

Cons Grace Bros Pty Ltd v Magistrates, Local Courts of NSW 84 ALR 492	Appl Viskauskas v Niland 57 ALJR 414	Cons Grace Bros Pty Ltd v Magistrates, Local Courts of NSW 12 IPR 600	Foll McWaters v Day 89 ALR 83	Appl R v Martin 78 FLR 133	Appl R v Curtis 88 FLR 435	Cons Clibby v Weston (1988) 15 NSWLR 35	Cons McWaters v Day; Ex parte Day 87 ALR 169
472	Appl Norgard JF & R, In the Marriage of 11 FamLR 646	Appl Viskauskas v Niland 153 CLR 280	Appl Hansens Pty Ltd v Adco Const Pty Ltd (1991) 4 ACSR 347	Appl/Cons Amarantos Shipping Co v South Australia (2004) 205 ALR 459	COURT	Appl Supertina Pty Ltd v Lombok Pty Ltd (1984) 59 ALR 581	[1930. Foll Byrne & Frew v Australian Airlines Ltd (1995) 131 ALR 422
Foll NRMA Insurance Ltd v Tait 92 ALR 299	Appl Scutchings v George 9 ALR 557	Appl McWaters v Day 168 CLR 289	Cons Scutchings v George [1991] 1 VR 732	Appl A Raptis & Son v South Australia (1977) 138 CLR 346	Foll Majik Markets Pty Ltd v Brake & Service Centre Drumoyne Pty Ltd (1991) 102 ALR 621	Cons Aboriginal Legal Service of WA Inc v Western Aust (1993) 113 ALR 87	Cons Houvardas v Zuravinos (2003) 202 ALR 535
Appl O'Sullivan v Noarlunga Meat Ltd (1956) 95 CLR 177	Appl Aboriginal Legal Service of WA Inc v State of WA (1993) 9 WAR 297	Appl Arrowcrest Group Pty Ltd v Gill (1993) 46 CLR 90	Appl Shanley v Cain (1997) 138 FLR 73	Cons R v Brackenridge (1998) 103 ACrimR 545	Appl R v Brackenridge (2000) 1 QdR 1		
Appl De Pardo v Legal Practitioners Complaints Committee (2000) 26 FamLR 254	Appl De Pardo v Legal Practitioners Complaints Committee (2000) 97 FCR 575	Appl Macks, Re; Ex p Saint & Johnson (2000) 75 ALJR 203	Appl De Angelis v De Angelis (2000) 27 FamLR 133	Appl IG Index plc v NSW (2006) 198 FLR 132			

[HIGH COURT OF AUSTRALIA.]

## EX PARTE McLEAN.

### ON REMOVAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. Constitutional Law—Inconsistency between Commonwealth law and law of State—  
1930.  
SYDNEY,  
March 28.  
MELBOURNE,  
June 6.

*Award of Commonwealth Court of Conciliation and Arbitration—Agreement pursuant thereto between employer and employee—Alleged neglect by employee to fulfil contract—Conviction under State law—Prohibition—The Constitution (63 & 64 Vict. c. 12), sec. 109—Commonwealth Conciliation and Arbitration Act 1904-1928 (No. 13 of 1904—No. 18 of 1928), secs. 30, 31, 38, 44—Judiciary Act 1903-1927 (No. 6 of 1903—No. 9 of 1927), secs. 38A, 40, 40A—Masters and Servants Act 1902 (N.S.W.) (No. 59 of 1902), sec. 4\*.*

Isaacs C.J.,  
Rich, Starke  
and Dixon JJ.

On an information for an offence under sec. 4 of the *Masters and Servants Act 1902* (N.S.W.) the defendant was convicted and fined for neglecting to fulfil the contract made between the informant (his employer) and himself in pursuance of an award, made by the Commonwealth Court of Conciliation and Arbitration, which bound both parties and required them to perform the contract. The very same conduct by the same persons was therefore punishable, but somewhat differently, under the *Commonwealth Conciliation and Arbitration Act 1904-1928* and the New South Wales *Masters and Servants Act 1902*.

\* The *Masters and Servants Act 1902* (N.S.W.), sec. 4, provides that "Any servant who contracts with any person to serve him for any time or in any manner, or to perform for him as such servant a certain work at a certain price, and does not enter into his service or commence his work according to his contract, such contract being in writing and signed by the parties thereto, or any servant having entered into such service or commenced such work who absents himself therefrom,

without reasonable cause, before the term of his contract has expired or before the work contracted for is completed, whether such contract is in writing or not, or neglects to fulfil the same, or is guilty of any other misconduct or ill behaviour in the execution thereof, shall be liable to a penalty not exceeding ten pounds or in lieu thereof, at the discretion of the convicting justices, shall forfeit the whole or such part of the wages then due, as the justices shall think fit."



*Held*, that the State Act was invalid, *pro tanto*, by virtue of sec. 109 of the Constitution ; and that the conviction was therefore bad.

H. C. OF A.  
1930.

*Clyde Engineering Co. v. Cowburn*, (1926) 37 C.L.R. 466, followed.

EX PARTE  
McLEAN.

*Semble*, the matter was not one which involved any question as to the limitations *inter se* of the constitutional powers of the Commonwealth and the State within secs. 39A and 40A of the *Judiciary Act* 1903-1927, but did arise under the Constitution (sec. 109) or involve its interpretation, and could be removed into, and determined by, the High Court under sec. 40 of the *Judiciary Act* 1903-1927.

RULE NISI for writ of prohibition removed from the Supreme Court of New South Wales.

Frederick Firth, a grazier of Lockslea near Warren, New South Wales, laid an information against James McLean alleging that the defendant, a shearer, being a servant as defined by the *Masters and Servants Act* 1902 (N.S.W.), and having contracted with Firth to perform for him as such servant a certain work, to wit, shearing, at Lockslea near Warren aforesaid and having commenced such work did neglect to fulfil such contract contrary to the Act in such case made and provided. Firth was a member of the Graziers' Association of New South Wales and McLean was a member of the Australian Workers' Union and, as such members, each was a party to an award made on 14th September 1927 in respect of the industry by the Commonwealth Court of Conciliation and Arbitration under sec. 38 of the *Commonwealth Conciliation and Arbitration Act* 1904-1928, and had executed an agreement between themselves in accordance with such award. On the hearing of the information Firth stated, in his evidence, that by careless and negligent handling McLean had seriously injured and damaged many sheep, some of which had died owing to the injuries so received, and that, though required by the agreement to notify Firth of the fact that the sheep had been injured, he had failed to do so ; that, in general, McLean had shorn the sheep badly and had left two inches of wool on them ; and that McLean had left his employment without permission. Firth also stated that he pointed out to McLean the unsatisfactory way in which he was shearing the sheep and told him the matter was entirely in his hands, and that he must handle the sheep more carefully and give a



H. C. OF A. 1930.   
 EX PARTE   
 McLEAN.

better cut or put his machine in, but he did not discharge McLean. In his evidence McLean admitted that he had been spoken to by Firth as stated, but said that he had replied to Firth to the effect that he could not do better than he was doing ; that he took it for granted that he was discharged and he thereupon went to the hut, packed up his belongings, and left some time later. An objection was taken on behalf of McLean that the Court had no jurisdiction to deal with the information under the *Masters and Servants Act*, as both the informant and the defendant were bound by the same award of the Commonwealth Court of Conciliation and Arbitration and the agreement of service made in pursuance of such award, for breaches of which certain penalties were provided which were inconsistent with the remedies provided by the *Masters and Servants Act*, and that, in the circumstances, the State law was abrogated by the Commonwealth legislation. The objection was overruled by Mr. George Sydney Goldie, P.M., who held that the decision in *Ex parte Macpherson* (1) applied. McLean was convicted and fined.

A rule nisi was obtained by McLean from the Supreme Court for a writ of prohibition directed to the Magistrate and the informant to restrain them from further proceeding upon the conviction on the ground (*inter alia*) that the Magistrate had no jurisdiction to convict McLean under the *Masters and Servants Act* 1902, as both McLean and the informant were bound by an award made under the *Commonwealth Conciliation and Arbitration Act* with which Act the *Masters and Servants Act* was inconsistent and, therefore, to that extent invalid.

On an application for the rule nisi to be made absolute the Full Court of the Supreme Court was of opinion that the matter involved questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the State of New South Wales, and, having regard to secs. 38A and 40A of the *Judiciary Act* 1903-1927, refrained from dealing with the matter, which was removed to the High Court and now came on for hearing.

Upon it being doubted whether the matter was within sec. 40A of the *Judiciary Act* 1903-1927, an application was made on behalf of McLean, and not opposed by the respondents, that the matter be

(1) (1910) 26 N.S.W.W.N. 178.



removed into the High Court under sec. 40 of that Act. The Court reserved its decision in respect of this application until after argument on the question of prohibition.

H. C. OF A.  
1930.  
EX PARTE  
McLEAN.

Other material facts appear in the judgments hereunder.

*Brissenden* K.C. (with him *Evatt* K.C. and *Nicholas*), for the applicant. This is a case of a direct conflict between a law of a State and a law of the Commonwealth. The mere assertion of jurisdiction by a State Court is a denial of jurisdiction of a Federal Court (*Clyde Engineering Co. v. Cowburn* (1)). The two sets of provisions as regards the duties of a shearer are inconsistent because they come under different jurisdictions and are to be adjudicated upon by persons sitting under other capacities and having different powers. Here it is quite impossible to assume the jurisdiction of the State Court without striking at once at the root of the jurisdiction of the Federal Court. Under sec. 109 of the Constitution, if the Federal Court asserts jurisdiction the State Court must give way. The question as to whether there is an inconsistency between a law of a State and a law of the Commonwealth does not and cannot depend upon whether the penalties imposed by the two Acts are different or identical (*Hume v. Palmer* (2)). The inconsistency relied on by the applicant is that jurisdiction is given to a magistrate in one case by a State law and in the other case by a Federal award promulgated under and by authority of a Federal Act. (See also *H. V. McKay Pty. Ltd. v. Hunt* (3) and *Union Steamship Co. of New Zealand v. Commonwealth* (4).)

[DIXON J. referred to secs. 4 and 7 of the *Masters and Servants Act* 1902 (N.S.W.).

[STARKE J. referred to sec. 30 of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 and to sec. 109 of the Constitution.]

*Windeyer* K.C. (with him *Pitt*), for the respondents. The Commonwealth has no power to order people to work unless they are parties to an award and there is trouble in the nature of a strike or lock-out. The decision in *Clyde Engineering Co. v. Cowburn* (1)

(1) (1926) 37 C.L.R. 466.

(2) (1926) 38 C.L.R. 441, at pp. 446, 447.

(3) (1926) 38 C.L.R. 308.

(4) (1925) 36 C.L.R. 130.



H. C. OF A.  
1930.

EX PARTE  
MCLEAN.

does not go to the extent of saying that if a Commonwealth tribunal administering the *Commonwealth Conciliation and Arbitration Act* obviously goes outside the powers granted by the Constitution any question of inconsistency can arise. This is not a matter of punishing a breach of the terms of a contract. In the language of sec. 4 of the *Masters and Servants Act* 1902 the Magistrate found that the applicant had "neglected to fulfil his contract." The question as to inconsistency between a State law and a Federal law does not arise. The compelling of people to work at all, or on a particular day, is entirely outside the jurisdiction of the Commonwealth. If the award purports to oust the jurisdiction of the State, then to that extent it is *ultra vires*. The purview of the *Commonwealth Conciliation and Arbitration Act* is to deal with people in connection with their relationship of employer and employee; it was not intended to deal with industrial disputes otherwise. The sanction which requires an employee to continue working is not a code of laws which deals with industrial disputes. The point is largely covered by the case of *Mallinson v. Scottish Australian Investment Co.* (1). It does not follow that because the agreement provides in very wide terms for the proper conduct of the employee the State penal law is ousted in a case where the employee does not conduct himself properly. The intent of the agreement was that the parties thereto should have their ordinary common law remedies for breaches. The reasons set out in the judgment of the Court in *Mallinson v. Scottish Australian Investment Co.* (2) apply to proceedings under the *Masters and Servants Act* 1902. The *Commonwealth Conciliation and Arbitration Act* provides that the relationship of employer and employee shall be established on certain terms, and the State Act (the *Masters and Servants Act* 1902) deals with the prevention of a rupture of that relationship. There is no conflict between the two Acts. The Commonwealth Act itself shows that it was not intended by that Act to punish persons for repudiating the relationship of employer and employee. The Magistrate's decision is that the applicant repudiated his contract: he neglected to fulfil his contract.

(1) (1920) 28 C.L.R. 66.

(2) (1920) 28 C.L.R., at pp. 70 *et seqq.*



*Evatt* K.C., in reply. The award cannot be attacked in these proceedings (see sec. 31 of the *Commonwealth Conciliation and Arbitration Act*).

H. C. OF A.

1930.

EX PARTE  
MCLEAN.

[*Dixon* J. referred to sec. 109 of the Constitution.]

[*Windeyer* K.C. Sec. 31 cannot be interpreted to mean that anything *ultra vires* cannot be called in question in a State Court.]

The award is a law of the Commonwealth: this is substantially the decision in *Clyde Engineering Co. v. Cowburn* (1). As to penalties for non-observance and breaches of the award, see *Josephson v. Walker* (2). Both the award and the State Act refer to the same subject matter, namely, the relationship of employer and employee.

*Cur. adv. vult.*

The following written judgments were delivered:—

June 6.

ISAACS C.J. AND STARKE J. On 6th November 1929 *Hammond* A.J. granted an order nisi for a common law writ of prohibition to restrain further proceeding upon a conviction of James McLean by the respondent, George Sydney Goldie, a Police Magistrate.

McLean was prosecuted under State law by Frederick Firth, his former employer, the offence being thus described in the information: "That on the nineteenth day of September 1929 one J. McLean a shearer being a servant as defined by the *Masters and Servants Act* 1902 having contracted with Frederick Firth to perform for him as such servant a certain work to wit shearing at Lockslea near Warren and having commenced such work did neglect to fulfil such contract." At the hearing before the Police Magistrate, the applicant's solicitor asked for particulars as to what was relied on as constituting the offence, and he was informed that they were these: "In injuring the sheep and failing to notify the employer that he had injured them, in leaving the employment without permission, and in shearing the sheep badly and leaving two inches of wool on them." It was objected that the Court had no jurisdiction since the State Act was inconsistent with relevant Commonwealth legislation. The Magistrate overruled the objection and convicted the present applicant, who was fined £2, with costs 8s., and professional

(1) (1926) 37 C.L.R. 466.

(2) (1914) 18 C.L.R. 691.



H. C. OF A. costs £3 3s., witnesses' expenses £1 16s., in default of payment  
 1930.  
 {  
 EX PARTE  
 McLEAN.  
 {  
 Isaacs C.J.  
 Starke J.

labour.

The order nisi was returned before the Supreme Court on 19th February 1930, but that Court, considering the matter one within sec. 40A of the *Judiciary Act*, proceeded no further, and directed the Prothonotary to forward the papers to the Registrar of this Court.

The case seems to fall rather within the overlapping legislation met by sec. 109 of the Constitution than within that of passing the frontier line of power. But for precaution sake learned counsel on both sides assented, by application of one and consent of the other, to the removal of the cause into this Court under sec. 40 of the *Judiciary Act*. The Court reserved its decision as to that step, and heard argument on the main question of the prohibition. In the circumstances, it is expedient to make an order removing the cause under sec. 40.

The conviction of McLean, it will be seen, was for "neglect to fulfil" his contract, the neglect consisting of (1) injury to sheep, (2) failure to notify the employer of such injury, (3) leaving without permission, and (4) badly shearing sheep. The conviction and punishment was for all four causes so far as appears, and these are inseparable. So that even if, as argued by Mr. *Windeyer*, the third item of "neglect" were within the State jurisdiction, it would not save the matter from prohibition, since the other items are clearly outside that jurisdiction. But, in truth, the third item is no less covered by sec. 109 than the other three. The contract itself was one prescribed by Federal law and not by State law. That is, by an award of the Commonwealth Court of Conciliation and Arbitration, which was at all material times in force, beginning 15th September 1927, it was prescribed (clause 2) that, as to shearing, before any member of the Australian Workers' Union (of which McLean was a member) should be employed, a written agreement in the form of schedule A should be signed by the member and by his employer. The agreement which the applicant was punished for neglect to fulfil was in accordance with the requirement of schedule A of the award. Clause 32 of the award is as follows: "The employers



bound by the award and their servants and agents respectively shall observe and perform the conditions of the award, and of the agreements in schedule A thereof." Clause 33 prescribes: "The Union and its members shall observe and perform the conditions of this award and of the agreements in schedule A thereof." The contract entered into is headed "Shearer's Agreement. In accordance with the award of the Commonwealth Court of Conciliation and Arbitration dated 14th September 1927."

It is to be noted *in limine* that not only the obligation to *make* the agreement, but the obligation to *observe* it, is prescribed by the award. The award itself is, of course, not law, it is a *factum* merely. But once it is completely made, its provisions are by the terms of the Act itself brought into force as part of the law of the Commonwealth. In effect, the statute enacts by the prescribed constitutional method the provisions contained in the award. When those provisions are examined, it is seen that they deal completely with the area of industrial relations covered by them. The intention is clear that the requirement of a contract, its form and its obligations, and the consequences of its breach, shall be governed by the Commonwealth law. If that is so, it necessarily follows that any alteration of the Commonwealth provisions of adjustment by State law, whatever be the scope or purpose of that law, must be inconsistent with the enactment of the Federal law.

In *Cowburn's Case* (1) is stated the reasoning for that conclusion, and we will now refer to those statements without repeating them. In short, the very same conduct by the same persons is dealt with in conflicting terms by the Commonwealth and State Acts. A Court, seeing that, has no authority to inquire further, or to seek to ascertain the scope or bearing of the State Act. It must simply apply sec. 109 of the Constitution, which declares the invalidity *pro tanto* of the State Act. In Canada, where no section corresponding to sec. 109 of the Constitution exists, but where, by reason of exclusive fields of legislation, conflicts may arise between the national and the provincial legislation, the Privy Council have enunciated a rule which in practical effect corresponds with sec. 109 of the Australian Constitution. In *Attorney-General of Ontario*

H. C. OF A.

1930.

EX PARTE  
McLEAN.Isaacs C.J.  
Starke J.

(1) (1926) 37 C.L.R., at pp. 489 *et seqq.*, 524.



H. C. OF A.

1930.

EX PARTE  
MCLEAN.Isaacs C.J.  
Starke J.

v. *Attorney-General for the Dominion of Canada* (1) Lord Herschell L.C. said that a Dominion bankruptcy law regulating voluntary assignments would exclude provincial legislation on the same subject under the power to make laws in relation to property and civil rights in the Province. Similarly, in *Tennant v. Union Bank of Canada* (2). And again in *Grand Trunk Railway of Canada v. Attorney-General of Canada* (3), where Lord Dunedin says the true question is whether the Dominion legislation is within its powers. If it is, it matters not that the provincial legislation which conflicts is in relation to a different class of legislation which is within the State legislative power.

In the present circumstances, the conviction was not authorized by any valid law, and the order for prohibition should be made absolute.

RICH J. I have read the judgment of my brother *Dixon* and agree with it. The *Commonwealth Conciliation and Arbitration Act* confers upon the tribunal a power, and the award embodies the exercise of that power. Just as in the case of powers and authorities in other branches of the law it reposes in the donee of the power a particular discretion in this case to ascertain and determine what shall be a proper industrial relationship in respect to matters in dispute. And as in the case of other powers the efficacy and legal result of the exercise of the discretion is derived wholly from the instrument creating the power to which the exercise is referred and attributed. In the law of real property "the title is derived immediately from the authority, and from the person by whom that authority was delegated" (*Preston's Essay on Abstracts of Title*, 2nd ed., vol. II., p. 257). Upon this reasoning it appears to be a necessary conclusion that if the Act means, as I think we have already held it does mean, to confer upon the tribunal an authority to determine what shall be the exclusive rights and duties of the disputants in respect of matters in dispute, then any State law is inconsistent with the Act which creates that power when the power is exercised if that State law deals with the same subject

(1) (1894) A.C. 189.

(2) (1894) A.C. 31, at p. 47.

(3) (1907) A.C. 65, at p. 68.



matter and purports to prescribe rights and duties of the same order.

Although I have reached this conclusion, the view that a law of a State which punishes a particular dereliction of duty becomes ineffectual because an award imposes the same or a similar duty strikes me as a very extreme result of the interpretation of the *Commonwealth Conciliation and Arbitration Act* which we have adopted in this Court.

As no offence was committed against State law by the applicant, the order nisi for prohibition must be made absolute.

DIXON J. The applicant was employed by the respondent as a shearer. Both were bound by an award of the Commonwealth Court of Conciliation and Arbitration. That award provided that, before a person to whom it applied was employed in shearing, a written agreement should be signed by him and his employer embodying terms and conditions which were set forth in a schedule. The award further provided that employees to whom it applied should observe and perform the conditions of the award and of the agreement. The applicant and the respondent signed a written agreement in the form thus prescribed.

During the course of shearing the respondent complained that the applicant was shearing the sheep improperly, and was injuring them, and told him that if he would not shear as he ought "he had better put his machine in." The applicant ceased shearing, and the respondent laid an information against him under sec. 4 of the New South Wales *Masters and Servants Act* 1902 for that being a servant as defined by that Act, having contracted to perform for the respondent as such servant certain work, to wit, shearing, and having commenced such work he did neglect to fulfil such contract. Upon this information the applicant was convicted. Sec. 4, under which he was convicted, is as follows: "Any servant who contracts with any person to serve him for any time or in any manner, or to perform for him as such servant a certain work at a certain price, and does not enter into his service or commence his work according to his contract, such contract being in writing and signed by the parties thereto, or any servant having entered into such service or commenced

H. C. OF A.

1930.

EX PARTE  
MCLEAN.

Rich J.



H. C. OF A.

1930.

EX PARTE  
MCLEAN.

Dixon J.

such work who absents himself therefrom, without reasonable cause, before the term of his contract has expired or before the work contracted for is completed, whether such contract is in writing or not, or neglects to fulfil the same, or is guilty of any other misconduct or ill behaviour in the execution thereof, shall be liable to a penalty not exceeding ten pounds or in lieu thereof, at the discretion of the convicting justices, shall forfeit the whole or such part of the wages then due, as the justices shall think fit."

The applicant appealed against his conviction to the Supreme Court of New South Wales by way of statutory prohibition upon grounds which were intended to raise the question whether this provision had any valid operation in the case of the applicant inasmuch as his neglect to fulfil his contract would amount to a breach of the Federal award punishable under the *Commonwealth Conciliation and Arbitration Act* 1904-1928. Upon the return of the order nisi for statutory prohibition the Supreme Court considered that the matter involved a question as to the limits *inter se* of the constitutional powers of the State and Commonwealth which, by reason of sec. 38A of the *Judiciary Act* 1903-1927, they had no jurisdiction to entertain or determine, and in pursuance of sec. 40A they proceeded no further in the cause which was treated as removed to this Court.

The question raised is whether a State law is inconsistent with a Commonwealth law and therefore invalid by reason of sec. 109 of the Constitution. This is not a question as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State. But the question turns upon sec. 109 of the Constitution, and for this reason the matter is a cause arising under the Constitution or involving its interpretation, which may be removed into this Court pursuant to sec. 40 of the *Judiciary Act* 1903-1927. An application was made on the part of the applicant that the cause should be so removed and, in the special circumstances attending this litigation, the application is to be granted. The question of substance was fully argued before us and, the cause having been removed, there is no reason why it should not be determined at once without further argument.



Sec. 44 of the *Commonwealth Conciliation and Arbitration Act* 1904-1928 penalizes any breach or non-observance of an award, and, inasmuch as the award in this case commanded performance of the applicant's contract, his neglect to fulfil it would constitute an offence under this provision. The same acts or omissions were therefore made subject to the penal sanctions of the Federal enactment and the somewhat different penal sanctions of the State enactment.

H. C. OF A.  
1930.  
EX PARTE  
MCLEAN.  
Dixon J.

When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and sec. 109 applies. That this is so is settled, at least when the sanctions they impose are diverse (*Hume v. Palmer* (1) ). But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be. If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter. But in the present case, conduct which the State law prescribes, namely, the performance of contracts of service, is a matter with which the Commonwealth Parliament has not itself attempted to deal. Although neglect by a shearer to perform such a contract constitutes an offence against Federal law, this does not arise from any statement by the Federal Legislature of what the law shall be upon that subject. The conduct which the Federal statute penalizes is the breach of industrial awards. There is no collision between an intention to deal exclusively with disobedience of awards and

(1) (1926) 38 C.L.R. 441.



H. C. OF A.  
1930.

EX PARTE  
MCLEAN.

Dixon J.

a law for the punishment of breach of contract. The Federal instrument, which prescribes performance of the shearers' contract of service, is the award of the Commonwealth Court of Conciliation and Arbitration. But unlawful as it is to depart from the course which such an instrument describes and requires, the instrument itself is, nevertheless, not "a law of the Commonwealth" within the meaning of those words in sec. 109. Sec. 109 cannot, therefore, operate directly upon it so as to render a State law invalid because it is inconsistent with the intentions which the arbitrator expresses in the award. But these considerations do not end the matter. They do establish that if State law is superseded it must be upon the ground that the State law thereupon becomes inconsistent with the meaning and effect of the *Commonwealth Conciliation and Arbitration Act* itself. But the provisions of that Act itself, which establish awards made under its authority, may have a meaning and effect consistently with which State law could not further affect a matter for which such an award completely provides. If the Act means not only to give the determinations of the arbitrator binding force between the disputants but to enable him to prescribe completely or exhaustively what upon any subject in dispute shall be their industrial relations, then sec. 109 would operate to give paramountcy to these provisions of the statute, unless they were *ultra vires*, and they in turn would give to the award an exclusive operation which might appear equivalent almost to paramountcy.

Close consideration of the reasons given by *Isaacs, Rich and Starke JJ.* in *Clyde Engineering Co. Ltd. v. Cowburn* (1) shows that the view upon which they acted in that case and applied afterwards in *H. V. McKay Pty. Ltd. v. Hunt* (2) was substantially that the Constitution empowered the Parliament to give and that Parliament had given the award this exclusive authority. The view there taken, when analyzed, appears to consist of the following steps, namely: (i.) The power of the Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State enables the Parliament to authorize awards which, in establishing the relations of the disputants, disregard the provisions

(1) (1926) 37 C.L.R. 466.

(2) (1926) 38 C.L.R. 308.



and the policy of the State law ; (ii.) the *Commonwealth Conciliation and Arbitration Act* confers such a power upon the tribunal, which may therefore settle the rights and duties of the parties to a dispute in disregard of those prescribed by State law, which thereupon are superseded ; (iii.) sec. 109 gives paramountcy to the Federal statute so empowering the tribunal, with the result that State law cannot validly operate where the tribunal has exercised its authority to determine a dispute in disregard of the State regulation.

H. C. OF A.  
1930.  
EX PARTE  
McLEAN.  
Dixon J.

The distinction between this doctrine and one which gives to sec. 109 a direct application to Federal awards is probably not confined to the mode of reasoning by which the conclusion is reached. It may well be that the distinction extends to the results produced. If a Federal statute forbids a particular act or omission and means to state what shall be the law upon that specific matter, any State law which dealt with the same act or omission would become inoperative, and it would probably be of no importance whether each Legislature was directing its attention to the same general topic or had dealt with the same act or omission in the process of legislating upon two entirely different subjects. For instance, sec. 4 of the New South Wales *Masters and Servants Act*, assuming it otherwise to apply to him, would doubtless be superseded in relation to an officer governed by the *Commonwealth Census and Statistics Act 1905-1920* who wilfully neglected to fulfil the duties of his office, because sec. 22 of that Act penalizes such conduct although in the process of dealing with a very different subject. On the other hand, the *Commonwealth Conciliation and Arbitration Act* in giving force and effect to awards necessarily confines their exclusive authority to the regulation of industrial relations and, moreover, to the regulation of industrial relations which are in dispute. It may perhaps follow from this rule that, while the arbitrator can make his award the exclusive measure of industrial rights and duties between the disputants, the laws of a State which do not regulate industry at all are not inconsistent with the exclusive authority which the Commonwealth statute gives to the award merely because they deal with specific conduct which, as between the disputants, is dealt with by the award. For example, if the award in this case expressly forbade shearers to injure sheep



H. C. OF A.  
1930.

EX PARTE  
MCLEAN.

Dixon J.

when shearing, it would not be a necessary consequence that a shearer who unlawfully and maliciously wounded a sheep he was shearing could not be prosecuted under the State criminal law for unlawfully and maliciously wounding an animal. It is not, however, necessary to determine whether this distinction in the application of the doctrine is valid. It may be assumed that provisions of State law which prohibit acts or omissions irrespective of the relation of employer and employed, and without regard to any other industrial relation or matter, are not superseded under sec. 109 merely because it happens that in their industrial aspect the same acts or omissions by parties to a dispute are forbidden by Federal award and by this means made punishable under the Federal statute. But, in this case, the State law, sec. 4 of the *Masters and Servants Act* 1902, deals directly with the relation of employer and employed, and in virtue of that industrial relation makes penal the very default which the Federal law punishes somewhat differently in the regulation of the same relation.

The case, therefore, is not one in which conduct made punishable by State law on grounds which do not affect industrial relations is forbidden by an award as a regulation of industry, and thus brought also within the penalties of the *Commonwealth Conciliation and Arbitration Act*.

It may be objected that the present case does not fall within the doctrine which ascribes such efficacy to an award because the Federal tribunal has not made an award in disregard of State law but, so far as material, has in effect forbidden the very neglect to perform a contract of service which State law punishes; and that it does not fall within the description of inconsistency illustrated by *Hume v. Palmer* (1) because there the respective Legislatures had each directed its attention to the same subject and both had themselves prescribed the rule upon it, while here the Commonwealth Parliament directed its attention to disobedience of awards and the State Legislature dealt only with the breach of contracts. But the substance of what the Federal award did in this case was to command performance of the prescribed contract as an industrial duty proper to be imposed and enforced by Federal law according to the sanctions

(1) (1926) 38 C.L.R. 441.



which it provides, while the State law required performance of the same contract as an industrial duty proper to be imposed and enforced by its authority and according to its sanctions. According to the doctrine deduced from the judgments of the majority of the Court in the cases of *Clyde Engineering Co. v. Cowburn* (1) and *H. V. McKay Pty. Ltd. v. Hunt* (2), the *Commonwealth Conciliation and Arbitration Act* gives full and complete efficacy and exclusive authority to this regulation of the Federal tribunal, and sec. 109 makes this statute prevail.

In these conditions, in so far as it affects persons bound by the award, sec. 4 of the *Masters and Servants Act* 1902 is inconsistent with the provisions of the Federal statute and, by virtue of sec. 109 of the Constitution, the latter must prevail, and the former to the extent of the inconsistency is invalid. Accordingly no offence was committed against State law by the applicant, and the order nisi for prohibition must be made absolute.

*Rule nisi made absolute.*

Solicitor for the applicant, *A. C. Roberts.*

Solicitors for the respondents, *McLachlan, Westgarth & Co.*

J. B.

(1) (1926) 37 C.L.R. 466.

(2) (1926) 38 C.L.R. 308.

H. C. OF A.  
1930.  
EX PARTE  
MCLEAN.  
Dixon J.