[HIGH COURT OF AUSTRALIA.]

THE AMALGAMATED ENGINEERING UNION CLAIMANT;

AGAINST

ALDERDICE PROPRIETARY LIMITED AND OTHERS . . . . . } RESPONDENTS.

IN RE THE METROPOLITAN GAS COMPANY AND OTHERS.

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MELBOURNE, *Oct.* 9, 10.

SYDNEY, *Nov.* 26.

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

Industrial Arbitration—Industrial dispute—Demand by organization of employees—Awards and agreements fixing hours for certain work in respect to one union—Subsequent award to another union fixing fewer hours for similar work—Former union not party to subsequent award—Ineffectiveness of later award to affect previous award to other union—"Otherwise order"—Meaning of—Decrease of hours by Full Arbitration Court in respect of members of union having earlier award—Effect of—Jurisdiction of Full Arbitration Court to reduce hours—Commonwealth Conciliation and Arbitration Act 1904-1928 (*No.* 13 *of* 1904—*No.* 18 *of* 1928), *secs.* 21AA, 28 (2), 31 (1).

The applicant companies employed certain persons, who were members of the Federated Gas Employees Industrial Union, as fitters, turners and blacksmiths. By certain awards and agreements the hours of such employees were fixed at 48 hours per week. Subsequently the Amalgamated Engineering Union obtained an award providing that the hours of (*inter alia*) fitters, turners and blacksmiths should be 44 hours per week. The Federated Gas Employees Industrial Union was not a party to this award. A summons was issued by one of the applicants asking for an interpretation and, if necessary, for a variation of the latter award. At the time of the hearing of that summons the Full Court of the Commonwealth Court of Conciliation and Arbitration had varied the awards and agreements of the Federated Gas Employees Industrial Union by reducing the hours of (*inter alia*) fitters, turners and blacksmiths from 48 to 44 hours per week, but this alteration was not brought to the notice of the Judge who heard the summons. The Judge held that as a result of the Amalgamated Engineering Union's award the hours of fitters, turners and blacksmiths who were members of the Federated Gas Employees

Industrial Union were reduced from 48 to 44 although the Federated Gas Employees Industrial Union was not a party to such award. The applicants then took out a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1927 to determine whether the award of the Amalgamated Engineering Union was binding as to (*inter alia*) fitters, turners and blacksmiths who were members of the Federated Gas Employees Industrial Union and employed by the applicants.

Held, that the award of the Amalgamated Engineering Union was not binding as to persons employed by the applicants who were members of the Federated Gas Employees Industrial Union but were not members of the Amalgamated Engineering Union.

SUMMONS referred to Full Court.

The applicants, the Metropolitan Gas Co., the South Australian Gas Co., the Colonial Gas Association and the Hobart Gas Co., issued a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1927 against the Amalgamated Engineering Union. The application was in respect of an award dated 1st July 1927, made by the Commonwealth Court of Conciliation and Arbitration in a dispute in which the Amalgamated Engineering Union was claimant and Alderdice Pty. Ltd. and others, including the four applicants on this summons, were respondents. At the hearing of the summons it was ordered that the following question (which was substantially the same as that raised by the summons) should be argued before the Full Court, namely, whether the said applicants are bound by clause 8 of the award made at the instance of the Amalgamated Engineering Union, in proceeding No. 61 of 1926, in so far as it purports to make the said award binding on all other persons following the occupation set out in the said award now or hereafter employed by the said applicants ?

Prior to 1st July 1927 awards and industrial agreements binding on the applicants were made in settlement of industrial disputes on the application of the Federated Gas Employees Industrial Union, all of which agreements and awards continued until the date of the summons in full force and effect. These awards and agreements prescribed rates of pay for certain classes of labour such as fitters, turners and blacksmiths, and also prescribed, with certain exceptions, that the standard hours of work should be 48 hours per week.

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On 1st July 1927 an award was made by the Commonwealth Court of Conciliation and Arbitration, pronounced by Judge *Beeby* on the application of the Amalgamated Engineering Union in proceedings No. 61 of 1926, to which all the applicants on this summons were respondents. Clause 8 of such award is as follows:— "This award shall come into operation on the 14th day of July 1927 and shall be binding on the claimants and respondents hereinafter mentioned for a period of six months thereafter. This award shall be binding (as to all members of the Amalgamated Engineering Union and all other persons following the occupation set out in the award now or hereafter employed by such respondents) on the respondents whose names are set out in the plaint filed by the Amalgamated Engineering Union, and on the said Amalgamated Engineering Union and any of its members now or hereafter employed by the said respondents." This award was consolidated with other relevant awards. The consolidated award, which was binding on all the applicants on this summons, prescribed rates of pay for (*inter alia*) fitters, turners and blacksmiths who were also covered by the above-mentioned awards to and agreements with the Federated Gas Employees Industrial Union, and also prescribed a working week of 44 hours.

Each of the applicants employed men in the occupation of fitters, turners and blacksmiths who were never members of the Amalgamated Engineering Union, but who were members of the Federated Gas Employees Industrial Union. As regards these employees the hours of employment, wages and conditions of employment were settled by the above-mentioned awards and agreements of the Federated Gas Employees Industrial Union, and there had not been prior to the Engineering award of 1st July 1927 any dispute between any of them and their respective employers.

On 28th September 1927 the Metropolitan Gas Co. applied to the Commonwealth Court of Conciliation and Arbitration for an interpretation of clause 8 of its award and, if necessary, for a variation of the same. The application was heard on 21st October 1927 by Judge *Beeby*, who, in delivering his judgment on 28th October 1927, said (*inter alia*):—"As a matter of interpretation there is no doubt that the intention of the Court, clearly expressed in clause 8, was to

apply the conditions of the Engineering award to all workmen doing engineering work, whether they were members of the applicant Union or not. The points left for determination are (*a*) whether the Court had power to make an award relating to the condition of workmen other than members of an applicant union; (*b*) whether, if it had the power, the order should have been made in view of the existence of the Gas Employees' agreement and award and of the failure to notify the parties to such agreement and award of the claim by the Engineering Union. As to (*a*) it has been definitely decided by the Chief Judge with whose decision I agree, in an order made in the professional musicians' industry on 8th December last, that the Court can deal with a claim relating to workmen other than members of a claimant organization. As the Engineers in their claim asked for an award to cover all persons following the occupations referred to in the plaint, the conditions of employment of workmen other than members of the claimant organization were the subject of a dispute which this Court could hear and determine. As to (*b*) I have no doubt that the Court has the power in making an award in the settlement of a dispute, incidentally to vary the terms of some other award or even of an existing industrial agreement. As a matter of general practice, I think it advisable that the parties to an award or agreement likely to be so affected should be before the Court on the hearing of the dispute. But I cannot rule that their not being so represented would invalidate the award. In this matter I clearly intended to include all persons following the occupations, and if the Gas Employees' Union and the Company had been formally notified of a possible incidental variation of their agreement and award, the result would not have been different. I therefore, as a matter of interpretation, rule that the Engineers' award as made, applied to all fitters and turners including those covered by the Gas Employees' award and agreement. The request by the Company for variation of the award is refused."

On 11th May 1928 the applicants took out the summons herein.

It also appeared on the hearing of this summons that on 19th October 1927 the Full Court of the Commonwealth Court of Conciliation and Arbitration varied the above-mentioned awards and agreements of the Federated Gas Employees Industrial Union, by

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reducing the hours of (*inter alia*) fitters, turners and blacksmiths from 48 to 44 hours per week but otherwise affirming the award or agreement; but on the hearing of the application to Judge *Beeby*, this alteration was not before him.

Owen Dixon K.C. (with him *Herring*), for the applicant Companies. Among the employees of the Metropolitan Gas Co. and many other gas companies were employees who did follow the occupations stated in the award, but they were not members of the Amalgamated Engineering Union and they were members of another union, the Federated Gas Employees Industrial Union, which had subsisting awards and agreements filed having the force of an award. The position thus arose that men who were bound by an award as members of a union which was a party to the dispute in which that award or agreement was made were in terms affected by the language of clause 8 of the award. The actual situation is that persons who are entitled to the benefits and are bound by the award or an agreement having the force of an award in the gas industry, are within the language of clause 8 of the award. Judge *Beeby* had no power to introduce into the gas industry a different standard of hours, assuming that in other respects he had power to make the award. There is no constitutional power enabling Parliament to authorize the Arbitration Court to make an award in the terms of clause 8, because that clause professes to deal with much more than the settlement of the dispute before the Court, as it professes to deal with the regulation of the hours of labour, apart altogether from the settlement of the dispute. It purports to deal with the hours of persons who are not in the dispute or in any way connected with it. Dealing first with the operation and interpretation of the *Commonwealth Conciliation and Arbitration Act*:—The operation and effect of the Gas awards and agreements which had the force of awards depend upon sec. 28 (2) of the *Commonwealth Conciliation and Arbitration Act* 1904-1927, as the periods for which the awards had originally been made had expired. Those awards are, by the effect of that sub-section, still in force. It cannot be suggested that what Judge *Beeby* did was to "otherwise order" within the meaning of that sub-section. When he made his order purporting

to affect people in general, he made it subject to the Gas agreements, which would not be "otherwise ordering." To enable the Judge to "otherwise order" the parties must be the same (see sec. 38). The position cannot be affected by the proviso to sub-sec. 2, which was added in 1920. Judge *Beeby* has not attempted to set aside or vary the terms of an award, within sub-sec. 3, but he has simply made a new award having a general operation. The members of the Federated Gas Employees Industrial Union were both bound by and entitled to the benefits of their own award (*Commonwealth Conciliation and Arbitration Act* 1904-1927, secs. 6A, 29), and the award obtained by the Amalgamated Engineering Union does not affect their rights or liabilities. In *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1) there was a difference of opinion between the members of the Court as to whether the interpretation which had been placed upon sub-sec. 1, applied also to sub-sec. 2, but the legislation has since been amended to make it clear that sub-sec. 2 is intended to give force and operation to the award until a new award is made. Whatever may be the position of the Gas Companies with regard to persons who are members of both Unions, they are not bound to extend the rates and hours awarded to the Engineering Union to persons who are members only of the Gas Employees' Union. The *Commonwealth Conciliation and Arbitration Act* is so framed as not to allow unions—whatever the constitutional power might be -- to make claims in respect of non-menbers. *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (2) refers only to present and future members of the union. Sec. 28 (2) exhibits an intention that an award between parties to a dispute shall be superseded by another award, and shall continue until it is superseded by another award between the same parties, not that it shall be interfered with, set aside or superseded or controlled by awards made between parties to other disputes. Sec. 28 refers only to successive awards between the same parties. This is supported by sec. 29.

[ISAACS J. referred to *Mallinson* v. *Scottish Australian Investment Co.* (3).]

(1) (1920) 28 C.L.R. 209.
(2) (1925) 35 C.L.R. 528.
(3) (1920) 28 C.L.R. 66.

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The position here is not like that of two persons making inconsistent contracts. The result of such a procedure is that one is broken; but here the award has the effect of declaring what must be done and under the Act it is required to be done as part of the law. The effect of sec. 24 is that if inconsistent awards are made the old one terminates. Sec. 44 also supports this view. The distinction between older awards and fresh awards was discussed in *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1). Apart from the restrictions contained in sec. 28 neither the Act nor the Constitution allows the Arbitration Court to make an award regulating the rights and duties of an employer in relation to persons who are neither parties to the dispute nor members of a union which is a party to the dispute.

[ISAACS J. Is this a denial of the *Burwood Cinema Case* (2) ?]

No; that case is distinguishable, as there the actual decision was concerned only with the members of the union.

[HIGGINS J. referred to sec. 38 (*h*) of the *Commonwealth Conciliation and Arbitration Act* 1906-1927.]

The scheme of the Act is for the regulation of hours and wages of persons before the Court, either by representation of an organization or directly with the disputants or both, and it was never considered by the Legislature, except by means of the common rule, that the Court should deal with the obligations of one person before the Court towards other persons in no way bound or affected by the award as constituting part of the regulation of the industry.

[HIGGINS J. Is there anything in the Act which says the award must be confined to the disputants ?]

Sec. 6 (A), part of sec. 9, sec. 19, perhaps sec. 22, secs. 24, 28 and 29, and Part V. are to that effect. *Australian Tramway Employees Association* v. *Prahran and Malvern Tramway Trust* (3) suggests the difficulty of working this Act where one union may affect the rights of members of other unions.

[KNOX C.J. If a union can ask for an award governing the conditions of employment of every person in a given industry, or if it can have the condition laid down that every person employed

(1) (1920) 28 C.L.R. 209. (2) (1925) 35 C.L.R. 528.
(3) (1913) 17 C.L.R. 680.

in a given industry shall have certain rates and conditions, what is the difference between that and a common rule ?]

There is no difference, but in the case of a common rule the Court makes the award applicable directly to persons who are not in dispute.

[STARKE J. referred to *Federated Clothing Trades of the Commonwealth of Australia* v. *Archer* (1).]

If my argument on this point is not correct, there would appear to be no reason why a company should not be registered under the *Companies Act* or under the *Friendly Societies Act* or the *Provident Societies Act*, having for its object the creation and subsequent settlement of industrial disputes. Dealing with the constitutional power to prevent and settle industrial disputes, nothing which is done under that power can be the origin of the industrial dispute. The power itself cannot both depend upon an industrial dispute and be efficacious to create the very industrial dispute which it settles. The Constitution does not give power to prevent industrial disputes, but merely gives power to create an arbitration and conciliation tribunal for the purpose of doing so. Arbitration has nothing to do with the prevention of industrial disputes, but applies only to the settlement of them. An organization cannot be armed by the Legislature under that power with a mere capacity to create a dispute (*Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (2)).

Robert Menzies, for the respondent Union. In this case a dispute exists between the applicant Companies and the members of the Federated Gas Employees Industrial Union. The claim of the Amalgamated Engineering Union was being made in relation to the conditions of all employees, whether unionists or not. The words of the log contain no limitation which would confine their operation to members of the organization. A dispute as to the conditions of employment of non-unionists is a dispute about an industrial matter within the meaning of the Act. The term "industrial matters" must be given the full literal interpretation given in the definition clause (*Federated Clothing Trades of the*

(1) (1919) 27 C.L.R. 207.

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

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Commonwealth of Australia v. *Archer* (1); *Australian Tramway Employees Association* v. *Prahran and Malvern Tramway Trust* (2)). The test of whether a thing is an "industrial matter" or not is: does the determination of the question which arises upon it in some way affect the industrial relation of employer and employed in the particular industry? The matter cannot be confined to a demand for wages, or to a demand for certain conditions of employment which directly touch the members of the claimant organization. If a claim is made in relation to the conditions upon which an industry is to be carried on, even although those conditions directly apply to some other persons, and if the refusal of the demand would bring about a dispute which would ordinarily be called an industrial dispute, then the matter in question is an "industrial matter." The definition of "industrial matter" in the Act has recognized that possibility by using terms which are as wide as can be conceived. The argument that the dispute does not fall within the constitutional power because the organization here had no power to initiate such a dispute as this, is definitely inconsistent with the *Burwood Cinema Case* (3). The same argument as is advanced here might have been put in that case. In that case this Court proceeded definitely upon the view that the organization was not acting merely as an agent of the members, but as a principal. Consequently, whatever the members may do the organization is able to do. The *Burwood Cinema Case* is conclusive upon this matter. The Court in making this award "otherwise ordered" within the meaning of sec. 28 (2) of the Act. If sec. 28 permits "otherwise ordering" in a proceeding not between the same parties, there has been an "otherwise ordering" here in relation to certain men, and the question falls. If it does not permit an "otherwise ordering" except in the same matter and between the same parties, then the only result is that the old award remains in full force, and the rights conferred by that award on the very men who are in question here remain unaltered. Though a member of the Gas Employees' Union, who is able to enforce merely a 48-hour week against his employer under the earlier award, could not himself enforce a 44-hour week,

(1) (1919) 27 C.L.R., at p. 212. (2) (1913) 17 C.L.R., at p. 702.
(3) (1925) 35 C.L.R. 528.

a 44-hour week could be enforced in relation to him at the instance of the Engineering Union. There is no inconsistency between the two awards. The employer can obey both awards by giving his employees a 44-hour week.

Owen Dixon K.C., in reply. *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1) supports the interpretation of the words "otherwise order" contended for by the Companies.

Cur. adv. vult.

Nov. 26.

The following written judgments were delivered :—

KNOX C.J. I agree with my brothers *Gavan Duffy* and *Starke* in thinking that the *Commonwealth Conciliation and Arbitration Act* confers no power on the Arbitration Court to make awards prescribing the duties of employers to employees who are neither parties to the industrial dispute before the Court nor members of nor represented by an organization which is a party to that dispute. In my opinion the question submitted should be answered in the negative.

ISAACS J. The industrial conflict that has convulsed Australia leaves no room for doubting the seriousness of the issues involved in this case, once its broad outlines are apprehended. The question we have to determine, when taken out of its technical setting and put into ordinary language, is simply stated : Is the Gas Company bound, by reason of an award of Judge *Beeby* made on 1st July 1927, to allow those of its employees who are members of the Federated Gas Employees' Union and employed as engineers, a 44-hour working week ? Nothing else arises, because anything beyond that question would be hypothetical and on well established principles not a proper subject for judicial decision (*Australian Commonwealth Shipping Board* v. *Federated Seamen's Union of Australasia* (2)). Happily there is, I believe, no difference of opinion among the members of the Court on the eventual answer to the concrete question, namely, that the Company is not so bound. But the course of arriving at that result is what matters mostly.

(1) (1920) 28 C.L.R., at pp. 237, 257. (2) (1925) 36 C.L.R. 442.

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Unfortunately this is divergent, and, as I view the matter, gives rise to more than one situation of peril to the industrial peace of the Commonwealth. We have been invited on behalf of the applicant Company, on a summary application under sec. 21AA of the Act, to declare that an award made as far back as 1st July 1927 for six months, and thereafter in terms continued in force by the Act until the Arbitration Court itself interfered, is now, and was from the beginning, invalid in an important respect, namely, the inclusion of engineering employees not members of the Union in the same 44-hour week as members of the Union. Where a law is imperative and leaves but one way available, there is simply a duty to comply. A Court *par excellence* is bound to respect the law. But even if I were convinced that in this instance the law left open the way suggested, yet as the same law most certainly leaves open another way, safer, less destructive, more consonant with the spirit of the Act, with the advancement of industrial peace, confidence in the stability of awards, and in the present instance, possibly greater justice to the employees concerned, I should prefer the latter course, which I unhesitatingly take. I may add that I think it is imperatively the only way the law leaves open.

1. *Full Arbitration Court Decision of October* 1927.—It matters not one iota, so far as this case is concerned, whether Judge *Beeby's* award in July 1927 originally created or did not create lawfully a 44-hour week for the Gas employees referred to. After that award was made, that is to say, 19th October 1927, the Full Arbitration Court, constituted by Chief Judge *Dethridge*, Judge *Lukin* and Judge *Beeby*, were called upon to re-determine the matter, and they expressly considered anew what should be the standard weekly hours for the Federated Gas Employees, and that Court fixed them as from 31st October 1927 and until further order, at 176 hours every four weeks, or 44 hours each week, or 48 hours per week, according to stated categories. After that pronouncement clause 8 of the Beeby award, so far as it concerned members of the Federated Gas Employees' Union, if it ever had vitality, became legally dead. As the question we have to answer relates only to the present and the future, excluding the past, I think I should exhibit some incongruity if I were to resurrect the extinct portion of the Beeby award for the

purpose of inquiring whether it was originally worthy of execution. A precedent may be found in the exhumation of the bones of the regicides, but I am not disposed to follow it. The Full Court decision is the living material for the present purpose. That is the latest, the most authoritative, and the only surviving pronouncement of the Arbitration Court on the subject. On the principle I have stated, that decision affords a short and sufficient answer to the question. It is an answer that stands before the eyes of the Court; it gives due effect to the recent legislation of Parliament, by which the Arbitration Court was strengthened and placed on a true judicial footing as the special guardian of the Commonwealth's industrial peace. At this time in existing circumstances I feel an added and a special responsibility to take no course that could suggest the least doubt with respect to so plain and definite a determination of the Full Arbitration Court, by not according to it the full measure of effect intended by Parliament. Its nature is plain; the authority to make it is incontestable.

In awards form is nothing, so long as the substance is there. The Act sets itself resolutely against technicalities and forms; the subject is too great to be controlled by anything but realities. The Act directs that awards are to be framed so as "to best express the decision of the Court and to avoid unnecessary technicality." It contemplates disputes, not about legal concepts, but about hard facts and conditions of life, solid matters of business. Awards are intended to be somewhat informal arrangements expressed in business terms and made chiefly between business men and their employees for the practical continuance of their mutual affairs, to a great extent for the benefit of persons unaccustomed to legal subtleties. These arrangements are to regulate their reciprocal rights and duties as to wages, hours, safety, leisure, and so on. Primarily claims are to be made and resisted without legal assistance. All is to depend on the good sense and fairness and experience of the tribunal where the differences persist. But, once the plain facts are adjusted and the strife ended, there are four essential principles which seem to me subject always to the constitutional requirement of "industrial dispute" to form the essence of the statute so far as the Legislature can effect them. They are: (1) the industrial

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disputes and their subject matter within the Court's jurisdiction are to be as wide as the Constitution will allow; (2) substantial effect is always to prevail and not rigid formality; (3) the Court is told by the Legislature to observe various precautions in its proceedings, and is trusted to do so to the best of its ability; (4) once, however, the task is completed and an award made, the strife is ended and both the parties and the community generally, whose interests are the primary consideration, may rely on finality, subject only to any alteration by the Arbitration Court itself, if justice requires it. It is obvious that on any other basis Commonwealth Industrial Arbitration is a snare and an exasperation to the parties, and, as an instrument of national peace, both costly and ineffective. But if all that were even less clear to me than it is, the Full Court decision would, in my opinion, easily survive criticism. It is a clear, definite, affirmative determination by the Full Court that the working week for all the employees of that Union shall until further order be a certain number of hours according to classification. The decision came about in this way:—In 1920, 1921 and 1924, by an award and a number of agreements certified as awards, the working week for members of the Federated Gas Employees Union employed by the Gas Companies, was fixed substantially at 48 hours, and for the most part for six months. The Act (sec. 28 (2)) prolonged the arrangement. In July 1927 Judge *Beeby* made an award in a dispute between the Gas Companies and the Amalgamated Engineers' Union, and for all engineering employees of the Companies, whether members of that Union or not, he awarded a 44-hour week. Whether that extension to other employees is good or bad is, as I have said, quite beside the question now, by reason of what followed. In October 1927 the Full Court of three Judges heard an application to vary the original 1920, 1921 and 1924 award and agreements as to hours only, not merely to 44 hours, but in some instances to even fewer hours per week. The Court considered the whole position, and delivered judgments which exclude misapprehension. They took the old award and agreements of 1920, 1921 and 1924 in hand, saw that a flat 48-hour week, so to speak, was prescribed. They considered for themselves what number of hours would in the then existing circumstances be a fair working week *for each and every unionist employee*, and

then they affirmatively decided what as for *all* employees it should for the future be, until that Court made some further order. That was "the decision of the Court" (sec. 28 (1)). Then to carry that out, as they could not make formally a new award, though their variation virtually had that effect, they directed what the standing award and arrangements should for the future prescribe, that is, in effect, (1) as to one class of employees, 176 hours for four weeks; (2) as to a second class of employees, 44 hours per week; (3) as to any remaining employees, 48 hours per week. The first two clauses directly express the maximum hours for their respective classes. The third class is dealt with by a clause which referentially prescribes affirmatively the number of hours. It says the award or agreement "shall remain as at present until further order." They did not simply vary the award as to the first two classes, and then say nothing more. That would have left the balance to depend on the old determination. But the variation concerned the whole ground by affirmatively declaring what the weekly hours should be right through.

The words "shall remain as at present" mean "shall continue to prescribe 48 hours"—the same number of hours, but by new authority because the variation is to be taken as a whole. It did not mean to incorporate any modification made by the Beeby award. If it did, then for the third class the present standard week would be 44 hours, not because the Beeby award said so, but because the Full Court said so. But the truth is that the Full Court was not concerning itself with anything but considering for itself what under the changed circumstances as they existed in October 1927, was a fair and just standard working week for each class of the Federated Gas Employees' Union. This is transparent from the words of the learned Judges in delivering judgment. Chief Judge *Dethridge*, in the course of his judgment, said:—"Employees in the gas industry perform work of a diverse nature, and the Union in its present application seeks not for a uniform reduction, but for a reduction of working hours *varying according to the functions of the respective workers*. It will be convenient *to divide the employees into classes* distinguished by the general characteristics of their work, and to *consider separately each of these classes*." And so the learned Judge

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considers each class, with the result stated. As to the last class, he says: "There would be no practical difficulty in *adhering to the present 48-hour week* in their case although the 44-hour week may be introduced in the gasworks proper." So that by "present" he means "48-hour week." As to the Court's power to entertain the case, the Chief Judge relied on the change of circumstances of various kinds. Judge *Lukin* said: "As to men engaged outside the works, I agree with the Chief Judge where he has not reduced the hours, and where he has reduced them I disagree with him." Judge *Beeby*, in effect, agreed with the Chief Judge. It is, therefore, clear to demonstration that from 31st October 1927 it was in the award and agreements as *remodelled* by the *new determination* of the Full Arbitration Court in the latest pronouncement of the Court, that the obligations of the Gas Companies in relation to weekly hours of the employees we are concerned with are to be found, and not *in any earlier determination of the Court.* That is what employers and employees have to look to in order to find their mutual relations respecting a working week.

As to the Full Court's authority, it is manifest that sec. 11 of the Act creates the Court, which is to consist of all the Judges. But for later qualifications, the jurisdiction of the Court would be exercisable only by all the Judges together. But sec. 18A qualifies that; and as the Court which heard and determined the application for variation in which the order was made and "the question decided" (sub-sec. 3), the Court had jurisdiction to make the order. Sub-sec. 3 of sec. 18A is sufficient to sustain this view, without any reference to sub-sec. 4, even if that sub-section is applicable, which in view of sec. 18AA I doubt. If it is applicable, it was satisfied, and the procedure thereby prescribed was followed, and the Full Court decision of 19th October 1927 is consequently the present existing governing regulation pertinent to this case.

It is true that the Beeby award was made as between the Gas Companies and the Amalgamated Engineers' Union as disputants. But that only creates this dilemma. Either it then henceforth bound the Companies to a 44-hour week with respect to the present employees concerned in this case, or it did not. If it did not, then *cadit quæstio*, for it could not then affect the former award agreements. If, however, it

did so extend, then it is now clearly as to the Federated Gas Employees superseded by and inconsistent with the later decision of the Court, that of October 1927. Every award and order depends for its binding force on the Act. It is impossible that the same statute at the same moment imposes inconsistent obligations on the same employers and in relation to the same employees, that is, in this case, the Gas Companies and its Federated Gas Employees Unionists. It follows that, if the latest, the October, order is valid, as it is, there cannot be, whether at the instance of the Amalgamated Engineering Union or anyone else, any obligation on the part of the Gas Company towards its employees contrary to that order. *Quacunque via*, the Beeby award is entirely negligible for the purposes of this case.

2. *Beeby Award of July* 1927.—The view I have so far expressed is not that of the majority. I have, therefore, to consider the position on the basis that the Beeby award has to-day the same operative efficacy in every respect as it had on the day it originally came into *de facto* operation. On that day was clause 8 invalid wholly, as transgressing the Constitution and the Act, or invalid *quoad* the Federated Gas Employees' unionists by reason of sec. 28 (2) of the Act, and further, can it in any case be declared invalid in these proceedings ?

As to the Constitution—the most serious objection, because if sustained it is incurable by Parliament, which can cure all else—an extraordinary view was urged. It was said that employees demanding industrial conditions from employers for themselves cannot, within the term " industrial disputes " as used in the Constitution, include a condition that if non-unionists are employed their industrial conditions shall be the same. The objection is opposed to reason and experience. For some years, as is shown by the evidence in this case, a widespread feeling of dissatisfaction existed in the engineering industry with undercutting as to wages and hours, and this was considered unfair and tending to create unharmonious relations between workers of the same craft working side by side at work of the same nature under different conditions. And not only so, they were considered as unjust to the members of the Union, because in reducing the number of employees, employers tend to

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dismiss award employees and retain those under less favourable conditions. In the professional musicians' industry award in December 1926, as Judge *Beeby* pointed out, the Court's right to deal with a claim relating to workmen other than members of a claimant organization was definitely decided by Chief Judge *Dethridge*. It is plain the pressure of the position is felt in Australia, and if it is beyond remedy it is clear that the annulment of awards is not likely to stop at the Beeby award. But, when fully analysed, the objection is based on a total misconception, and, moreover, offends against the community's sense of humanity. Beyond question, such a claim comes within the comprehensive definition of "industrial matters" in the Act. As will presently be seen that lengthy definition would tax the intelligence to make it more comprehensive.

If a claim for preference to the unionists, or for the "non-employment" of persons not being members of the Union, be an industrial matter, and so within the potential ambit of an industrial dispute, it surely follows that instead of a total exclusion, there may be a partial or conditional exclusion. For instance, it may be claimed that coloured labour shall not be employed, or only employed in separate buildings, or only employed, if employed at all, at the full rates, &c., claimed by the unionists. *It is a radical error to suppose that such a claim is confined to securing benefits for non-disputants.* That is a probable consequence, and a humane one; but it is only indirect. The primary and direct object is to protect the claimants themselves. Nothing could better illustrate this than the evidence in this case above quoted. Sweating in industries is notoriously the outcome of unregulated competition on the same competitive field of industry. Is protection of unionists from sweating by means of non-unionist competition outside the limits of the Constitution? I refuse to believe it. But if not, how is it to be prevented when decent conditions are awarded to unionists? A paper award is of itself little satisfaction, and unless preference is awarded as well, the better the conditions settled by the award, the more likely the unionists are to lose their employment altogether. If, for instance, they are awarded £6 a week for 44 hours and neither preference is added nor a provision for identical conditions for

non-unionists, what more likely than that the employers, if left free, would take on or retain labour at £5 for 48 hours, or later at £4 for 50 hours, and so on? The only way, apart from preference, to prevent entire loss of employment is to take away the employers' inducement to frustrate the award. So that naturally preference and the equalization of conditions are alternative methods open to the tribunal to secure the desired benefits to the claimants.

A union acting for its members in formulating, urging and supporting the claims it makes, fills a double capacity. It is for certain statutory purposes the direct corporate agent for its members; but it is something more. It is in a broader and industrial sense representative of the whole class of employees engaged in the industry for which it is formed. That is a fact of life, and is recognized by the Act, sec. 2, clause VI. Once it is permitted by the statute to represent its members for making and sustaining their claims, it can make all the claims they could themselves put forward as "employees" in the industry concerned. There is nothing to cut down the full scope of the constitutional term "industrial disputes." As to this, I would incorporate and direct attention to what is said in *Australian Insurance Staffs' Federation* v. *Accident Underwriters' Association* (1). It cannot be denied at this time of day that a union may validly demand industrial conditions for future members of the union—yet necessarily unknown. But if so, on what intelligible principle can it be denied that it may claim those conditions for other fellow-employees in the industry? At the time the demand is made, there is no necessary connection between the union and future members. They may not even yet be fellow-employees. There is one possible *industrial* link only between the present members of the union and its future members, and that is identical with the industrial link between present members of the union and non-unionist employees in the industry. *The connecting link is the industry itself.* That was my view in the *Jumbunna Case* (2) and the *Builders' Labourers' Case* (3). (See also per *Starke* J. in the *Burwood Cinema Case* (4).) All that necessarily means that

(1) (1923) 33 C.L.R. 507, at pp. 523-525.
(2) (1908) 6 C.L.R., at p. 373.
(3) (1914) 18 C.L.R. 224, at p. 243.
(4) (1925) 35 C.L.R., at p. 548.

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the disputants *for their own benefit* have a personal interest in having the conditions of their industry maintained at the highest level possible, in order that they may be the better assured of a juster remuneration and a better standard of living than might be possible if their occupation were degraded by unchecked competition. It would, indeed, be remarkable if this were impossible in an Australian Constitution. It would be no less remarkable if it were left impossible in a statute of the Australian Parliament specially directed to the subject. It is not so left. The Act gives the Court cognizance of all industrial disputes, and defines "industrial dispute" as one extending beyond the limits of any one State—and that is as wide as the Constitution. It further says, it includes "any dispute as to industrial matters." At this point I may indicate with regard to the Act what I have pointed out with respect to the Constitution. The Act necessarily contemplates a dispute between given disputants. The Court, of course, cannot go beyond the dispute of those parties. It can only grant something for their benefit and in relation to them. But that is not the point here. The point is: What can *they* dispute about as an industrial matter affecting *their* relations? The Act goes as far as the Constitution in this respect. An "industrial dispute" extends (sec. 4) to "industrial matters," and unless that is cut down it includes the prevention of sweating by unfair competition in wages, hours or otherwise. "Industrial matters" are not cut down. They are defined to "include" certain things described, but not to "mean" only those. Nevertheless, the enumeration of what they include is so wide that one might well despair of any attempt to widen it. It includes "all matters relating to work, pay, wages, rewards, *hours*, privileges, rights, or duties of *employers or employees*." "Employees" there means not the persons then actually in the employment of the employers, but the whole class of employees in that industry. It also includes "the mode, terms and conditions of employment or *non-employment*." It includes "the relations of employers and employees"—that is again the whole class. It still further includes "the employment, preferential employment, dismissal, or non-employment of any particular persons, or of persons of any particular sex or age, or *being or not being members of any organization, association, or body*."

And, lastly, in terms the generality of which it would be hopeless to attempt to exceed, it includes: "all questions of what is fair and right in relation to any industrial matter having regard to the interests of the persons immediately concerned and of society as a whole." It would be a singular interpretation that would exclude from those words a claim to protect unionists from sweating competition or a loss of employment as the price of obtaining a paper award bettering their condition. As though to make such an interpretation utterly impossible, sec. 38B allows the Court to go beyond the specific relief claimed and to include in its award whatever it may think will settle the dispute or prevent further disputes. From whatever aspect, therefore, the matter is viewed, whether from the standpoint of the Constitution or the statute, and whether the interpretation be guided by considerations of strict literalism, or of humanity, self-interest or general welfare, the objection is unsustainable. A decision of this Court to the contrary would, of course, have to be followed by the Arbitration Court, so as to exclude such a claim from awards and agreements having the effect of awards, even at the cost of annulling existing awards containing such a provision. But it would influence industrial discontent, the evolution of industrial relations and the actuality of industrial injury and dislocation in the Commonwealth, precisely to the same extent as King Canute's command controlled the waves of the ocean.

I turn now to sec. 28 (2), which is said to be another reason for dismembering the Beeby award. By that sub-section Parliament undoubtedly of its own legislative will enacts, contrary to the decision of the Arbitration Court, that after his determination expires it shall be continued until a new award is made "unless the Court otherwise orders." It does not say "in a proceeding between the parties." I do not think those words mean more than this: "unless the Court in some competent proceeding makes an order inconsistent with such continuance."

The narrower view rests on the analogy of ordinary litigation, controlled by technical, and sometimes by meticulous rules, where the controversy and its consequences are limited to the litigants. It overlooks the enormous difference of subject matter and of the nature of the proceeding. It disregards the broad national purpose

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to be served—the unbroken continuance of industry. It forgets that the interests of the community form the prime consideration of the Act, both in its general tenor and in such special references as are found, for example, in secs. 4 and 25D, and that, whatever may be the effect on particular parties, the Arbitration Court itself can provide for adjustment. I therefore think there is no necessity to imply words not expressed, and thereby contract the general power of the Court to act in every industrial dispute of which it has cognizance, as within the limits of the dispute it finds the general welfare requires it. At best, it is a mere technicality when placed in juxtaposition with the broad provisions of the same statute. The words "pursuant to this Act" in sec. 18 are not to be read as requiring every statutory direction to be followed on pain of nullification.

Sec. 19 says: "The Court shall have cognizance, for purposes of prevention and settlement, of the following industrial disputes:—(*a*) *All industrial disputes* which are certified to the Court by the Registrar as proper to be dealt with by it in the public interest." Then follow (*b*), (*c*) and (*d*), commencing in each case with "All industrial disputes," &c. Now, supposing, for instance, the Registrar had certified under 19 (*a*) the dispute settled by the Beeby award of July 1927 as "proper to be dealt with in the public interest," how could it be said that it was not "pursuant to this Act" or that sec. 28 (2) was a bar to the Court's jurisdiction? I regard that as out of the question. The true position is, I think, well stated by Judge *Beeby* in relation to his own award on this objection. His Honor said:—"I have no doubt that the Court has the power in making the award in the settlements of a dispute, incidentally to vary the terms of some other award, or even of an existing industrial agreement. As a matter of general practice, I think it advisable that the parties to an award or agreement likely to be so affected should be before the Court on the hearing of a dispute. But I cannot rule that their not being so represented would invalidate the award." Sec. 28 (2) must be read as only one part of a larger scheme, and an award such as the Beeby award is in fact "the Court otherwise ordering." Awards are not strict judicial decisions: they are quasi-legislative declarations, and the Arbitration Court's

award is given the force of law, and consequently the latest prevails. You have to treat them all as valid, but like statutes the question is what is the result of their totality, always giving effect to the latest ?

3. *Section* 21AA.—I have now to state why, whatever be the law as to the preceding matters, the Legislature did not confer on this Court by sec. 21AA the power to annul awards of the Arbitration Court in whole or in part. The point to be borne in mind is that in order to give this Court jurisdiction on this *summary* application, Parliament itself must have conferred it. It is wholly different from those cases where the power to take that drastic action is the direct grant of the Constitution under the prohibition power, which is independent of the Legislature and cannot be abridged by it. The simple question is whether the Legislature meant merely to mitigate the evil of nullifying awards which had attained such oppressive proportions some years ago, or, *inter alia*, to aggravate it by offering further facilities to that view. The section was designed as a prophylactic; it is being used as an irritant. There is a decision of an equally divided Court to the contrary (*Ince Bros. and Cambridge Manufacturing Pty. Ltd.* v. *Federated Clothing and Allied Trades Union* (1)). The radical change effected in the statute by the reorganization of the Arbitration Court as a true judicial body, the momentous character of industrial events now occurring in the Commonwealth, and the great divergence of opinion in this Court in relation to the Arbitration Act, make it my clear duty to take the subject once more prominently into consideration, and to state again my own personal opinion as to the scope and effect of sec. 21AA.

I believe its genesis was a suggestion of my own (see *Tramways Case* [*No.* 2] (2)), supported by my brother *Powers* (3)). At that time, prohibition was not infrequently resorted to for the purpose of wrecking awards after they had been made or of stopping them when they were just about to be made. The arbitration tribunal was then a non-judicial body, and so the suggestion was that an alleged industrial dispute might be tested judicially before the award was made, in order that when once it

(1) (1924) 34 C.L.R. 457.
(2) (1914) 19 C.L.R. 43, at p. 82.
(3) (1914) 19 C.L.R., at p. 153.

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had been made it should be allowed to stand. My brother *Powers* made some important observations on this aspect of the matter in the *Tramways Case* [*No.* 2] (1). The injustice of inviting large bodies of workers to bring their grievances to the Commonwealth arbitration tribunal and punishing them if they resorted to direct action instead, of leading them to exercise patience and to incur expense and trouble and delay and then, after obtaining what was considered a just award, of finding that this Court on a prohibition motion destroyed the whole edifice or a major part of it at a stroke, was thought too glaring a wrong to be allowed to continue. Even above and beyond this, the inevitable turmoil of industrial struggles, accentuated by the undoing of supposed settlements on a fair basis by a fully informed tribunal, was perceived to be a serious obstacle to the national welfare. To meet this state of affairs sec. 21AA was passed. Its governing words are "*When an alleged industrial dispute is submitted to the Court*"; then this Court has certain powers, which are described. An application may be made to a Justice of this Court "for a decision on the question whether the dispute or any part thereof exists, or is threatened or impending or probable, as an industrial dispute extending beyond the limits of any one State or on any question of law arising in relation to the dispute, or to the proceeding or to any award or order of the Court." The decision is final and conclusive and without appeal, and not open to challenge on any account whatever.

On the jurisdiction given by the Legislature itself depends the power claimed in this proceeding. And primarily it depends on the opening words above set out. Two diverse opinions exist as to those simple words. It is hardly credible, but such is the fact. One opinion is that they mean while the dispute is still in existence and is in course of submission and not yet terminated by an award. The other is that they mean either then or at any time, possibly years after the submission is ended, when the dispute has long ceased to exist and the award has been in operation without thought of invalidity on anyone's part. The first is the view that I, with my learned brothers *Powers* and *Rich*, took. The other view prevailed. Its consequences are vast. Under the constitutional power of

(1) (1914) 19 C.L.R., at pp. 153, 157.

prohibition there is one condition of validity that can never be avoided by the Legislature, namely, an industrial dispute. That must be subject to judicial decision by some judicial tribunal. Not necessarily by this Court. For instance, the present Arbitration Court could be entrusted with the power of determining it, and the Legislature could at its will permit or not permit an appeal from that well-equipped Court to this Court. But as to other causes of prohibition, so far as they depend on breaches of the Act itself—such as the suggested breach of sec. 28 (2)—they are created by the Legislature. Did the Parliament so intend ?

As I read its language in sec. 31—than which it is a severe task to find clearer words—it distinctly, so far as it could, cut out all interference with awards by this or any other Court. It says : " No award or order of the Court shall be challenged, appealed against, reviewed, quashed, or called in question, or be subject to prohibition mandamus or injunction, *in any Court on any account whatever*." I cannot bring myself to think it consistent with that provision that this Court is intended by Parliament to have power to challenge, review or call in question the Beeby award of July 1927. Sec. 21AA is perfectly consistent with sec. 31, if the former applies while the dispute is submitted and *before* the award is made, and then it may legitimately be used to ascertain the meaning and effect of any other award or order of the Arbitration Court bearing on the existing dispute, but not to set them aside. Sec. 31 applies *after* the award is made and forbids any outside interference. If some judicial confirmation of the ordinary efficacy of such words is needed, see *Minister for Labour and Industry (N.S.W.)* v. *Mutual Life and Citizens' Assurance Co.* (1) and the reasons there given. The Parliament of New South Wales has felt in the same manner as I understand the Commonwealth Parliament has felt, that the supreme consideration is " *Peace in industry*," and so made the Industrial Court self-contained and its awards unchallengeable. We have only to imagine the disastrous result if on some summary application, say some months hence, the award around which has centred the distressing upheaval we are still witnessing here, were declared invalid *ab initio* for some inadvertent transgression of a statutory

(1) (1922) 30 C.L.R. 488.

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provision. Men may be punished for disobedience to the award, organizations heavily fined, the whole community may be made to suffer through what appears a right insistance on the award, or an unlawful resistance to its directions, and after all that has happened some flaw may at any time be discovered by legal ingenuity which leads, and as held in the *Federated Clothing and Allied Trades Union Case* (1) compels, the Court to bring the whole structure to the ground. This may happen in the chambers of one Justice, if he prefers to exercise the jurisdiction alone.

We have only to look at the Act to see what might happen. Sec. 6A says: "No person or organization bound by an award of the Court, or entitled to the benefit of an award of the Court, shall do anything in the nature of a lock-out or strike, or continue any lock-out or strike. Penalty: One thousand pounds." Now, suppose a penalty of £1,000 is imposed because the person charged is bound by or entitled to the benefit of an award. Sec. 31 clearly applies to that award, and shelters it certainly from all proceedings that are not either constitutional or under sec. 21AA. The award cannot then be challenged, and the fine is inflicted. Then someone (perhaps months or years afterwards) discovers a departure from the Act—sec. 21AA is used to get rid of it. Similarly as to secs. 9 and 50, where drastic provisions are found. Under sec. 48 imprisonment may be awarded and, if by another Court, the award cannot be challenged in those proceedings. Furthermore, this Court, when acting under sec. 21AA and annulling an award, can only *destroy*: it cannot build up; it cannot substitute or in any way amend. On the other hand, control and correction of the award is given to the Court itself, having knowledge of the circumstances, possessing means of rectifying errors and of doing justice, by adjusting difficulties, and, moreover, is not compelled to act arbitrarily. Sec. 38 gives the Court almost absolute power to do right: it may "vary its orders and awards"; it may "reopen any question"; it may "direct parties to be joined or struck out"; it may "correct amend or waive any error defect or irregularity whether in substance or in form," and it may "generally . . . give all such directions and do all such things as it deems necessary or expedient in the premises." Judge *Beeby*, for

(1) (1924) 34 C.L.R. 457.

instance, having before him the Gas Companies as well as the claimants, could have required the Federated Gas Employees' Union to be joined, and no doubt would, if he had thought it would have been prejudiced. At most it was an irregularity not to do it, but it was not even that if under the powers quoted he deemed it unnecessary expense and trouble.

I cannot find anything in the Act to support the extreme course of nullification suggested. Sec. 21AA was introduced by the Legislature at a specific place in the Act, which indicates the intention of Parliament that sec. 31 should be read as a later expression of its will, and as covering all that goes before, including sec. 21AA. I can find nothing in the language or the position of sec. 21AA for supposing Parliament intended it on this statutory point of *procedure* to supersede sec. 31. And on this point *the legislative intention is paramount.* I refer for the fuller exposition of the matter to the joint judgment of my brothers *Powers* and *Rich* and myself in the *Federated Clothing and Allied Trades Union Case* (1). If what is said there, and by myself in this judgment, was the real intention of Parliament, and so remains, there seems to me nothing could be more necessary for the internal peace of this country than that Parliament should re-express that intention, in words that, if possible, are too clear to admit of misapprehension.

Apart from the constitutional limitation of "industrial disputes," and their settlement by conciliation or arbitration, the jurisdiction of the arbitration tribunal is in the hands of Parliament itself. It may vest that jurisdiction unconditionally, adding directory provisions which it may well trust that Court to interpret and follow finally. The Parliament of New South Wales many years ago found it necessary to make the Industrial Court "self-contained" (see *Minister for Labour and Industry (N.S.W.) Case* (2)). Queensland has done the same (see *Industrial Arbitration Act* 1916 (7 Geo. V., No. 16), amended by the Act of 1923 (14 Geo. V., No. 10)). The second sub-section of sec. 7, secs. 15 and 19 are important in this connection. In the Western Australian *Industrial Arbitration Act* 1912 (No. 57), secs. 61 and 99 are important. Whether this should be followed by the Commonwealth Parliament is a matter of

(1) (1924) 34 C.L.R., at pp. 465-475. (2) (1922) 30 C.L.R. 488.

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policy for the wisdom and discretion of the Parliament itself when weighing the relative importance of the various considerations appertaining to the subject matter. Of one thing I am personally assured. So long as the Legislature expressly provides opportunity for some party to the award at any distance of time to apply to any other tribunal whatever to nullify summarily or at all the awards made by the Arbitration Court, no proper reliance can be placed upon them. Private or public confidence must be wanting respecting awards that constantly have hanging over them a sword of Damocles that is suspended, it may be, by the frailest hair of legal technicality.

HIGGINS J. The question asked under sec. 21AA is whether the said applicants (certain Gas Companies) are bound by the said clause 8 (of an award made by Judge *Beeby* on 6th July 1927 in the dispute between the Amalgamated Engineering Union and Alderdice Pty. Ltd. and others) so far as it purports to make the said award binding as to all other persons following the occupations set out in the said award now or hereafter employed by the said applicants. In my opinion, this question should be answered in the negative—not by reason of the order made by the three Judges on 19th October 1927 (which I regard as invalid, on grounds which I shall subsequently explain), but because of the provisions of sec. 28 (2) of the Act. Strictly speaking, I should have thought that the question was directed merely to the power of the Court of Conciliation to make an award in dispute A affecting the condition of employees who are not parties to that dispute; but counsel for the Union in dispute A has expressed himself as willing to admit the effect of sec. 28 (2) as being comprehended by the question, and I see no objection to acting on his admission.

Before dealing with sec. 28 (2) I had better say that in my opinion it is fully within the jurisdiction of the Court to impose on the employers in dispute A a duty to give as good conditions to persons who are not members of the claimant Union as are given to persons who are members. Of course, the giving of such conditions to outsiders must be within the ambit of the dispute, as here, part of the log of demands. Under sec. 4 an "industrial dispute" includes any dispute as to industrial matters; and "industrial matters" includes

practically anything industrial — including even specifically "all matters pertaining to the relations of employers and employees, and the *employment, preferential employment, dismissal,* or *non-employment of any particular persons,* or of persons of any particular sex or age, or being or *not being members of any organization, association, or body.*" Indeed, counsel for the Gas Companies admitted that the members of the Union have a real interest in their claim that non-members of the Union shall not be employed by the side of members of the Union on conditions inferior to their own; for instance, if they are so employed, the members of the Union become more liable to dismissal than the non-members when there is shortening of hands. The effect of the order, if made, would not be to award as between the non-members and the employers, would not be an award enforceable by non-members by penalty under sec. 44; but it would be an award as between the claimant Union and the employers enforceable as between the claimant Union and the employers. I see no difficulty, so far, as to the jurisdiction of Judge *Beeby* to make the order appearing in clause 8.

It is reassuring to learn that the learned Chief Judge came to the same conclusion as to the jurisdiction of the Court in the case of the Professional Musicians, 8th December 1926—not yet reported, but see par. 11 of affidavit of Harrison. I understand that he felt the practical need of such a power, under the pressure of his most difficult functions, as well as considered that the power had been conferred by the Act. But I regard sec. 28 (2) as fatal to the operation of clause 8. "After the expiration of the period so specified" (specified in awards between the Federated Gas Employees and the Gas Companies), "the award shall unless the Court otherwise orders, continue in force until a new award has been made." It is, to my mind, clear that "a new award" means an award between the same parties; and I have come to the conclusion, after considerable doubt, that "unless the Court otherwise orders" refers to an order in the same dispute. It has been pointed out that in the case of *Waterside Workers' Federation of Australia* v. *Commonwealth Steamship Owners' Association* (1) I expressed the same view *obiter,*

(1) (1920) 28 C.L.R., at pp. 237-238.

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but with hesitation; now, on further consideration of the matter, I express it as my deliberate judgment.

This does not end the matter for me; for I have been brought face to face with sec. 31 (1) (a section which was not discussed in the argument before us): "No award or order of the Court shall be challenged, appealed against, reviewed, quashed, or called in question . . . in any other Court on any account whatever." I have considered whether this sweeping provision might not cure disobedience to sec. 28 (2). The Court of Conciliation has really an administrative task, a practical task, for the prevention and settlement of industrial disputes; and may not Parliament have meant that no mistake of the Court, no mistake of law or of fact, was to interfere with the operation of any award or order which the Court might make in its very difficult and responsible task of promoting continuity of operations. The principle established by the Privy Council in *Moses* v. *Parker* (1) might be applicable. Such may be the position as to ordinary matters of fact or of law; but I do not think that sec. 31 (1) absolves from limitations of powers duties imposed on the Court by the Act itself. The words of sec. 28 (2) are explicit—the award has to continue until a new award "unless the Court otherwise orders"; and if I am right in my view that "otherwise orders" means otherwise orders in the same dispute, then, this order having been made in another dispute, it follows that the awards of 1920, &c., must continue in force. After all, sec. 28 (2) has just the same force as sec. 31 (1); effect must be given to both sections equally; and the only way to give effect to both seems to be to treat the jurisdiction conferred as limited by sec. 28 (2).

I am, therefore, of opinion, that the Gas Companies are *not* bound as to the conditions of the non-members of the Union.

But I have still to deal with the order made by three Judges on 19th October 1927—after the award of Judge *Beeby*. It is said, not in the arguments presented to us but as the result of independent investigations, that this order of 19th October, being made in disputes between the Federated Gas Employees and the Gas Companies, is the final ruling of the Court up to date, and must

(1) (1896) A.C. 245.

prevail over the award of 1st July 1927. A practice has, apparently, grown up of treating the tribunal of three Judges provided by sec. 18A (4) as if it were a Full Court of Arbitration which may make an order in the place of the Court where hours are concerned. That practice, in my opinion, is clearly not justified. The obvious scheme of the Act is to leave the framing of every award to the single mind of a single Judge—"Subject to this Act the jurisdiction of the Court may be exercised by the Chief Judge or another Judge" (sec. 18A (1)); and there is no "Full Court" mentioned in the Act. It is true that the Judge may, in any case in which he thinks it desirable to do so, invite *one or more* other Judges to sit with him for the hearing; but there was no such invitation here. "Subject to this Act" refers to the provision of sec. 18A (4) that the Court has no "jurisdiction" to reduce the standard hours to less than 48 unless the reduction be "approved" by a majority of three Judges who hear the question. The single Judge is responsible for the award as a whole; he (or another Judge) may make any order varying it; and he may have to modify the other clauses in order to adjust the award to any disapproval of his scheme of hours. The three Judges, very properly, have no jurisdiction to "sabotage" his award. In this case, the three Judges have purported to deal directly with the application to vary the awards in the Federated Gas Employees' Cases, instead of confining themselves to their function of approving or disapproving of the proposal to reduce hours. They have actually inserted clauses in the awards, as well as added a provision as to strikes in respect of any matter determined in the proceedings in which these variations are made. In the case of *Salisbury Gold Mining Co.* v. *Hathorn* (1) the Judicial Committee of the Privy Council showed clearly that where A can do an act with the consent of B the act done (if any) must be done by A, not by B. It is quite clear that Judge *Beeby* desired to get approval under sec. 18A (4), and did not "invite" the other Judges to sit with him for the hearing of the case; for he said:—"It is not for me to say whether the 44-hour week will be applied to employees other than engineers engaged in metal trades. *That question must necessarily go to the Full Court.*" Probably it is not necessary to support the doctrine

(1) (1897) A.C. 268.

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of the *Salisbury Case* (1) by other illustrations. But I may add that if a municipality has power to make a regulation with the consent of the Governor in Council, the Governor is not to make the regulation, but the municipality; and if the municipality cannot get consent to what it proposes it need not make a regulation at all. And a Court that has the function of approving of any marriage of its ward cannot direct her to marry or whom to marry.

If this view is right, sec. 31 (1) does not protect the order made by the three Judges; for the three Judges are not "the Court," and have no jurisdiction to make the order varying. Sec. 11 creates a Commonwealth Court of Conciliation and says of what Judges the Court, as an institution, is to consist. But the jurisdiction of the Court in any particular matter cannot (under sec. 18A) be exercised by more than one Judge except in two cases: (a) when the single Judge invites others to sit with him (sub-secs. 2 and 3); (b) when the Chief Judge and two others have to "approve" or disapprove of a change in standard hours.

Perhaps it is unnecessary to add that sec. 18AA, even if relevant, has nothing to do with awards or orders made in 1927. This section was assented to on 22nd June 1928, came into force on 13th August 1928, and relates to *future* interpretations and *future* variations only.

In my opinion, therefore, the order of 19th October 1927 is void for want of jurisdiction on the part of the three Judges; but the question asked should be answered in the negative.

GAVAN DUFFY AND STARKE JJ. Under agreements dated in 1920-1921, certified and filed under the *Commonwealth Conciliation and Arbitration Act*, and under an award dated 20th December 1921, the ordinary hours of duty or labour for various classes of employees in gasworks, including fitters, turners and blacksmiths, were 48 per week. In 1927 an industrial dispute was referred to the Commonwealth Court of Conciliation and Arbitration pursuant to sec. 19 (*d*) of the Arbitration Act, in which the Amalgamated Engineering Union was the claimant, and the proprietors of a number of gasworks bound by the agreements and award already mentioned and various other employers were respondents. The

(1) (1897) A.C. 268.

Union claimed an award to govern the wages and working conditions of all persons employed by a respondent in any of the branches of the industry named in the log, including blacksmiths, fitters and turners. It also claimed that the ordinary hours of duty should not exceed 44 per week. In February 1927 the Commonwealth Conciliation and Arbitration Court, in Full Court, had approved, pursuant to sec. 18A (4) of the Act, the reduction of the standard hours of work in the engineering industry from 48 to 44 per week. On 1st July 1927 Judge *Beeby* made an award in this industrial dispute whereby he awarded that the ordinary hours of duty should be 44 per week, and he directed (clause 8) that the award should be binding on the claimants and respondents for a period of six months, and that the award should "be binding (as to all members of the Amalgamated Engineering Union and all persons following the occupations set out in the award now or hereafter employed by such respondents) on the respondents and on the Union" and any of its members now or hereafter "employed by the . . . respondents." In October 1927 the Federated Gas Union applied to the Commonwealth Court of Conciliation and Arbitration to vary the agreements filed as before mentioned, and also awards of the Court, so as to reduce the weekly working hours in the gas-making industry covered by these agreements and awards, from 48 to 44. The application was heard by the Full Court, and the agreements and awards were, on 19th October 1927, varied as to shiftmen, blacksmiths, fitters and turners so as to reduce the weekly hours of duty from 48 to 44, but otherwise the agreements and awards were to "remain as at present until further order." The variation was to come into operation on 31st October 1927.

In September 1927 the Metropolitan Gas Co. applied to the Commonwealth Conciliation and Arbitration Court for an interpretation of clause 8 of the award obtained by the Engineering Union in July of that year, and if necessary for a variation of the same (Act sec. 38 (*o*)). On 28th October 1927 Judge *Beeby* disposed of this application; a variation was refused, and, as a matter of interpretation the Judge ruled that the Engineers' award as made applied to all fitters and turners, including those covered by the Gas Employees' agreements and award. Apparently the order of the Full Court

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dated 19th October 1927, varying the Gas agreements and awards, was not before Judge *Beeby*; at all events it was not referred to by him. As a fact, the Gas Companies employed men in the occupations of blacksmiths, fitters and turners who were not and never had been members of the Amalgamated Engineering Union but who were members of the Gas Employees' Union.

On 11th August 1926 the Gas Companies issued a summons out of this Court under sec. 21AA of the Arbitration Act for a decision upon the following question: whether the applicants were bound by clause 8 of the award dated 1st July 1927, obtained by the Amalgamated Engineering Union from Judge *Beeby*, "in so far as it purports to make the said award binding as to all other persons following the occupation set out in the said award now or hereafter employed" by the Gas Companies. The summons came on before *Isaacs* J., who directed that the question should be argued before the Full Court.

In our opinion the question should be answered in the negative. We do not think that the order of the Arbitration Court, in Full Court, made in October 1927, varying the Gas agreements and awards, is a sufficient reason for so deciding the question. The argument in support of the validity of Judge *Beeby's* award as interpreted by him was put in two ways before us. First, it was said that it operated independently of the existing award and agreement because it did not affect the rights of the parties to the award and agreements *inter se*, but merely gave rights to and imposed liabilities on the parties to the dispute which it settled: if that argument were accepted the result would be that Judge *Beeby's* award would have exactly the same validity after the order of the Full Court in October 1927 as it had before that order, which dealt only with the award and agreements of 1920-1921. In the alternative it was said that Judge *Beeby's* award altered the award and agreements of 1920-1921. Now, the variations made by the order of the Full Court were only to operate from 31st October 1927, and the direction that otherwise the agreements and awards remain "as at present" involves the question whether they had been affected by the Engineering award of Judge *Beeby*. To say that the Full Court order disposes of the question does not meet

the difficulty raised by the interpretation given to the Engineering award by Judge *Beeby* in October 1927, namely, that it applied to all fitters and turners, including those covered by the Gas Employees' agreements and award. That interpretation—which, whether right or wrong, was within the jurisdiction of the Arbitration Court—is binding upon the parties, and amounts to a decision that the Engineering award had affected the Gas Companies' agreements and awards, which the Full Court had directed should "remain as at present," that is, be given due effect as they existed and as they were interpreted according to law. If neither of these arguments is accepted and Judge *Beeby's* award is bad, there is no need to invoke the assistance of the order of the Full Court.

Nor do we think that the question can be answered by reference to the provisions of sec. 28 alone. That section gives efficacy and force to an award of the Court, made within its jurisdiction, for a period to be specified in the award, and thereafter until a new award is made between the parties, unless the Court by its order limits the duration of the award. We must look elsewhere to discover what awards and orders are within the jurisdiction of the Court. It is not necessary to determine what jurisdiction might be given to the Court under the terms of the Constitution, because clear words would be necessary in the Arbitration Act to endow the Court with powers and authority to specify the duty of employers to employees who are not parties to the industrial dispute before the Court, nor members of nor represented by the organization making the claim. Nowhere in the Act are any such words to be found: always the power is to settle some dispute in which the parties are more or less defined or capable of definition (cf. secs. 16, 18, 19, 19B, 23, 24, 26, 27, 29, 32, 37, 38 (*i*), (*j*), (*p*), (*s*), 38B and 48), and to make orders and awards with respect to the reciprocal duties and obligations of the parties appearing or represented in that dispute. The power in the Court to grant preference of employment to unionists in no wise conflicts with this view: that is a power to prescribe the rights and duties of the actual disputants as between themselves, though it may also be detrimental to the interests of others. *Federated Clothing Trades of the Commonwealth of Australia* v. *Archer* (1) occasions no

(1) (1919) 27 C.L.R. 207.

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difficulty, for there the order was upon the employer to place a tag upon goods which he owned or possessed. In no case has this Court held that the Arbitration Court had jurisdiction to make awards prescribing the duties of employers to workmen who were not parties, real or represented, in the industrial dispute before the Court.

It is for these reasons that we think the question submitted to this Court should be resolved in the negative.

Powers J.

POWERS J. On 1st July 1927 an award was made in the Commonwealth Court of Conciliation and Arbitration by his Honor Judge *Beeby* on the application of the Amalgamated Engineering Union in an alleged industrial dispute which was submitted to the Court pursuant to orders under sec. 19 (*d*) of the Act. The applicants in this case were respondents in that proceeding. The award referred to contained clause 8, which was as follows :—" 8. This award shall come into operation on the 14th day of July 1927, and shall be binding on the claimants and respondents hereinafter mentioned for a period of six months thereafter. This award shall be binding (as to all members of the Amalgamated Engineering Union, and all other persons following the occupation set out in the award now or hereafter employed by such respondents) on the respondents whose names are set out in the plaint filed by the Amalgamated Engineering Union and any of its members now or hereafter employed by the said respondents." The Amalgamated Engineering Union under that clause claimed that the applicants were liable to pay the rates mentioned in that Union's award, and to grant the conditions as to hours of duty set out in that award, not only to members of the Amalgamated Engineering Union and to non-unionists, but also to members of the Federated Gas Employees Industrial Union employed by the applicants although they were employed and working under awards and industrial agreements under the *Commonwealth Conciliation and Arbitration Act*—which awards continued and still continue in full force and effect. The applicants (the Gas Companies) refused to pay the rates, or grant the hours set out in the Amalgamated Engineering Union award, to members of the Federated Gas Employees Industrial Union, and continued to pay to them the

rates fixed by the Federated Gas Employees Industrial Union award, and to members of the Amalgamated Engineering Union they paid the rates fixed and observed the hours fixed by the Amalgamated Engineering Union award.

A summons was later on issued in the High Court under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* at the instance of the applicants (the Gas Companies) to obtain a decision on the following question: Whether the applicants are bound by the said clause 8 in so far as it purports to make the award binding as to all other persons following the occupations set out in the award now or hereafter employed by the said applicants? At the hearing of the summons it was ordered and directed that the following question should be argued before this Full Court: Whether the said applicants are bound by clause 8 of the award made at the instance of the Amalgamated Engineering Union in proceeding No. 61 of 1926 in so far as it purports to make the said award binding on all other persons following the occupation set out in the said award now or hereafter employed by the said applicants. From the affidavits and exhibits submitted at the hearing, it is shown that, before the award of 1st July 1927 was made, awards and industrial agreements which are binding on the applicants were made and/or certified to by the Commonwealth Conciliation and Arbitration Court; that those agreements and awards were made in settlement of industrial disputes on the application of the Federated Gas Employees Industrial Union; that all those agreements and awards continued and still continue in full force and effect by virtue of sub-sec. 2 of sec. 28 of the *Commonwealth Conciliation and Arbitration Act* under which all the awards in question were made.

The applicants contended before this Court (1) that they were not bound by clause 8 of the 1st July award so far as it purported to make the award binding on all other persons following the occupation set out in the award, but that it was only binding so far as the members of the Amalgamated Engineering Union were concerned; (2) that if the applicants were bound as to all other persons, not members of the Federated Gas Employees Industrial Union, the award was not binding on them so far as the members of that Union were concerned who were working under existing

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awards of the Arbitration Court; (3) that if they were bound so far as members of the Gas Employees Industrial Union are concerned, as to wages and conditions other than hours, they were not bound as to "hours," because the Full Court of the Arbitration Court—in the latest order in the gas industry proceedings after the Engineers' award of 1st July 1927 was made, namely, on 19th October 1927, fixed the hours of duty for members of the Gas Employees Industrial Union.

The proceedings in both disputes, in the order in which they were dealt with by the single Judge and by the Full Court of the Arbitration Court, were as follows: (1) The agreements certified to, and the awards of the Court made at the instance of the "Federated Gas Employees Industrial Union" (hereinafter called the "Gas Employees' Union") were all made before 1925, namely, in December 1920, March 1921, August 1921, December 1921 or May 1924; (2) those awards and agreements have continued in force ever since by virtue of sub-sec. 2 of sec. 28 of the *Commonwealth Conciliation and Arbitration Act*; (3) on 1st July 1927 the Engineers' award in question was made containing clause 8 previously referred to—at that time an application by the Gas Employees' Union *to vary* the hours was pending in the Full Court of the Arbitration Court; (4) on 28th September 1927 the Metropolitan Gas Co. applied to the Arbitration Court for an interpretation of clause 8 of the award of 1st July 1927, and, if necessary, for a variation of the award; (5) on 19th October 1927 the application of the Gas Employees' Union direct to the Full Court for a variation of their awards by reducing the hours from 48 to 44 hours a week was dealt with by the Full Court of the Arbitration Court, and that Court by a majority refused, except in certain special cases, to reduce the hours—it was also ordered that the variations should come into operation on 31st October 1927; (6) on 28th October 1927 his Honor Judge *Beeby*, on the application by the Gas Companies for an interpretation of clause 8 of the Engineers' award, delivered judgment and said (*inter alia*)—"As a matter of interpretation there is no doubt that the intention of the Court, clearly expressed in clause 8, was to apply the conditions of the Engineers' award to all workmen doing engineering work whether they were members of the applicant

Union or not," and in conclusion he added—" I therefore, as a matter of interpretation, rule that the Engineers' award as made applied to all fitters and turners including those covered by the Gas Employees' award and agreement." No variation was made on 28th October, so the Full Court variation on 19th October is the latest variation and is still in force.

It is contended in the circumstances mentioned: (1) that the Constitution does not authorize legislation to be passed authorizing awards to be made fixing the conditions of employment of unions or persons not parties to an " industrial dispute," and therefore that clause 8 is invalid to the extent claimed by the applicants; (2) that the Arbitration Act does not authorize the Arbitration Court to make awards in disputes between a union and the employers of its members fixing the wages or conditions of work for members of other unions or persons not parties to the dispute then before the Court, and therefore not binding on them; (3) that organizations in dispute with employers can only, in proceedings before the Court, represent and act for the members of the organization, and for them only; (4) that the words " unless the Court otherwise orders " in sub-sec. 2 of sec. 28 of the Arbitration Act mean in the proceedings in the dispute between the same parties, not otherwise ordered in some other dispute with some other union or in an application by another union, and therefore that the award in the Engineers' Case did not alter the wages or conditions of work of members of the Gas Employees' Union; (5) no Judge or Court, except the Full Court, has " otherwise ordered " in the Gas Companies' proceedings that the Gas Employees' award should be varied or ended, and the Full Court has only varied it as to hours in a few special classes of work and therefore subject to that variation they continued in full force and effect. It is further contended that in the circumstances mentioned the hours of duty must, in any case, be those fixed by the Full Court on the application of the Gas Employees' Union in the latest variation so far as " hours " are concerned. If any award made in a different dispute can vary the conditions set out in a prior award in another dispute, and if the award in the Engineers' Case did vary the conditions granted by the Gas Employees' award, then the later variation of the Full Court in the Gas Companies'

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application varied the Engineers' award " as to hours " as to members of the Gas Employees' Union. The applicants, therefore, would not be bound as to hours by clause 8 of the prior award (the Engineers' award).

I hold that the award of 7th July 1928 is not binding on the applicants *so far as the hours of duty are concerned* because the hours of duty for gas employees employed by the applicants have been fixed by the Full Court's variation of 19th October 1927, and that variation is in force. The Full Court had power under the Arbitration Act to make the variation in question. The Full Court's variation fixed the hours at 48 hours for gas employees, with the exceptions named in the variation. Such variation is effective as the latest variation whether the award of 17th July did or did not alter the conditions of gas employees until 19th October 1928. I hold the views expressed for the reasons so fully set out in the reasons for judgment of my brother *Isaacs* on this point, and I do not think I can usefully add anything to the reasons given.

Holding the views mentioned it is not, in my opinion, necessary to deal with any of the other grounds relied upon by the applicants so far as hours of duty are concerned; but the question submitted to this Court for its opinion is much wider, namely, " whether the applicants are bound by clause 8 . . . in so far as it purports to make the said award binding as to all other persons following the occupations set out in the award now or hereafter to be employed by the said applicants." Clause 8 applies not only to the hours of duty but to wages and other conditions of work set out in the award of 1st July 1927. In the award " thirty-eight occupations " are mentioned, and wages and general conditions of work are fixed for all persons engaged in any of the occupations named. The question submitted to this Court is general and not confined to hours of duty, and the variation of hours by the Full Court only affects the hours of duty. It is necessary, therefore, to deal with the question: Is the award of 1st July 1927 binding on the applicants so far as the Gas Employees' Union, bound by awards and agreements, are concerned, who are not members of the Engineers' Union in respect of wages and conditions, except hours? The applicants contend that they are not bound in any way by the award in the Engineers'

Case for several reasons which I have referred to, including the ground that the awards and agreements made by the Arbitration Court in settlement of the disputes between the Gas Employees' Union and the Gas Companies have not been determined and are still in force and "except as to hours" have not been varied by the Court; and that until varied or determined by some order of the Arbitration Court in a proceeding between the parties in the same proceeding, continue in force—and no award in another proceeding in another dispute by another union in another industry can alter the conditions under which employees are to be employed in the "gas industry" by the applicants under existing awards and industrial agreements. On this question I agree with my brother *Higgins* that even if the Full Court had not any power to make the variation it did, or if it did not when made affect the Engineers' award, sub-sec. 2 of sec. 28 of the Arbitration Act prevents the operation of clause 8 so far as the gas employees working under existing awards are concerned, because the Court (apart from the Full Court) has not "otherwise ordered" in the proceeding between the same parties in the same dispute—and any order to be made under sec. 28 affecting the parties to an award must be made in the same dispute or proceeding. As a past President of the Arbitration Court I am pleased to be able to come to that conclusion, because any other interpretation of the sub-clause would, in my opinion, cause industrial unrest, confusion and dissatisfaction among employers and unions; that is, if an outside union could *in another dispute in another industry*, without any notice to the union or its members to be affected, obtain awards binding on the other union and its members conflicting with existing awards and also with agreements made at round table conferences in settlement of disputes between it as a union and the employers of their members. If awards can be made in such a case conferring benefits, they can also be made to the disadvantage of the unions working existing awards. Each union claims that it, and it alone, has the right under the Act to represent its members and to obtain awards in its own disputes settling conditions of work for its members, during the existence of the award obtained. As I hold that clause 8 is not binding on the applicants for the reasons mentioned, I do not consider

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it necessary to deal with the constitutional question raised or with any of the other grounds relied upon by the applicants.

In my opinion the answer to the question should be in the negative.

Question answered in the negative.

Solicitors for the applicant Companies, *Derham & Derham.*

Solicitors for the respondent the Amalgamated Engineering Union, *Maurice Blackburn & Co.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

JAMES . . . . . PLAINTIFF;

AGAINST

THE COMMONWEALTH OF AUSTRALIA AND OTHERS . . . . . } DEFENDANTS.

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SYDNEY, *Nov.* 29; *Dec.* 12.

KNOX C.J., HIGGINS, POWERS AND STARKE JJ.

Constitutional Law—Freedom of inter-State trade and commerce—Licences to be granted by "prescribed authority" of four States—No "prescribed authority" for two States—Limitation of quantity of dried fruits which may be carried from one State into another State—Discrimination—Preference given to one State over another State—Regulations ultra vires—Use by Commonwealth of State instrumentalities—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 92, 99, 117—*Dried Fruits Act* 1928 (*No.* 11 *of* 1928)—*Dried Fruits Acts* 1924-1927 (*S.A.*) (*No.* 1657—*No.* 1835)—*Dried Fruits* (*Inter-State Trade*) *Regulations* 1928 (*Statutory Rules* 1928, *No.* 91).

The validity of a Federal Act or of regulations made thereunder cannot be attacked on the ground of interference with freedom of inter-State trade and commerce: sec. 92 of the Constitution protects inter-State trade against State interference, but does not affect the legislative power of the Commonwealth.

W. & A. McArthur Ltd. v. *Queensland*, (1920) 28 C.L.R. 530, followed.