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ustralian Co
td (1935) 53
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(1950) 81
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54 CLR 387

[HIGH COURT OF AUSTRALIA.]

THE AMALGAMATED CLOTHING AND ALLIED TRADES UNION OF AUSTRALIA } CLAIMANT;

AGAINST

D. E. ARNALL AND SONS AND OTHERS RESPONDENTS.

IN RE AMERICAN DRY CLEANING COMPANY.

H. C. OF A. 1929.

MELBOURNE, *Oct.* 21; *Nov.* 7.

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

Industrial Arbitration—Industrial dispute—Award fixing conditions of employment in respect of every person employed in the industry whether members of union or not—Validity of award—Commonwealth Conciliation and Arbitration Act 1904-1928 (*No.* 13 *of* 1904—*No.* 18 *of* 1928), *sec.* 21AA.

An award made by the Federal Arbitration Court purported to bind named employers, including the applicant company, in respect of each and every person employed by them in the clothing and allied trades and industries, whether members of the union making the claim or not, and the union and the members thereof. The applicant had never employed any member of the union or of any organization or union of employees in the clothing or allied trades or industries.

Held, by *Knox* C.J., *Gavan Duffy*, *Rich*, *Starke* and *Dixon* JJ. (*Isaacs* J. dissenting), that the judgments of *Knox* C.J., *Gavan Duffy* and *Starke* JJ., in *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.*, (1928) 41 C.L.R. 402, should be applied, and therefore that in so far as the award of the Arbitration Court purported to bind the applicant in respect of every person employed by it, whether a member of the union or not, it was *ultra vires*.

SUMMONS referred to Full Court.

This was a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 issued at the instance of the American Dry Cleaning Co. for the determination of certain

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questions of law arising in relation to various industrial disputes and proceedings between the Amalgamated Clothing and Allied Trades Union of Australia and a number of employers, including the American Dry Cleaning Co., and in relation to an award made in 1927 and varied by a further award in 1928.

The award in question purported to be binding on the American Dry Cleaning Co. Clause 1 thereof provided: "This award shall be binding upon the employers named in the schedules A, B, C, D and E attached hereto in respect of each and every person employed by them in the said industry, whether members of the Amalgamated Clothing and Allied Trades Union of Australia or not, and upon the claimant Union and the members thereof." Clause 2 provided:—"The minimum rate of wages to be paid to journeymen, journeywomen, and adult employees shall be as follows:— . . . Group 6.—Dyeing, Cleaning and Repairing.—8. The following rates shall be paid for dyeing, cleaning and repairing, which includes the work of any person in a factory, workroom, or shop of a dyer or cleaner, such as dyeing, cleaning, repairing, or pressing articles of all descriptions, or performing any operations incidental thereto; . . . Journeywomen—Females not provided for in the foregoing: . . . (j) pressers, namely, females employed pressing off any part of male outer garments . . . £4 19s." And clause 19 (c) of the award (as varied by awards numbered 128, 174, 192, 232 and 233 of 1928) provided:—"Subject to existing indentures, not more than three female apprentices or improvers shall be employed in all groups to every journeywoman. Provided that in respect of any class mentioned in clause 8, group 6, of this award the same rate is fixed for a journeywoman as is fixed thereby for a journeyman not more than one female apprentice or improver shall be employed to every two journeywomen in any such class."

For the purpose of its business the American Dry Cleaning Co. employed at all material times the following, amongst other, classes of employees: journeymen and female improvers whose respective ages were 16 years, 17 years and 18 years, and whose wages varied from £1 0s. 3d. per week to £1 18s. 6d. per week pressing off male outer garments, and journeywomen employed

pressing female garments using an iron not exceeding nine pounds in weight, but did not employ any journeywomen pressing off any part of male outer garments (within the meaning of class (j) of clause 8, group 6, of the said award). The American Dry Cleaning Co. had never employed any member of the Union or of any organization or union of employees in the clothing or allied trades or industries. On 1st July 1929 the Union issued two summonses out of the Arbitration Court against two of the partners in the firm requiring them to show cause why they should not be ordered to pay penalties for an alleged breach of the award (as varied) in that on 5th June 1929 the firm employed more than one female improver to every two journeywomen in class (j) of clause 8, group 6 of the award. On 9th July 1929 the summonses came on for hearing in the Commonwealth Court of Conciliation and Arbitration and were adjourned pending a decision on the questions of law set out in the summons taken out under sec. 21AA.

The questions raised by this summons were substantially as follows:—(1) Whether clause 19 (c) of the award (as varied) in its relation to class (j) of clause 8, group 6 of the award is binding on the American Dry Cleaning Co. unless and until it employs a member of the Amalgamated Clothing and Allied Trades Union of Australia; (2) whether clause 19 (c) of the award (as varied) in its relation to class (j) of clause 8 of group 6 of the award had on 5th June 1929, or at any subsequent time up to the date hereof, any operation with respect to the said firm in the absence of any employment by the said firm on 5th June 1929 and at any subsequent date of any member of the above-mentioned Union; (3) whether the said award, and in particular clause 19 (c) thereof (so varied as aforesaid and in relation to class (j) of clause 8 of group 6), operates during such time as the said firm is not employing members of the said Union to prevent the said firm from employing more than one female apprentice or improver to every two journeywomen in any class mentioned in clause 8, group 6, in which the same rate of wage is fixed for a journeywoman as is fixed for a journeyman; (4) whether clause 1 of the said award is *intra vires* of the said Court and valid so far as it purports to bind employers who are not in fact employing any member of the said Union?

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Mayo (with him *Daly*), for the respondent Union. There is a preliminary objection: the summons is not competent so far as it asks for a declaration that the award is inoperative or invalid. The phrase "question of law" in sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 should have a limited construction so far as the validity of the award is concerned, otherwise it would be necessary to impute to Parliament the intention of repealing *pro tanto* sec. 23 of the *Judiciary Act*. Sec. 21AA was considered in *Federated Engine Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co.* (1). There is an implication from sec. 23 of the *Judiciary Act* imposing a requirement of a certain majority of Justices, that the scope of the matters which may be considered by a Justice under sec. 21AA is limited. The question of the existence of a dispute must be determined before the award is made, but the jurisdiction to determine any "question of law" as to an award arises after the award has been made. Sec. 21AA must be considered with due regard to sec. 31 (*Ince Bros. and Cambridge Manufacturing Co. Pty. Ltd.* v. *Federated Clothing and Allied Trades Union* (2)). The question whether a dispute exists connotes a question of fact, but it also includes a question of law. This is the only question involving a point of law which may go to the validity of the proceedings. If this question be not propounded before the award, the latter, so far as sec. 21AA is concerned, must be treated not only as a *de facto* award but also as a *de jure* award. The "question of law" as to an award may be a mere matter of interpretation, but it must be something other than what is necessary to the decision of whether there was a dispute existing; it may not be a question imperilling the award.

KNOX C.J. The Court is of the opinion that the objection should be overruled.

Thompson (with him *Wright*), for the applicant Company. The question that arises in this case is: Is there power under the Constitution or under the Arbitration Act for the Arbitration Court to make an award binding an employer respondent who in fact

(1) (1916) 22 C.L.R. 103. (2) (1924) 34 C.L.R. 457.

has not at any relevant time in his employ a person who is a member of the claimant organization in respect of employees who are not and never have become members of the claimant organization? The answer to that question in the negative does not conflict with *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (1). That case decides only that a respondent may be bound if and when he does employ a person in respect of whom the award is made (2)). That case says that the employer is bound though he has not in his employment a unionist employee, but it does not say that he is bound with respect to non-unionists. This case arises out of *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (3). The whole point of that case is that the Union simply represents its present and future members and not the whole industry. Secondly, there is no power under the Arbitration Act, or, if it is necessary to go so far, under the Constitution, to deal with reciprocal rights and duties of parties who are not in fact or by this doctrine of representation before the Court. (See the decision in *Alderdice's Case*. There is nothing either under the Constitution or under the Arbitration Act that gives power to make such an award. The emphasis of all the provisions in the Arbitration Act is on the word " parties " (secs. 19B, 23). The only power given is to settle as between the " parties " their mutual and reciprocal rights and duties. If there are no unionists employed at all, then there is no power to make an award directly affecting their conditions, hours, wages, &c., at the instance of persons who are employees (*Federated Clothing Trades of the Commonwealth of Australia* v. *Archer* (4)). There is a limitation on the general power given to Parliament and to the Court. There must be a dispute in fact as between parties on an industrial matter that can be completely settled by arbitration. Arbitration is the power in the instrument that operates by determining the mutual rights and liabilities of the disputing parties. Here there were the Union and certain disputing parties, and the first question is whom does it represent. The answer to that is that the authorities go only to this: that it represents only

(1) (1925) 35 C.L.R. 528.
(2) (1925) 35 C.L.R., at pp. 530, 531; par. 15 of special case, at p. 531.
(3) (1928) 41 C.L.R. 402, at pp. 406, 408, 435.
(4) (1919) 27 C.L.R. 207.

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its present and future members and not the whole body of employees in the industry. There is no authority that it represents all employees in the industry irrespective of whether they ever join the Union or not. The rules of this organization give no express power to represent persons other than its own members. The Union's claim that there can be a dispute between it and an employer of non-members of the Union directly affects non-disputants; and to that extent is not an arbitrable industrial dispute between these parties, as no case has ever so decided, and such a contention conflicts with the legal right of a man to dispose of his labour as he pleases, and the claim to do this is not the exercise of arbitral power because the person whose rights and liabilities are directly sought to be affected are not before the Court. There is nobody to bind the non-unionist. The essence of this case is that a proper arbitration cannot be made because a postulate of a proper arbitration is that the parties that are to be directly bound should be before the Court to enable them to be bound. The only practical view is to restrict awards to things directly affecting disputants as to matters concerning not their relations generally but the conditions of their actual employment, and exclude matters that directly affect the conditions of the actual employment of non-disputants, disregarding the fact that such conditions may be indirectly affected. [Counsel referred to *Archer's Case* (1) and *Federated Saw Mill, Timber Yard and General Woodworkers' Employees' Association of Australasia* v. *James Moore & Sons Pty. Ltd.* (2).]

Mayo (with him *Daly*), for the respondent Union. This point was not necessary to the decision in *Alderdice's Case* (3). That case is distinguishable on the ground of representation. If representation is confined to legal representation, even then it cannot be contended that there is no representation of non-unionists or of future unionists. Representation does not refer to legal representation but refers to bodies which represent other persons having regard to the superficial area of the dispute. If this matter is concluded by the decision in *Alderdice's Case* the respondent asks the Court's permission to

(1) (1919) 27 C.L.R., at pp. 209, 215.
(2) (1909) 8 C.L.R. 465, at pp. 483, 488, 489, 512, 518.
(3) (1928) 41 C.L.R., at p. 411.

reopen the question decided in that case and to reargue the matter before this Court.

[KNOX C.J. The Court will not accede to that request.]

[Counsel also referred to *Archer's Case* (1).]

Cur. adv. vult.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. This is a summons under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 for the determination of certain questions of law arising in relation to various industrial disputes and proceedings between the Amalgamated Clothing and Allied Trades Union of Australia, and a number of employers, including the American Dry Cleaning Co., and in relation to awards made therein. The summons was directed by the Chief Justice to be argued before the Full Court, and, having been so argued, now falls for decision.

The Arbitration Court made awards purporting to bind named employers, including the American Dry Cleaning Co., in respect of each and every person employed by them in the clothing and allied trades and industries, whether members of the Union or not, and the Union and the members thereof. Under these awards rates of wages were provided for journeywomen, and the number of apprentices or improvers who might be employed was limited by the number of journeywomen employed. One provision was that in certain cases no more than one female apprentice or improver should be employed to every two journeywomen. The American Dry Cleaning Co. never employed any member of the Union or of any organization or union of employees in the clothing or allied trades or industries. The Company was proceeded against under the Arbitration Act for a breach of the award in that it employed more than one female improver to every two journeywomen. Upon this proceeding, the Company contended that the award of the Arbitration Court purporting to bind the Company in respect of every person employed by it, whether a member of the Union or not, was beyond the jurisdiction of the Court; and

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

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the summons under sec. 21AA was issued at its instance for the purpose of determining this question. In *Alderdice's Case* (1) we agreed in the following opinion: "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." Further consideration of the matter has only confirmed us in this view. In the present case the improvers and journeywomen employed by the Company were not parties to the industrial disputes and proceedings in which the awards were made, nor were they members of or represented by the Union, and, for the reasons given by us in *Alderdice's Case*, the award now before us, purporting to impose obligations on the American Dry Cleaning Co. with respect to such employees, cannot be supported and was made without jurisdiction.

The duty of a Court of law is to interpret the law, and not to consider the consequences of its decision. But, since it is said that our decision will lead to a lowering of the standard of living, perhaps it is wise to remember that *Higgins* J., when President of the Arbitration Court, never, so far as we know, made a provision in his awards such as is now challenged. To him the evil suggested was never apparent, for, if it had been, he would not have forgotten the maxim *Boni judicis est ampliare jurisdictionem*.

The questions submitted by the summons should, in our opinion, be determined as follows:—1, 2, 3 and 4: The clause in the said award is not binding on the American Dry Cleaning Co., so far as it purports to bind the Company in respect of persons employed by the Company who were not parties to the industrial disputes in which the award was made nor members of nor represented by the organization making the claim.

ISAACS J. The summons under sec. 21AA of the Arbitration Act, as I may call it, asks for the determination of four questions. The real point of substance is whether the Federal Arbitration Court

(1) (1928) 41 C.L.R., at p. 435.

has any jurisdiction, on the submission of a claim by an employees' organization, to make an award providing that the industrial conditions awarded are to be observed by the respondent employers towards all employees in the industry, whether members of the claimant Union or not. It was contended on the part of the applicant on the summons that upon the true construction of the Constitution and the Act and also on the authority of *Alderdice's Case* (1) the Court does not possess that jurisdiction. The respondent Union denied both contentions. In *Alderdice's Case* the decision was unanimous that the award there under consideration was not binding on an employer as to members of a certain union other than the claimant union. But the reasons differed. Six Justices composed the Court, and there was no actual majority expressing the same reasons. The case did not fall within sec. 23 of the *Judiciary Act*, since the decision itself was unanimous. But three Justices, namely, the learned Chief Justice and my brothers *Gavan Duffy* and *Starke*, agreed in a statement as to the construction of the Act; and it is to be assumed that they also agreed in the reasoning that led to that conclusion. Various grounds for impeaching the award had been taken. The other three members of the Court rested on other grounds than the one now under consideration. As to the present issue, I expressed the opinion I now hold. My late brother *Higgins*, whose acquaintance with the subject matter to which the Act must be applied, was perhaps unrivalled, and whose opinion on this question merits special weight, said (2):—"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." *Powers* J. thought it unnecessary to express any opinion on the point. The formulated reason concurred in by the three Justices, and now relied on by the applicants, is thus stated in the judgment of the Chief Justice (3): "I agree with my brothers *Gavan Duffy* and *Starke* in thinking that the *Commonwealth Conciliation*

(1) (1928) 41 C.L.R. 402.
(2) (1928) 41 C.L.R., at p. 428.
(3) (1928) 41 C.L.R., at p. 411.

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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."

On the argument in the present case, it was intimated to the learned counsel for the Union that that statement governed this case, because the word "represented" there meant represented in the strict sense as in sec. 29 of the Act, and that apart from a reconsideration of what was held in *Alderdice's Case* (1) argument would not be permitted. Counsel thereupon asked for reconsideration of *Alderdice's Case*, and this was refused. I dissented from that refusal, and now have to state my reasons for dissent. No doubt can exist as to the gravity of the situation if the *Alderdice* ruling correctly interprets the Arbitration Act. To the award or collection of awards with which we are immediately concerned, about 7,000 employers are scheduled, which means, at a safe estimate, that considerably over 20,000 unionists are affected. It needs but little effort of the imagination to perceive that this award, and other awards of a like nature already in operation, concern many tens of thousands of employers and employees. The outcome, to put it practically, is that, unless and until a remedy is found, there must inevitably, from the mere operation of human nature and unregulated self-interest, be a lowering of the standard of living, and the risk of non-employment for unionists, unless preference be adopted; as to non-unionists, there will be either a total want of protection from sweating, or the complication and possible diversion of State regulations. For employers also, those who employ union labour are placed at a disadvantage relatively to those who do not. These are considerations that must have been present to the mind of the Legislature in framing the provisions of the Act, and are most material in determining whether such consequences were intended when the general and all-embracing terms of the statute were employed. And, still further, it gives rise to a grave doubt, as will presently appear, whether such a dispute can be entertained at all by the Arbitration Court, even to award

(1) (1928) 41 C.L.R. 402.

conditions to unionists. That, however, cannot be authoritatively settled until, as is not improbable, another application under the now somewhat familiar sec. 21AA calls for its determination. I therefore regard it as a very pressing responsibility to state my individual opinion, and, since I had in *Alderdice's Case* (1) the misfortune to differ from my colleagues on this point, to re-examine the statute with anxious care in order to ascertain if the grave evils indicated are permitted by it. I have done so, and, as I retain my former opinion, I have to state fully why, as a pure matter of law, I hold a dissentient view.

The formula above quoted rests on the following reasoning, contained in the joint judgment of my brothers *Gavan Duffy* and *Starke* at p. 435 of *Alderdice's Case*:—"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." On the accuracy and application of this reasoning, so much depends. With all deference, I am unable to agree with it, and so will state how I regard the relevant factors that enter into it. As to the necessity for clear words for this particular demand, I must confess that, after all the earnest and respectful attention I have given to this opinion, I am unable to accede to it. If it be once conceded that a demand for equalization of conditions which affect a fair standard

(1) (1928) 41 C.L.R. 402.

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of living is within the constitutional ambit of "industrial disputes" —and it would indeed be a calamitous interpretation that excluded it—I cannot perceive any reason for requiring any special words, or any clearer words, to enable the Court to deal with that demand any more than with any other demand. There are no legal degrees in industrial demands. The Act, where it gives jurisdiction to deal with a dispute, gives it as to "the dispute." Sec. 24 (2) is explicit. It says: "If no agreement between the parties as to *the whole of the dispute* is arrived at, the Court shall, by an award, determine *the dispute*, or (if an agreement has been arrived at as to a part of the dispute) *so much of the dispute as is not settled by the agreement.*" Words could not be plainer. But if the reasoning quoted be correct, it is at least arguable—I say no more than that, because, having heard no argument at any time upon it, it would be improper to express any definite opinion—that a dispute containing such a demand not being wholly arbitrable is not a dispute within the purview of the Act at all. On the other hand, and apart altogether from the humanitarian aspect of the demand so far as it affects non-unionists, it is to my mind altogether improbable that in employing the comprehensive language of the Act to be presently quoted, Parliament intended to commit to the Court an impossible task. Impossible, however, it would be, if Parliament intended to make such a demand, as the Act stands, incapable of settlement by arbitration, incapable even of an agreement to be certified as an award. If that demand is so incapable, so must be the rest of the dispute. For a dispute is the whole dispute as the parties make it, not such parts of it as Parliament or a Court selects or chooses to call the dispute. If employees choose to include such a demand in the log of industrial claims and are not satisfied unless the employers agree to the whole log, and the employers refuse, then the whole log is in dispute. What may be granted on arbitration is another matter. But for Parliament to limit its permission to settlement of part only, by excluding any demand forming an integral portion of the dispute, is not to authorize settlements of "the dispute" as it in fact exists. Suppose Parliament excluded hours or wages, or employment of black or yellow labour, and permitted arbitration as to all the rest, surely that would not be arbitration as to "the

dispute." As a bare matter of power, I do not deny that Parliament could limit its authority to arbitrate in any way and in respect of any demand it pleases. But if limited as to demands, that would not in law be power to arbitrate so as to settle "the dispute," in fact it would be patently ineffectual to secure industrial peace. I should expect very special, and, indeed, intractable language to produce this result. If "the dispute" as such is referred to arbitration, no part is excluded. It is for the arbitral tribunal then to deal with each demand as it thinks just. The entirety of a Federal dispute is well exemplified in the *Builders' Labourers' Case* (1). And Parliament has expressly referred to arbitration "the whole dispute." To this part of the present case I apply the words of Lord *Shaw of Dunfermline* in *Butler* v. *Fife Coal Co.* (2), as I applied them in the *Builders' Labourers' Case*:—"The commanding principle in the construction of a statute passed to remedy the evils and to protect against the dangers which confront or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, the Act shall be interpreted in the sense favourable to making the remedy effective and the protection secure. This principle is sound and undeniable." I repeat what I said in the *Builders' Labourers' Case*, that I know of no legislative provision to which the "commanding principle" can, in its integrity as a guide to logical construction, be more appropriately applied.

Now, I observe that the reasoning of my learned brothers quoted leaves entirely open whether the power and authority to the Arbitration Court could be given under the terms of the Constitution. For myself, I adhere to the opinion elaborated in *Alderdice's Case* (3) that such a grant of authority to the Court is within the competence of Parliament. Of course, if clear words for the purpose are necessary also in the Constitution, they certainly are not there. All that we find in the Constitution on this subject is the power of Parliament to legislate with respect to "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." The two relevant

(1) (1914) 18 C.L.R. 224.
(2) (1912) A.C. 149, at pp. 178-179.
(3) (1928) 41 C.L.R. 402.

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expressions for our present purpose are "arbitration" and "industrial disputes." Unless the subject matter referred to is inherently contained in the term "industrial disputes," it does not exist in the Constitution. But if it is contained, as I think it is, for legislative purposes in the words "industrial disputes," then it seems to me to be clearly and necessarily contained for arbitral purposes in more than one section of the Act, conferring power and authority on the Court and on organizations. For instance, sec. 65 says: "Every organization shall be entitled (*a*) to submit to the Court *any industrial dispute* in which it is interested; (*b*) to be represented before the Court in the hearing and determination of *any industrial dispute* in which it is interested." Why should those words be limited any more than the words of the Constitution? The circumstances of disputes, their particular structure and the items of difference, are as kaleidoscopic as the events and attributes of industrial life itself, and it seems to be impossible to put into stricter or more elastic categories the component parts of industrial disputes. Sec. 18 says: The Court shall have jurisdiction to prevent and settle, pursuant to this Act, *all industrial disputes*." There is no limitation stated as to the content of an industrial dispute, but whatever condition or procedure is enacted must be observed, as, for instance, three Judges to change standard hours. So far, the industrial dispute itself may be as wide as the Constitution permits it. Then, come to sec. 19, which deals with the cognizance of industrial disputes by the Court. It says:—The Court is to have cognizance for 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*; (*b*) *all industrial disputes* which are submitted to the Court by an organization, or by an association registered for the time being as an organization, by plaint; (*c*) *all industrial disputes* with which any State Industrial Authority, or the Governor in Council of a State in which there is no State Industrial Authority, requests the Court to deal; (*d*) *all industrial disputes* as to which a Judge or a Conciliation Commissioner appointed under section eighteen C of this Act has summoned a conference under section sixteen A of this Act, and as to which no agreement has been reached, and which a Judge

or the Commissioner has thereupon referred to the Court." Reading par. (*b*) of sec. 19 with sec. 65, it seems to me the Act in the most express manner allows an organization to submit to the Court by plaint, and empowers the Court to take cognizance of " all industrial disputes " in which the organization is interested, *whatever be the subjects of dispute*, unless we find somewhere in the Act a distinct cutting down of the term " industrial dispute." But one thing is certain. Whatever industrial dispute it is that an organization under par. (*b*) can submit, it is that same industrial dispute, and no other, that can be brought within the cognizance of the Court by the Registrar " in the public interest," or by a State authority for the industrial peace of the State, or by a Judge or Conciliation Commissioner who intervenes to maintain or restore industrial peace in the Commonwealth. There is certainly no reason disclosed in that for cutting down the content of the industrial dispute as used in the sections quoted, but rather the necessity of maintaining it to the full. Sec. 20, enabling the Court to restrain a State Industrial Authority, is further evidence to me of the intention of Parliament to maintain to the full the content of industrial dispute and give completeness to the Court's decision. Sec. 23 explicitly empowers the Court to investigate " every industrial dispute of which it has cognizance," and adds " all matters affecting the merits of the dispute and the right settlement thereof." Sec. 24 provides that an agreement between the parties " as to the *whole or any part of the dispute* " may be certified by a Judge, and is to have the same effect as an award, and further, as already stated, it makes provision in the event of failure to agree. I may interpose this observation: if an industrial dispute can within the meaning of the Constitution exist as in the present case, surely the parties can voluntarily agree with respect to it; if they can, I cannot understand why it is not an agreement within the meaning of sec. 24, and consequently, when certified, an " award." Sec. 25A says: " The Court shall in making its awards provide so far as possible and so far as the Court thinks proper for *uniformity throughout an industry* carried on by employers in relation to hours of work, holidays and general conditions in that industry." Now, that section does not profess to enlarge the scope of " industrial dispute "

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or "award" as these existed before. But it gives to me unmistakable proof that Parliament all through had committed to the Court the settlement of all industrial disputes as these existed in fact and in their entirety. I cannot reconcile sec. 25A with any intention to leave a diversity of industrial conditions between different employees of the same employer, simply on the ground that some are unionists, and others are not. The inherent idea of the section is equality of standard of living to employees, and equality of cost of production between employers. Sec. 38 grants varied powers "as regards *every* industrial dispute of which it has cognizance," and the very first power is "(*a*) to hear and determine *the dispute* in manner prescribed." This takes us back to secs. 18, 24 and 65, so that the full content of the dispute is before the Court, and the first power is to hear and determine "the dispute," that is, the whole dispute and not part of it only. Among those powers is (*f*), namely, power to make a *common rule*. It has been determined by this Court in *Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (1) that that power is *ultra vires* the Parliament, because it is foreign to arbitration. But the intended power has remained in fact in the Act during all its transmutations. And, whatever it lacks in legal efficacy, it evinces to me in the most unmistakable manner that Parliament *intended* to carry the authority of the Court so far as it could confer it, where an industrial dispute exists. I cannot imagine Parliament *intending* to bind by the terms of an award employers in respect of non-unionists where neither employers nor employees were parties to the dispute with an organization, and yet leave them free where the employer was such a party. To say the least, it would be anomalous. Sec. 38B indicates the same comprehensive scope. Sec. 40, in regulating the grant of preference, says: "(2) Whenever, in the opinion of the Court, it is necessary, for the prevention or settlement of the industrial dispute, or for the maintenance of industrial peace, or for the welfare of society," to direct preference, it shall so direct. I cannot suppose that Parliament meant that the large public purposes mentioned were made subordinate to the freedom of employers to

(1) (1910) 11 C.L.R. 311.

pay non-unionists whatever they pleased and insist on whatever hours they choose.

Is there anything elsewhere in the Act to cut down the meaning of "industrial dispute," as it must be understood from the sections quoted? On the contrary, as it seems to me, that comprehensive meaning is confirmed and strengthened by other provisions. Sec. 4 is the interpretation section. It enacts that, except where otherwise "clearly" intended, certain words and phrases are to have their assigned meanings. Among these is the expression "industrial dispute." That phrase *means* "an industrial dispute extending beyond the limits of any one State," and includes "(1) *any dispute* as to industrial matters." As the definition of "industrial matters" uses the words "employers" and "employees," I shall first refer to the definition in the same section of those words. It will be seen they are of the widest import. "Employer" means "*any* employer in any industry." "Employee" means *any* employee in any industry, and includes any person whose *usual* occupation is that of employee in any industry. Now, coming to "industrial matters," there is, first, a broad all-embracing definition in these terms: "'Industrial matters' includes all matters relating to work, pay, wages, reward, hours, privileges, rights, or duties of employers or employees." Reading into that general statement the definition of "employee," the word "employees" must be taken to mean *all* employees, including those not in actual employment, but whose usual occupation is that of employee in the industry. Certainly the contrary is not "clearly" indicated. But, for fear of any limitation being unduly placed upon these general words, the definition proceeds to say, "and in particular, but without limiting the general scope of this definition," the term "industrial matters" includes 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." I stop at that point for a moment, because, if clear words were necessary to confer on the Court the power necessary to make the present award, there the words stand. I can conceive of none more suitable.

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Let me collect the relevant terms and connect them: "All matters pertaining to . . . the employment . . . of persons . . . being or not being members of any organization . . ." What words could more directly apply to *Alderdice's Case* (1) or this case? As if to preclude all attempts to abridge the largest possible connotation of what had already been said, and to indicate that the paramount purpose of Parliament was to deal completely with industrial disputes, and to conserve the public welfare, notwithstanding private interests to the contrary, there are added these words (after a reference to demarcation and to industrial agreements) "and 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.*" This overwhelmingly convinces me that Parliament conferred the largest power it thought it could.

There are other sections referred to in the quoted reasoning, which I should mention, as 26, 27, 29, 32, 37 and 38 (*i*), (*j*), (*p*), (*s*), and 48. These sections certainly show that the parties and those represented by them in the strict sense are those only which the Court can recognize as disputants or litigants, and the only ones bound by an award. In the relevant sense it is true the Court deals only with the reciprocal rights, duties and obligations of the parties appearing or represented in that dispute. The extreme power the Commonwealth Court has in settling the dispute by arbitration is to award reciprocal duties and obligations of the parties. But it may consequentially result in so awarding that the award provides a duty of one of the parties towards the other that consists of a benefit to a third set of persons. If A contracts to enter B's service, but only on the undertaking to him by B that C's salary shall be raised to equal his own, B's obligation to pay C is towards A. If the unionist employees of an iron foundry, fearing discharge in times of slackness, insist on non-unionists receiving the same wage as themselves, and the employer agrees in writing to this, his obligation is towards the unionists, and for their benefit, and none the less that non-unionists receive a better wage. That was the nature of the demand in this case. Preference, it is said in

(1) (1928) 41 C.L.R. 402.

the reasoning quoted, is permissible because "there 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." I agree, but the power equally exists, though it may also be beneficial to the interests of others. Experience has shown the advantage to a disputing union that non-unionists shall not work under conditions that prejudice the members of the union. An instance is afforded by the *Alderdice Case* (1), and I will quote what I said in that case (2):—"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 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." I there said, and I desire to repeat, that as to claims like the present "*it is a radical error to suppose that such a claim is confined to securing benefits for non-disputants*" (3). That seems to me the pivotal point of difference between my learned brothers and myself. If that is right, the award is plainly valid as it stands. And why is it not right? The endeavour of unionists to prevent the very award they seek for their betterment being made the direct cause of their own industrial loss and degradation, and to make that endeavour without unnecessary severity to other employees, is a natural and indelible fact of the industrial life of to-day. What other impulse induces a union to ask for equal conditions for all employees and spend its time and energy and

(1) (1928) 41 C.L.R. 402. (2) (1928) 41 C.L.R., at p. 417.
(3) (1928) 41 C.L.R., at p. 418.

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money to secure them? Not pure altruism. It is the knowledge, gained by experience, that without either equalization of conditions, preference or exclusion of other labour, the more favourable an award nominally, the greater the risk of losing all. And on what other basis would the arbitral tribunal grant the claim? I would repeat here what I said in *Alderdice's Case* (1), since I cannot better express my reasons. With reference to the benefits to outsiders, I said:—"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.* Sweating in industries is notoriously the outcome of unregulated competition on the same competitive field of industry. . . . 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." I repeat that if, as is conceded, preference is allowable, it is only consistent to admit equalization of conditions. If industrial peace can be secured with the milder means, it is surely better and more humane so, but if only the heavier price is allowed, then the Arbitration Court will have to consider the direction of the Legislature in sub-sec. 2 of sec. 40. And so resolved Parliament seems to me to have been to leave no possible necessary means of securing industrial peace out of the reach of the Arbitration Court, that even the words "dismissal" and "non-employment" are inserted as industrial conditions, even as to persons not being members of organizations. A simple example makes very plain the importance to a claimant union of an award like the present. Suppose the award permits

(1) (1928) 41 C.L.R., at p. 418.

piecework and fixes an award rate. What are the chances of the unionists if non-unionist labour is unregulated? It therefore becomes evident, if the constitutional grant contains the power to authorize the Court to award as here, that the Legislature, on a true construction of the Act, has given that authority to the full and brimming over; that the claim for equalization of conditions is a claim for the direct benefit of members of the union, to protect their interests and make their awarded rights effective, and that this award should stand.

With reference to the constitutional power, this may usefully be added. If the claim for equalization of conditions is a benefit, or possible benefit, to the claimants, and its grant by the Court creates a duty on the part of the employer towards the union, then it stands on the same footing as preference in the reasoning quoted. If, on the other hand, it gives rise, *when granted*, to no right or duty as between the respondents to the award and the union, then it is entirely outside the dispute and outside the ambit of the constitutional power of arbitration.

For these reasons the questions should be answered in favour of the respondent to the summons.

Before parting with this case, I would most earnestly again beg the attention of those responsible for the legislation of the Commonwealth to sec. 21AA. I have very fully stated my views as to that section in *Alderdice's Case* (1). The present case, where the award has been in existence since 1st March 1928, is an example of what may occur. For about nineteen months employers and employees have ordered their business and individual lives in reliance on its provisions, and now the whole matter, thought to be definitely settled, is again, not for any adjudged constitutional infringement, but for a reason ultimately depending entirely on an accurate recognition of the facts of industry, thrown again into the crucible of dispute. Parliament alone can say whether this section—unless limited to constitutional questions—should any longer continue to be the convenient *Campo Santo* of industrial awards.

RICH AND DIXON JJ. In the case of *Amalgamated Engineering Union* v. *Alderdice Pty. Ltd.*; *In re Metropolitan Gas Co.* (2), the

(1) (1928) 41 C.L.R., at pp. 423-428.

(2) (1928) 41 C.L.R. 402.

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award was expressed to be binding upon the employers who were parties "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 the" employers (1). This provision was interpreted under sec. 38 (*o*) of the *Commonwealth Conciliation and Arbitration Act* by the Court of Conciliation and Arbitration, which declared its "intention, . . . clearly expressed in" the clause, "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," and ruled that the "award as made applied to all fitters and turners including those covered by the gas employees' award and agreement" (2). This Court accepted the interpretation of the award. "That interpretation—which, whether right or wrong, was within the jurisdiction of the Arbitration Court—is binding upon the parties" (per *Gavan Duffy* J. and *Starke* J. (3)). The question before the Full Court for decision was whether the applicants, the Metropolitan Gas Co. and other employers, were bound by the clause in the award so far as it purports to make the award binding as to all other persons following the occupation set out in the award then, or thereafter, employed by the applicants. This question the Court answered in the negative. Three of the Justices—*Knox* C.J., *Gavan Duffy* J. and *Starke* J.—did so upon the ground 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"—"the organization making the claim" (4).

In the present case the award provides that it shall be binding upon the employers which it names "in respect of each and every person employed by them in the industry whether members of the" organization making the claim "or not." The fourth question in the summons is whether this provision is valid so far as it purports to bind employers who are not in fact employing members of the organization. It is obvious that this question could not, consistently

(1) (1928) 41 C.L.R., at p. 404.
(2) (1928) 41 C.L.R., at pp. 404-405.
(3) (1928) 41 C.L.R., at p. 435.
(4) (1928) 41 C.L.R., see pp. 411, 435.

with the reasoning of these Justices in *Alderdice's Case* (1), be answered Yes, save upon the ground that employees affected were "represented" by the organization which made the claim, within the meaning of the term "represented" when used in the judgments.

In *Alderdice's Case* the employees who were not members of the claimant organization were no more and no less represented by that organization than in this case. The only possible distinction in their respective positions arises from the fact that it appeared in that case that they or many of them were governed by another award and belonged or presumably belonged to another organization. In this case it does not appear whether the employees of the applicant in this summons do, or do not, belong to another organization or whether they are, or are not, governed by another award.

It is clear, however, from the report of the case (1) that it was not upon this ground that *Knox* C.J., *Gavan Duffy* J. and *Starke* J. held that they were outside the class represented by the organization. No such ground is taken in the reasons, and the answer to the question whether the award was binding as to all other persons following the relevant occupations is a plain negative, and draws no distinction between those who are, and those who are not, members of other organizations or bound by other awards. But, even if we are wrong in thinking that this conclusion appears on the face of the report, the announcement which the three Justices who gave this judgment made from the Bench during the hearing of the present case leaves no room for doubt that the word "represented" was not intended to cover the case of an organization propounding claims in relation to employees who were not and never became members, upon the footing that they had interests akin to the interests of those who were its members. The judgment of *Knox* C.J., *Gavan Duffy* J. and *Starke* J. in *Alderdice's Case* is, therefore, a direct authority which completely covers this case. In that case, however, the Court was composed of six Justices and three of them, *Isaacs* J., *Higgins* J. and *Powers* J., although giving the same answer to the question asked by the special case did so for other reasons, and two of these Justices, *Isaacs* J. and *Higgins* J., expressly dissented from the reasons of *Knox* C.J., *Gavan Duffy* J. and *Starke* J. In

(1) (1928) 41 C.L.R. 402.

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these circumstances these reasons cannot be said to be the *ratio decidendi* of the order made by the Court. Nevertheless, it would be a futile proceeding for us to investigate for ourselves a question so recently considered by our colleagues, and to form our opinion when we have their decision to which they now adhere and which must govern this case. It would, in any event, be undesirable for us to take such a course, and it is made no less undesirable by the consideration that if we did arrive at an opinion upon the meaning of the statute opposed to that of our colleagues, a thing we do not suggest as likely, we should then be faced with the formidable constitutional question whether, so interpreted, the Act was within the power of Parliament. Not only does the decision of *Knox* C.J., *Gavan Duffy* J. and *Starke* J. govern this case upon the substantive question raised for decision, but also upon the preliminary objection taken by the respondent to the summons that it went beyond what sec. 21AA authorized. For *Alderdice's Case* (1) was decided upon a proceeding under that section.

We therefore concur in answering question 4, No. It follows upon the facts as a necessary consequence that questions 1, 2 and 3 should be answered No.

Questions answered accordingly.

Solicitors for the applicant Company, *Baker, McEwin, Ligertwood & Millhouse.*

Solicitors for the respondent Union, *W. J. Denny & Daly.*

H. D. W.

(1) (1928) 41 C.L.R. 402.