a determination of the Woodworkers' Board . . . which determines certain conditions of employment and the lowest prices and rates of wages to be paid in respect of certain of the persons or classes of persons employed in Melbourne by . . . the respondents . . . Has this Court" (the Commonwealth Court of Conciliation and Arbitration) "power to make any enforceable award inconsistent with the said determination?" *Griffith* C.J. said (5):—"In my opinion the Wages Boards

(1) (1915) 20 C.L.R., at p. 168.
(2) (1910) 10 C.L.R. 266.
(3) (1909) 8 C.L.R. 465.
(4) (1909) 8 C.L.R., at p. 469.
(5) (1909) 8 C.L.R., at pp. 499-500.

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are subordinate legislative bodies duly constituted by the law of Victoria, and for reasons already given, I think that the Court cannot supersede ordinances made by them. *That is to say, the Court cannot fix a lower minimum of pay or a higher maximum of hours of labour than those prescribed by the determination, or make any other order inconsistent with the particular ordinance of the Board as to a matter within its jurisdiction.*" I cannot see that the legal effect of such stipulations differs because they are made by independent tribunals instead of by one tribunal. True, a repeal by implication does not take place, but sec. 109 of the Constitution resolves the inconsistency. So I am unable even to agree that the rule enunciated in *Whybrow's Case* (1) was rightly applied in that case and in other cases which follow it.

I must now examine the scope and purpose of the Commonwealth law, both by itself and in conjunction with the award of the Court made pursuant to its provisions, and then compare the State law with those provisions.

The *Commonwealth Conciliation and Arbitration Act* establishes a Court of Conciliation and Arbitration, and gives it cognizance of industrial disputes extending beyond the limits of any one State, and authorizes it to hear and determine such disputes, and to make any award for their right settlement. The Court is thus given full and unfettered authority, within the ambit of the disputes and the limits of any law of the Commonwealth, to make such awards as it thinks right and proper for the just settlement of those disputes. And, if I am right in denying the first proposition above mentioned, it is not subjected, in arriving at that settlement, to the law of any State. Now secs. 12 and 13 of the *Forty-four Hours Week Act* 1925 of the State of New South Wales are framed so as to operate only in cases where an award or order or an industrial agreement is made pursuant to the Commonwealth law. And they then proceed to establish a rule of conduct in those cases in relation to maximum hours of labour without overtime and minimum rates of wage, notwithstanding anything which the Commonwealth tribunal has awarded or may lawfully award, or which an industrial agreement has settled, or may lawfully settle, in respect of these matters. The

(1) (1910) 10 C.L.R. 266.

Commonwealth law provides in effect that the maximum hours of labour, without overtime, and the minimum rate of wage shall, within the ambit of its authority, be those which the Commonwealth tribunal awards, whilst the State law provides in substance that the maximum hours of labour without overtime and the minimum rate of wage shall, in New South Wales, in cases in which the Federal authority has been or may in future be exerted, be those definitely fixed and prescribed in the State Act. The State law defeats the settlements effected by the Commonwealth tribunal, and operates to interfere with the settlement of disputes by that tribunal as regards maximum hours of labour and minimum rates of wages. In my opinion, these laws, in themselves, are inconsistent and contradictory, and the provisions of secs. 12 and 13 of the State Act are therefore invalid. Further, in these cases, we have actual awards to consider.

The Commonwealth tribunal has, in substance, prescribed certain minimum rates of wage and maximum hours of labour without overtime, and it has regulated very largely the industrial relation between the parties to the dispute. These provisions act and react upon each other and, taken as a whole, represent what the Court considered a right and just settlement of the dispute. Then was enacted the State law, which alters the rights and obligations of the parties as to hours of labour and rates of wages fixed by the awards and imposes other rules of its own as to persons bound by the award and subject to its territorial jurisdiction. It undoes, as to these persons, what the Commonwealth tribunal considered a right and just settlement of their dispute taken as a whole. Such provisions are, in my opinion, inconsistent with the law of the Commonwealth and, therefore, invalid. And, in my opinion, the same result would follow, for reasons advanced earlier, if comparison were confined to the provisions of the awards relating to the ordinary weekly hours of work and the minimum rates of wage, and the minimum rate of wage and the hours specified in the State Act.

Lastly, some reliance was placed upon the provisions of sec. 6 of the State Act. But that section must, for the reasons already stated, be just as invalid as are secs. 12 and 13, if it extends to cases where awards have been made by the Commonwealth tribunal under the sanction of the Commonwealth law, fixing the ordinary working hours of employees, without overtime, in any industry.

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The cases the subject of these appeals now fall for determination. In *Cowburn's Case*, the claim for wages was founded both upon the award of the Commonwealth tribunal and upon the provisions of secs. 12, 13 and 14 of the State Act. The award provided that any employee not attending for duty should lose his pay for the actual time of such non-attendance. Cowburn's ordinary hours of duty in a week were 48, but in the week in question in this case he only attended for and performed his duty during 44 hours. For the 4 hours during which Cowburn did not attend for duty he lost his pay, and the lost pay is the sum for which he sues in these proceedings. It cannot be recovered on the award, and, so far as his claim is based on the State Act, the provisions thereof upon which he is forced to rely are inconsistent with a law of the Commonwealth and, therefore, invalid. Consequently, the appeal in *Cowburn's Case* must be allowed. In the cases in which Pickard was informant breaches of an award of the Commonwealth tribunal were charged. But to support those charges it was necessary to establish that the recognized standard hours for the general body of employees in the industry concerned was 44 hours a week. It was said that the State law established a 44 hour week in New South Wales, and that it therefore became the recognized standard hours for the general body of employees within the meaning of the award. There is more than one answer to the contention, but it is enough to say that it fails because the State law, for reasons already stated, is inconsistent with the Commonwealth law, and is, therefore, invalid to the extent of the inconsistency. The appeals in these cases must also be allowed.

In each case appeal allowed, order appealed from discharged and summons dismissed.

Solicitors for the appellants, *Salwey & Primrose*, by *Darvall & Horsfall.*

Solicitors for the respondents, *Sullivan Bros.*

Solicitors for the interveners, *Gordon H. Castle*, Crown Solicitor for the Commonwealth ; *J. V. Tillett*, Crown Solicitor for New South Wales.

B.L.